FEDERAL COURT OF AUSTRALIA

R and N Hunter Pty Ltd ATF The Hunter Family Superannuation Fund v Count Financial Limited [2025] FCA 544

File number(s):	VID 565 of 2020
Judgment of:	**HALLEY J**
Date of judgment:	27 May 2025
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – financial services – application brought by applicant on its own behalf and on behalf of group members – consideration of conflicted remuneration following the introduction of the Future of Financial Advice reforms (**FoFA reforms**) – whether practice of financial advisers (**Representatives**) of a financial services licensee (**Licensee**) continuing to receive commissions or rebates breached fiduciary duties owed to applicant and group members, contravened provisions within Pt 7.7A of the *Corporations Act 2001* (Cth) (**Corporations Act**) or constituted misleading or deceptive conduct **EQUITY** – fiduciary obligations – relationship between financial adviser and client – whether Representatives and Licensee owed fiduciary obligations to applicant by reason of undertaking to provide ongoing advice and holding themselves out as expert financial advisers – established categories of fiduciary duty not extended – non-presumptive fiduciary duties owed to applicant by Representatives in relation to certain financial product – fiduciary duty not owed by Licensee – whether advice given to applicant to acquire products that paid commissions or other benefits to the Licensee and Representatives breached fiduciary duties– whether receipt of commission or other benefits, and related conduct, gave rise to insurmountable conflict of interest – whether fiduciary duties attenuated by disclosure and implied agreement – whether fully informed consent provided to alleged breach of fiduciary duties – consideration of "full disclosure in all the circumstances"– fiduciary duties owed to applicant not breached **EQUITY** – where claimed Representatives and Licensee owed fiduciary obligations to group members by reason of representations made in financial services guide – whether common questions of fact and law able to be determined in

proceeding – common questions not able to be determined in proceeding

CORPORATIONS – introduction of best interests duty (s 961B) and conflict priority rule (s 961J) pursuant to the FoFA reforms – distinction between fiduciary obligations and statutory obligations pursuant to s 961B and s 961J – effect of "grandfathering" exception in s 1528 of Corporations Act – whether s 961B and s 961J impose requirement to obtain fully informed consent to any conflict or perceived conflict of interest – whether Representatives failed to comply with s 961B and s 961J of the Corporations Act in relation to advice provided to the applicant – contraventions not established

CORPORATIONS – whether Licensee contravened s 961L of the Corporations Act – whether Licensee failed to take reasonable steps to ensure that Representatives complied with, relevantly, s 961B and s 961J – consideration of Licensee's remuneration policy, incentive program, supervision of Representatives, quality assurance processes and standards – contravention not established

CORPORATIONS – where group members claim Representatives failed to comply with s 961B and s 961J and Licensee contravened s 961L – whether common questions of fact and law able to be determined in proceeding – common questions proposed by respondent able to be determined in proceeding – contraventions not established

CONSUMER LAW – whether Licensee made representations as to future matters to applicant that were likely to mislead or deceive – whether Licensee contravened s 1041H of the Corporations Act, s 12DA of the *Australian Securities and Investments Act 2001* (Cth) or s 18 of the *Australian Consumer Law* in Sch 2 to the *Competition and Consumer Act 2010* (Cth) – contraventions not established

CONSUMER LAW – where group members claim Licensee made representations as to future matters that were likely to mislead or deceive – whether common questions of fact and law able to be determined in proceeding – relevant common question not able to be determined in proceeding

PRACTICE AND PROCEDURE – application for leave to amend agreed fact – leave not granted

Legislation:	*Australian Securities and Investments Act 2001* (Cth) s 12DA
	Competition and Consumer Act 2010 (Cth), Sch 2, s 18
	Corporations Act 2001 (Cth) Ch 7, ss 764A, 769B, 916A, 917, 917B, 917E, 941B, Pt 7.7A, ss 961B, 961E, 961J, 961L, 961M, 963G, 1041H, 1528
	Corporations Amendment (Further Future of Financial Advice Measures) Act 2012 (Cth)
	Corporations Amendment (Future of Financial Advice) Act 2012 (Cth)
	Evidence Act 1995 (Cth) ss191, 192
	Federal Court of Australia Act 1976 (Cth) s 23, Pt IVA, s 33ZB
	Superannuation Industry (Supervision) Act 1993 (Cth) s 52
	Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019 (Cth)
Cases cited:	*ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65
	Aequitas Ltd v Sparad No 100 Ltd (formerly Australian European Finance Corp Ltd) [2001] NSWSC 14
	Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited (2018) 265 CLR 1; [2018] HCA 43
	Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 2) [2020] FCA 1355; (2020) 148 ACSR 14
	Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3) [2020] FCA 1885, (2020) 385 ALR 625
	Australian Competition and Consumer Commission v Dukemaster Pty Ltd [2009] FCA 682
	Australian Securities and Investments Commission v Allied Advice [2022] FCA 496; (2022) 160 ACSR 204
	Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2) (2020) 377 ALR 55; [2020] FCA 69
	Australian Securities and Investments Commission v AMP Superannuation Limited [2023] FCA 488; (2023) 168 ACSR 206
	Australian Securities and Investments Commission v Financial Circle Pty Ltd (No 2) [2018] FCA 1644; (2018) 131 ACSR 484
	Australian Securities and Investments Commission v NSG Services Pty Ltd (2017) 122 ACSR 47; [2017] FCA 345
	Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd (No 2) [2018] FCA 59; (2018)

124 ACSR 351

Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) (2018) 266 FCR 147; [2018] FCA 751

Australian Securities and Investments Commission v Westpac Securities Administration Ltd (2019) 272 FCR 170; [2019] FCAFC 187

Australian Securities Investments Commission v Citigroup Global Markets Australia Pty Ltd (2007) 160 FCR 35; [2007] FCA 963

Bennett v Elysium Noosa Pty Ltd (in liq) (2012) 202 FCR 72; [2012] FCA 211

Birtchnell v Equity Trustees, Executors & Agency Co Ltd (1929) 42 CLR 384

Blackmagic Design Pty Ltd v Overliese (2011) 191 FCR 1; [2011] FCAFC 24

Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund (No 3) [2022] FCA 224

Breen v Williams (1996) 186 CLR 71

Bright v Femcare Ltd [2002] FCAFC 243

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; [2004] HCA 60

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25

Campomar Sociedad, Limitada v Nike International Ltd (2002) 202 CLR 45; [2000] HCA 12

Clark Boyce v Mouat [1994] 1 AC 428

Casaclang v Wealthsure (2015) 238 FCR 55; [2015] FCA 761

Commonwealth Bank of Australia v Smith (1991) 42 FCR 390

Coope v LCM Litigation Fund Pty Ltd [2016] NSWCA 37; (2016) 333 ALR 524

Daly v Sydney Stock Exchange Ltd (1986) 160 CLR 371

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31

Dillon v RBS Group (Australia) Pty Ltd (2017) 252 FCR 150; [2017] FCA 896

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22

FHR European Venturers Ltd LLP v Mankarious [2011] EWHC 2308 (Ch)

Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82

GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers [2005] VSCA 113

Gray v New Augarita Porcupine Mines Ltd [1952] 3 DLR 1

Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296; [2012] FCAFC 6

Henderson v Amadio (No 1) [1995] 62 FCR 1

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 39 FCR 546

Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41

Howard v Commissioner for Taxation (2014) 253 CLR 83; [2014] HCA 21

Imperial Mercantile Credit Association (Liquidators) v Coleman (1873) LR 6 HL 189

Industry Research and Development Board v Phai See Investments Pty Ltd (2001) 112 FCR 24; [2001] FCA 532

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen [2024] FCA 1472

Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2003] VSC 27; (2003) ATR 81-692

Kamasaee v Commonwealth of Australia & Ors (No 10) (Issues for trial ruling) [2017] VSC 272

Kimberley NZI Finance Ltd v Torero Pty Ltd [1989] ATPR (Digest) 46,054

Law Society of New South Wales v Harvey [1976] 2 NSWLR 154

Lloyd v Belconnen Lakeview Pty Ltd [2019] FCA 2177; (2019) 142 ACSR 445

Lloyds Bank v Bundy (1975) 1 QB 326

Moussa v Camden Council (No 5) [2023] NSWSC 1135

Naaman v Jaken Properties Australia Pty Ltd [2025] HCA 1: (2025) 421 ALR 227

Nguyen v Rickhuss [2023] NSWCA 249

Oliana Foods Pty Ltd v Culinary Co Pty Ltd (In Liq) [2020] VSC 693

One.Tel Ltd (in liq) v Rich (2003) 45 ACSR 466; [2003] NSWSC 522

Our Lady's Mount Pty Ltd (as trustee) v Magnificat Meal Movement International Inc (1999) 33 ACSR 163

Pavan v Ratnam (1996) 23 ACSR 214

Perera v GetSwift Ltd (2018) 263 FCR 1; [2018] FCA 732

Porter & Anor v Mulcahy & Co Accounting Services Pty Ltd & Ors [2021] VSC 572

R v Rivkin (2004) 59 NSWLR 284; [2004] NSWCCA 7

Re McGrath & Anor (in their capacity as liquidators of HIH Insurance Ltd) [2010] NSWSC 404; (2010) 266 ALR 642

	Real Estate Services Council v Alliance Strata Management Ltd (unreported, NSW Court of Appeal, 8 June 1994) *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2021] NSWSC 383 *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2021] NSWSC 383 *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 5)* [2015] NSWSC 1771 *Semrani v Manoun* [2001] NSWCA 337 *Short v Crawley (No 30)* [2007] NSWSC 1322 *Simpson v Donnybrook Properties Pty Ltd* [2010] NSWCA 229 *Stack v AMP Financial Planning Pty Ltd (No 2)* [2021] FCA 1479; (2021) 401 ALR 113 *Thomson v Golden Destiny Investments Pty Ltd* [2015] NSWSC 1176 *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212; [2016] HCA 44 *Toyota Motor Corporation Australia Limited v Williams* [2023] 296 FCR 514; [2023] FCAFC 50 *Traderight (NSW) Pty Ltd v Bank of Queensland Limited (No 17) and 13 related matters* [2014] NSWSC 55 *Williams v Toyota Motor Corp Australia Ltd (Initial Trial)* [2022] FCA 344 *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028; (2012) 301 ALR 1 *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 *Wyse & Young International Pty Ltd v Sanna* [2019] NSWSC 683
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	712
Date of last submission/s:	29 April 2024
Date of hearing:	4-7, 11-14, 19-22 March 2024
Counsel for the Applicant:	Mr C H Withers SC with Mr T Bagley, Mr B O'Connor and Mr M J Gvozdenovic

Solicitor for the Applicant:	Piper Alderman
Counsel for the Respondent:	Ms E Collins SC with Mr P Meagher, Mr M Sherman and Mr J Birrell
Solicitor for the Respondent:	Clayton Utz

ORDERS

VID 565 of 2020

BETWEEN:	**R AND N HUNTER PTY LTD (ACN 105 163 522) ATF THE HUNTER FAMILY SUPERANNUATION FUND** Applicant
AND:	**COUNT FINANCIAL LIMITED (ACN 001 974 625)** Respondent

ORDER MADE BY: **HALLEY J**

DATE OF ORDER: **27 MAY 2025**

THE COURT ORDERS THAT:

1. The common questions filed by the respondent on 2 July 2024 be answered in accordance with "**Annexure A**" annexed to these orders.
2. The amended originating application filed on 16 December 2020 otherwise be dismissed.
3. The applicant is to pay the respondent's costs, as taxed or agreed.

ANNEXURE A

[The order entered is available on the Commonwealth Courts Portal, which attaches Annexure A].

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

HALLEY J:

A. INTRODUCTION

1 The principal issue that arises in this proceeding is whether the practice of financial advisers of a financial services licensee continuing to receive commissions or rebates from product providers following the introduction of the Future of Financial Advice (**FoFA**) reforms breached fiduciary duties owed to clients, contravened best interests and client priority duties in the *Corporations Act 2001* (Cth) (**Corporations Act**) or constituted misleading or deceptive conduct.

2 The Applicant is the corporate trustee of a self-managed superannuation fund (**Hunter SMSF**), operated for the benefit of Roslyn Hunter (**Mrs Hunter**), Neal Hunter (**Mr Hunter**), and their sons, Shaun Hunter and Dene Hunter. Mrs Hunter has been the director and company secretary of the Applicant since 19 June 2003 and at all material times was responsible for the financial affairs of the Applicant and made decisions for the Hunter SMSF.

3 The Applicant brings this proceeding on both its own behalf and as the representative for and on behalf of **Group Members**.

4 The Respondent (**Count**) was the holder of an Australian Financial Services License (**AFSL**) during the period from 21 August 2014 to 21 August 2020 (**Relevant Period**). Count conducted a franchise business pursuant to which it authorised various corporate entities, partnerships and sole traders (**Member Firms**) and individuals employed by Member Firms to provide financial advice under its AFSL (together, **Count Representatives**).

5 Centenary Financial Pty Ltd (**Centenary**) and three of its employees, Michael Williams, Arthur Duffield and Chad Hohnen (together, **Applicant's Representatives**) were authorised representatives of Count.

6 The Applicant acquired four financial products, following the provision of financial advice by the Applicant's Representatives, that are relevant to this proceeding (**Applicant's Products**). Three of the Applicant's Products were issued to the Applicant prior to the Relevant Period.

7 Each of the Applicant's Products was a financial product for the purposes of s 764A(1) of the Corporations Act. Both upfront and trail commissions were payable on the products.

8 The Applicant claims that it received personal financial advice from the Applicant's Representatives on six occasions in relation to the Applicant's Products during the Relevant Period (**Relevant Period Advice**).

9 The Applicant contends that the Applicant's Representatives, and in turn, Count breached fiduciary duties that each owed to the Applicant in relation to the Relevant Period Advice and contravened related best interests and client priority statutory duties owed to the Applicant, and by reason of omissions in the Relevant Period Advice also engaged in misleading or deceptive conduct.

10 The Applicant does not contend that any of the Applicant's Products was not suitable or should not have been recommended by the Applicant's Representatives.

11 For the reasons that follow I have concluded:

(a) the only personal financial advice that the Applicant received with respect to the Applicant's Products in the Relevant Period was in relation to a life insurance policy with AMP Life Limited (**AMP Policy**);

(b) having regard to all the relevant circumstances, the Applicant's Representatives owed fiduciary duties to the Applicant with respect to their recommendation to the Applicant during the Relevant Period to acquire the AMP Policy;

(c) the receipt of commissions and other benefits in connection with the AMP Policy was disclosed to the Applicant and constituted part of the agreed remuneration for the acquisition of the AMP Policy or was otherwise the subject of the informed consent of the Applicant;

(d) Count did not owe any fiduciary duties to the Applicant with respect to the Relevant Period Advice or was not otherwise liable for any alleged breach of fiduciary duties by the Applicant's Representatives;

(e) the Applicant has not established that the Applicant's Representatives contravened either s 961B or s 961J of the Corporations Act in relation to the provision of any of the Relevant Period Advice;

(f) the Applicant has not established that Count contravened its statutory supervisory obligations pursuant to s 961L of the Corporations Act in relation to the provision of any of the Relevant Period Advice; and

(g) the Applicant has not established that Count engaged in any misleading or deceptive conduct in contravention of s 1041H of the Corporations Act, s 12DA of the *Australian Securities and Investments Act 2001* (Cth) (**ASIC Act**) or s 18 of the *Australian Consumer Law* (**ACL**) in Sch 2 to the *Competition and Consumer Act 2010* (Cth) in relation to the provision of any of the Relevant Period Advice.

12 The Applicant also advances claims on behalf of Group Members that during the Relevant Period, Count and the Count Representatives breached fiduciary duties that each owed to Group Members, contravened related best interests and client priority statutory duties owed to Group Members, and by reason of that conduct also engaged in misleading or deceptive conduct.

13 For the reasons that follow I have concluded that given the breadth and generality of the pleaded Group Member definition advanced by the Applicant and the limited evidentiary foundation on which the claims on behalf of Group Members have been advanced, the scope of the common questions that can be addressed in the proceeding is necessarily narrow.

14 The parties were not able to agree common questions for determination in relation to the claims that the Applicant advanced on behalf of Group Members. For the reasons developed below, the common questions advanced by Count were framed in a manner that the Court was in a better position to answer than those advanced by the Applicant. I have answered each of the common questions as formulated by Count in the **First Schedule** to these reasons. The common questions advanced by the Applicant, except to the extent they were accepted by Count, raised issues that could not be determined on a common basis given the manner in which the Applicant has advanced its case.

15 The parties have prepared a statement of agreed facts that I have relied upon in preparing these reasons for judgment.

16 The parties have also prepared an agreed list of factual and legal issues for determination at the initial trial. I have specifically addressed each of the agreed factual and legal issues in the course of these reasons. Many of the agreed factual and legal issues, however, were not framed in a manner that could be answered with a simple yes or no. In order not to introduce undesirable prolixity into these reasons for judgment I have answered the agreed factual and legal issues while retaining the numbering used in the parties' document but have otherwise reproduced the agreed list in the **Second Schedule** to these reasons.

B. GLOSSARY

17 I have used the following defined terms in these reasons:

Defined Term	Definition
2FASOC	Second Further Amended Statement of Claim filed on 12 March 2024.
Advice Non-Disclosures	Together or severally, the factors pleaded at [26] of the 2FASOC which the Applicant contends were not disclosed or contained in any of the advice documents, emails or conversations (as recorded by the file notes).
AFL	Agreed facts and legal issues for determination
AFSL	Australian Financial Services License
AMP Distribution Agreement	Operative distribution agreement dated 20 June 2003 in place at the time in which the AMP Policy was acquired by the Applicant.
AMP Policy	AMP Elevate Life Insurance Policy no. P811402855, issued by AMP Life Limited.
AMP Template Agreement	Undated template agreement entitled "AMP Financial Services (AMPFS) Distribution Agreement"
APL	Count's Approved Product List
Applicant's Common Questions or **ACQ**	Applicant's proposed common questions
Applicant's Products	The Relevant Products acquired by the Applicant.
Applicant's Representatives	The Count Representatives who provided financial services to the Applicant (and were authorised by Count to do so),

	Centenary Financial Pty Ltd, Michael Williams, Arthur Duffield and Chad Hohnen.
April 2009 ROA	Record of advice provided by Mr Duffield to the Applicant on 21 April 2009.
August 2015 ROA	Record of advice completed by Mr Williams and provided to the Applicant on 4 August 2015.
BAC Review	A preventative audit and review control of financial planning advice files referred to as the Best Interest Duty Assessment and Coaching Review, implemented from or around October 2018 to the end of the Relevant Period.
Bonus Pool	The pool of funds from which the variable quarterly bonus was paid.
CBA	Commonwealth Bank of Australia
CBA Cash Account	Commonwealth Bank of Australia Accelerator Cash Account held by the Applicant.
CBA Rebate Decision	Standard included in CBA's licensee standards that when giving personal advice to clients in relation to commissioned financial products, and a conflict existed due to the continued receipt of the Commissions, the adviser must dial down or reduce their advice fee by the amount of the Commission to remove the conflict.
Centenary	Centenary Financial Pty Ltd
CFSFs	Licensee service fees, structured in the same manner as LAFs, but used to describe fees paid on a specific Colonial First State wholesale product.
CMLA	Colonial Mutual Life Assurance Society Limited (CMLA

	trading as CommInsure)
Commissions	Initial and/or "trail" commissions in relation to the sale of the Relevant Products pursuant to the Distribution Agreements.
Control Gap Spreadsheet	Spreadsheet entitled "control gap assessment" produced by Count.
Count	Count Financial Limited
Count Licensee Standards	Policies, licensee standards, corporate guidance documents and training that Count Representatives were required to comply with during the Relevant Period.
Count Representatives	Authorised corporate entities, partnerships, sole traders and individuals employed by Member Firms to provide financial advice under Count's AFSL.
CTC Benefits	The benefits provided to the Count Representatives under the CTC Program.
CTC Program	Points based rewards system titled "Contribution to Count" calculated primarily by reference to revenue contributed to Count by the Count Representatives.
December 2013 ROA	Record of advice prepared by Mr Williams and issued to the Applicant on or around 18 December 2013.
Distribution Agreements	The contractual arrangements between Count and the issuers of financial products for the sale and distribution of the products.
FASEA Code of Ethics	Financial Adviser Standards and Ethics Authority Code of Ethics

Financial Services Guide	Financial services guide issued by Count to clients that was updated from time to time.
FoFA Reforms	Future of Financial Advice Reforms
FPA Code of Professional Practice	Code of Professional Practice produced by Financial Planning Association of Australia.
GBE	Gross Business Earnings
Grandfathered Member Firms	Member Firms who joined before 1 July 2013 who were subject to specific remuneration policies.
Hunter SMSF	Hunter Family's self-managed superannuation fund
July 2015 Meeting	Meeting between Mr Williams, Mr Hohnen, Zeljko Butorajac and Mrs Hunter on 31 July 2015.
July 2017 ROA	Record of advice prepared by Mr Williams and provided to the Applicant on 19 July 2017.
Key Risk Indicators Document	A document produced in May 2018 by Count titled "key risk indicators".
LAFs	Fees paid by clients of Member Firms to Count on specific platform products, generally calculated as a percentage of the value of funds under management held by the client in the platform product.
LSFs	Management fees charged by Member Firms in relation to listed security portfolios, calculated by reference to the sum of those funds under management.
Macquarie	Macquarie Group Limited
Macquarie Cash	Applicant's cash management account operated by

Management Account	Macquarie Bank Limited.
Macquarie Cash Management Trust	Macquarie Cash Management Trust, being the precursor to the Macquarie Case Management Account.
March 2018 SOA	Statement of advice prepared on 5 March 2018 directed at life insurance coverage for Shaun Hunter.
May 2008 SOA	Statement of advice provided to the Applicant by Mr Williams on 20 May 2008.
May 2008 TFCA	Total Financial Care Agreement issued by Centenary on 20 May 2008 and provided by Mr Williams to the Applicant in late May 2008.
Member Firms	Authorised corporate entities, partnerships and sole traders who were part of Count's franchise business.
Neal TCP Policy	Policy schedule issued by CMLA on 30 July 2009 for a CommInsure Total Care Plan life insurance policy listing the Applicant as the "policy owner" and Mr Hunter as the insured.
New Member Firms	Member Firms who joined after 1 July 2013 who were subject to specific remuneration policies.
November 2015 ROA	Record of advice prepared by Mr Williams and provided to the Applicant on 19 November 2015.
October 2008 ROA	Record of advice provided to the Applicant by Mr Duffield on 3 October 2008.
Other Benefits	Payments or items of monetary value other than Commissions and Rebates received by Count or Count Representatives from product providers.

Pre-Relevant Period Advice	Personal Advice received by the Applicant from the Applicant's Representatives between 20 May 2008 and 18 December 2013.
Project Gecko	A project initiated by Count in or about early 2017 in which financial data was analysed to identify Member Firms that had been with Count for five or more years and did not meet commercial viability thresholds.
QAA	Quality Advice Assurance
QAA question sets	Standard set of questions issued by Count to Count employees conducting a file review as part of the Quality Advice Assurance process to assist with the performance of the file review, during the Relevant Period.
Rebates	Volume bonuses for the sale of some of the Relevant Products pursuant to the Distribution Agreements.
Relevant Period	21 August 2014 to 21 August 2020 inclusive.
Relevant Period Advice	The following personal advice received by the Applicant during the Relevant Period: (a) 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; (b) on or around 4 August 2015, from Centenary and Michael Williams which is documented in a Record of Advice; (c) on or around 19 November 2015, from Centenary and Michael Williams which is documented in a Record of Advice;

	(d) on or around 19 July 2016, 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; (e) on or around 19 July 2017, from Centenary and Michael Williams which is documented in a Record of Advice; and (f) on or around 5 March 2018, from Centenary and Chad Hohnen which is documented in a Statement of Advice.
Relevant Products	The Relevant Products: (a) 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; (b) are each financial products within the meaning of s 764A(1) of the Corporations Act; (c) are comprised of three classes, being financial products, insurance products and platforms.
Representations	The representations pleaded in the 2FASOC at [74] as comprising, collectively, on their own, or in any combination the representations pleaded therein.
Respondent's Common Questions or **RCQ**	Respondent's proposed common questions
Retail Entitlement Offer	Retail Entitlement Offer announced by Santos Limited.
RLAL Communication	Letter and attached schedule provided on subpoena from a Claims Data Manager of Resolution Life Australasia Limited.

Roslyn TCP Policy	A policy schedule issued by CMLA on 1 May 2009 for a CommInsure Total Care Plan life insurance policy listing the Applicant as the "policy owner" and Mrs Hunter as the insured.
Scenario 1	Profit based calculations performed by Mr Cairns for the purpose of quantifying the relief sought by the Applicant in the proceeding.
Scenario 2	Loss based calculations performed by Mr Cairns for the purpose of quantifying the relief sought by the Applicant in the proceeding.
Skandia One Fund	Applicant's investment portfolio described as the Skandia One Fund.
Solutions Requirements Document	CBA document issued on 9 October 2015 titled "Solution Requirements Document" for the "Adviser & Conflicted Remuneration – Corporate Guidance" project.
Splits	Specified percentage of Commissions and adviser service fees deducted by Count before passing fees through to the Member Firm.
TCP Policies	Roslyn TCP Policy and Neal TCP Policy
Total Financial Care Agreements	Formal contractual arrangements entered into by the Applicant and Centenary for the provision of ongoing advice services.
TPD	Total permanent disability
True Position	The True Position pleaded in the 2FASOC at [75] as comprising, jointly and severally, the facts pleaded therein, during the Relevant Period.

C. WITNESSES

C.1. Applicant's lay witnesses

18 The Applicant relied on the evidence of Mrs Hunter and her son, Shaun Hunter.

C.1.1. Mrs Hunter

19 Mrs Hunter affirmed three affidavits in the proceedings and was cross examined. After leaving school, Mrs Hunter worked for the CBA for 12 years as a teller, supervisor and ultimately as a loans officer. She subsequently worked for the Ku-ring-gai Soccer Club, initially as a part-time office administrator and then worked full time for 9 years as an office and financial administrator.

20 Mrs Hunter found the process of cross examination stressful. I have no doubt that Mrs Hunter genuinely believes that the Applicant's Representatives charged an excessive amount for the services that they provided to the Applicant, both directly under the Total Financial Care Agreements and indirectly through the receipt of Commissions from the providers of the Applicant's Products. Unfortunately, Mrs Hunter allowed that sense of grievance to colour her evidence, in particular, her oral evidence.

21 In giving her oral evidence, Mrs Hunter had a tendency to be defensive, argumentative and exaggerate her alleged inability to understand the documents with which she was provided by the Applicant's Representatives. At one stage of her cross examination, when pressed on a particular issue, she responded that she was a "mother who's just running a superannuation fund for her family" and when confronted with specific disclosures of commission arrangements in documents that had been provided to her, she responded "that doesn't mean anything to me", they are "just facts and figures". I accept that Mrs Hunter had little financial experience but I am satisfied that Mrs Hunter, by reason of her work experience with the CBA and her demeanour in the witness box, was an intelligent and capable person who would have had little difficulty understanding the documents with which she was provided by the Applicant's Representatives, notwithstanding her testamentary protestations to the contrary.

22 Mrs Hunter steadfastly maintained that all meetings that she attended with Mr Williams, either alone or with Mr Hunter, were initially held annually at Mr Duffield's house at Christmas time notwithstanding a reference in the May 2008 SOA to previous meetings.

23 Mrs Hunter accepted that parts of documents were expressly drawn to her attention by Mr Duffield and Mr Williams but claimed both in her affidavits and in cross examination that they

never told her that Centenary received any Commissions from product providers. When pressed on important details she would often respond to matters that might be thought adverse to the Applicant's case by stating that she could not recall but if it was otherwise consistent with the Applicant's case, she would confidently assert that it "would have" happened.

24 Ultimately, given the selective nature of Mrs Hunter's professed lack of recollection, I have not been able to attribute significant weight to her evidence of contemporaneous conversations, in particular, her contentions that Mr Williams or Mr Hohnen never told her about the payment of Commissions on the Applicant's Products.

C.1.2. Shaun Hunter

25 Shaun Hunter is the son of Mr and Mrs Hunter and a director of the Applicant since 2010.

26 Shaun Hunter gave evidence of his very limited involvement in the affairs of the Hunter SMSF, his dealings with Mr Hohnen in relation to the purchase of a residential property in Asquith in 2018, and the absence of any disclosure by Mr Hohnen or anyone else at Centenary of any receipt by Centenary of Commissions in exchange for recommending financial products or any of the other matters that the Applicant contends should have been disclosed to it.

27 He was not cross examined on the basis that the Applicant would not take any *Browne v Dunn* point against Count in relation to his evidence.

C.2. Count's lay witnesses

28 Count relied on evidence from Mr Williams, Mr Hohnen, Michael Spurr, Karen Peel, Belinda Light, and Cameron Lewis.

C.2.1 Mr Williams

29 Mr Williams gave evidence of (a) his dealings with the Applicant, in particular the advice he provided to the Applicant in records of advice and in connection with the Applicant's acquisition of the AMP Policy and the Macquarie Cash Management Account, (b) meetings and communications with Mr and Mrs Hunter, (c) Centenary's remuneration arrangements, (d) the CTC Program, and (e) the Total Financial Care Agreements and certain records of advice. He was extensively cross examined.

30 Mr Williams was an impressive witness. He answered questions directly, concisely and without prevarication. His evidence was given in a relatively dispassionate manner and was consistent with the apparent logic of events. He could not recall the detail of specific conversations that

he had with Mr and Mrs Hunter but was able to give cogent and plausible evidence of his usual practice in providing financial services to retail clients. He made appropriate concessions, did not speculate and was not unduly defensive. I was satisfied that his evidence was generally reliable and his evidence as to his state of mind at various times was honestly given.

C.2.2. Mr Hohnen

31 Mr Hohnen gave evidence of (a) his usual practice in providing financial advice to retail clients, (b) his discussions and communications with Shaun Hunter in connection with the issue of the AMP Policy to the Applicant, (c) the preparation of the March 2018 SOA and (d) Centenary's remuneration arrangements. He was not cross examined on the basis that Count would not take any *Browne v Dunn* point against the Applicant in relation to his evidence.

C.2.3. Mr Spurr

32 Mr Spurr held various senior executive positions with Count, its subsidiary CountPlus Pty Ltd and the CBA during the Relevant Period, including with CBA as Project Manager in Adviser Remuneration and Incentives. His primary role in that position was to review Count's existing remuneration model and to consider, develop and implement an alternative remuneration model. He gave evidence of (a) Count's business model and remuneration policies, (b) the CTC Program, (c) Count's APL, and (d) the "dialling down" of Commissions. He was cross examined.

33 Mr Spurr responded directly to questions in cross examination without prevarication and made appropriate concessions. He was not argumentative and I am satisfied that he gave truthful evidence to the best of his recollection. I am satisfied that his evidence can be relied upon.

C.2.4. Ms Light

34 Ms Light was employed as a Senior Manager, Supervision & Governance in the Risk Management and Compliance team of Count during the Relevant Period. She gave evidence of (a) Count's business structure, (b) Count's risk management framework and risk management function, (c) the framework for adviser supervision and monitoring, including detection measures, and (d) the investigation and consideration of matters of concern. She was briefly cross examined.

35 Ms Light answered questions directly and without prevarication. I am satisfied that her evidence is reliable and given honestly.

C.2.5. Ms Peel

36 Ms Peel was first employed by CBA in 1988 and has held compliance roles in CBA since 2002, including in the period October 2014 to approximately May 2018, Executive Manager, Wealth Risk Management Advice and acting Chief Risk Officer, Wealth Risk Management Advice from approximately May 2018 to approximately June 2019. Ms Peel gave evidence of CBA's risk and compliance framework as far as it concerned or was applicable to Count, including (a) risk assessment and the testing of process and controls, (b) key governing policies that applied to Count, (c) the regulatory reform program, and (d) CBA's in-house function. Ms Peel was not cross examined on the basis that Count would not take any *Browne v Dunn* point against the Applicant in relation to her evidence.

C.2.6. Mr Lewis

37 During the Relevant Period Mr Lewis was variously a Senior Manager, Quality Advice Assurance at CBA for CBA's licensees, including Count, seconded to other business units of CBA, including in 2018 serving as a Senior Technical Advice Expert for CBA's Advice Remediation Program which included an assessment of client files of Count, and from 1 October 2019, Senior Manager, Supervision and Monitoring at Count, coinciding with the sale of Count to CountPlus. Mr Lewis gave evidence on (a) contractual relationships between Count and Member Firms, (b) Count's organisational structure, and (c) Count's risk and compliance framework. Mr Lewis was not cross examined on the basis that Count would not take any *Browne v Dunn* point against the Applicant in relation to his evidence.

C.3. Expert witnesses

38 Both the Applicant and Count relied on expert reports addressing relief.

39 The Applicant tendered a report and a reply report from Martin Cairns. Mr Cairns is the managing director of Sapere Research Group Limited and the co-lead of its forensic accounting and valuation team. He has extensive experience in a wide range of business sectors involving audit, accounting, forensic and valuation issues.

40 Count tendered a report from Andrew Ross. Mr Ross is a partner of KordaMentha. He has extensive experience in the provision of financial advice, valuation and forensic accounting.

41 Neither Mr Cairns nor Mr Ross was cross examined.

42 Mr Cairns advanced profit based calculations described as Scenario 1, and loss based calculations described as Scenario 2, for the purpose of quantifying the relief sought by the Applicant in the proceeding.

43 For the three Applicant's Products that were insurance products, Mr Cairns determined the profit based calculations in Scenario 1 comprised total Commissions referrable to the Applicant's Products together with pre-judgment interest. In Scenario 2 the loss based calculations were based on decreases in the value of the three Applicant's Products between the annual premiums payable on those products and the annual premiums that would have been payable had the premiums been subject to maximum dial down rates together with pre-judgment interest.

44 For the Macquarie Cash Management Account, Mr Cairns calculated, for both Scenario 1 and Scenario 2, the difference between the actual interest rate earned by the Applicant from Macquarie, as the product provider, and the interest the Applicant would have received but for the payment of Commissions referrable to the Macquarie Cash Management Account together with pre-judgment interest.

45 In his report, Mr Ross raised numerous concerns with the analysis and methodology adopted by Mr Cairns in his first report.

46 In the course of the trial, however, Count accepted that the calculations undertaken by Mr Cairns in Scenario 1 for Commissions could be accepted for the purposes of determining compensation for the Applicant if the Applicant was otherwise successful in establishing any of its causes of action in the proceeding. I set out below the calculations of Commissions and pre-judgment interest in Scenario 1 performed by Mr Cairns in his first report:

Table 4: Question 4 – Commissions – Scenario 1 (in $)[8]

Product	Commissions	Pre-judgment Interest	Total
MCMA	55.05	26.67	**81.72**
TCP 1385467	6,158.85	1,980.31	**8,139.16**
TCP 1385978	3,249.57	970.52	**4,220.09**
AMP P811402855	1,200.87	328.70	**1,529.57**
Total	**10,664.34**	**3,306.21**	**13,970.54**

Table may not add due to rounding

47 I note that due to an inadvertent double counting of interest issue, Mr Cairns corrected the figures for Commissions and pre-judgment interest for the Macquarie Cash Management Account in his reply report. The corrected figures for Commissions was $51.32 and for pre-judgment interest was $24.78. As a result of these corrections the aggregate figure advanced by Mr Cairns in Scenario 1 reduced from $13,970.54 to $13,964.92.

D. APPLICATION TO QUALIFY REMUNERATION AGREED FACT

D.1. Overview

48 The statement of agreed facts adduced into evidence pursuant to s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**) included an agreed fact in [24] in the following terms:

> Commissions formed part of the way in which financial advisers, including Count Authorised Representatives, were remunerated for the provision of personal advice.

49 On the last day of the initial trial the Applicant foreshadowed that it would seek to qualify the terms of the agreed fact in [24].

50 On 15 April 2024, the Applicant filed submissions seeking leave to amend [24] as follows:

> Commissions formed part of the way in which financial advisers, including Count Authorised Representatives, were remunerated for the provision of personal advice **to some Group Members**.

D.2. Submissions

D.2.1. The Applicant

51 The Applicant accepts that *some* Count Representatives were remunerated by Count in the form of Commissions and in *some* cases the Commissions may have constituted remuneration for providing advice to a client but submits that in other cases the Count Representative may have received an upfront or ongoing advice fee by the client and therefore the Commissions would have been *in addition* to those fees.

52 In these circumstances, the Applicant submits that [24] cannot be read as an admission or concession that Count Representatives in fact received a Commission for work performed for Group Members in all instances for the following reasons. First, it does not have the information to make such an admission on behalf of all Group Members. Second, the Applicant cannot make admissions that affect individual claims for particular Group Members for whom it does not act. Third, it would be contrary to Count's defence that it admitted it did not require the Count Representatives to provide any service in exchange for Commissions. Fourth, it is

inconsistent with the terms of the Distribution Agreements that show that the Commissions were paid to Count Representatives for marketing their products. Fifth, it is not possible to assume that Commissions constituted remuneration if there existed an agreed fee for service, such as the upfront fee of $1,650 and the ongoing fee of $5,500 payable by the Applicant to Centenary as recorded in the May 2008 SOA.

53 The Applicant submits, however, that in order to "obtain certainty" it should be given leave to amend [24] to add the words "to some Group Members".

54 The Applicant submits that the Court plainly has power to permit the amendment pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).

55 Next the Applicant submits that given the Court's Practice Note "Central Practice Note: National Court Framework and Case Management" (**CPN-1**) recognises that a statement of agreed facts is a "collaborative tool to minimise the length of the trial hearing", an "innovative tool relating to managing evidence" and is "encouraged by the Court", it would be "somewhat perverse" if a party seeking to reach "the most effective, efficient and economical way to manage evidence" was prevented from making a submission important to its case because of competing interpretations as to how a paragraph in a statement of agreed facts should be read.

56 The Applicant submits that such a result would be antithetical to the purpose and objective of CPN-1, particularly given (a) the Applicant's position that no service was provided was well known to Count such that it "would be truly odd" if the Applicant were taken to have suddenly and without any rational explanation abandoned that position in an agreed document ordered by the Court, and (b) there would be no prejudice to Count in permitting the Applicant to make that amendment to [24] simply to clarify an agreed fact that is unclear.

D.2.2. Count

57 On 29 April 2024, Count filed submissions opposing leave to amend or qualify [24] and attached copies of correspondence between the parties' solicitors with respect to the inclusion of [24] in the statement of agreed facts.

58 Count submits that leave to amend or qualify [24] should be refused for the following reasons.

59 *First*, the application is misconceived because the power conferred by s 23 of the FCA Act does not extend to "amending" evidence that has been adduced in the proceeding or deeming that a respondent has agreed to a fact that it has not agreed to.

60 *Second*, the amendment sought to be made to [24] is inconsistent with the case the Applicant pursued at trial. Count submits that the Applicant separately admitted that Count's payment to Centenary of Commissions received from product providers was a component of Centenary's remuneration, the Applicant cross examined Mr Williams on the premise that Commissions was a form of remuneration, and Count made both written and oral submissions based on [24] that Commissions were in substance, a form of deferred remuneration.

61 *Third*, the application is brought extremely late causing prejudice to Count as it prepared and advanced its closing written and oral submissions on the basis that [24] was agreed and uncontroversial. Count submits that it made forensic decisions on that basis, including a decision not to adduce expert evidence.

62 *Fourth*, the Applicant has not filed any evidence to explain its delay until the last day of the trial to identify any desire to qualify the language of [24] or why it did not seek to adduce any evidence in support of the proposed amendment to the paragraph.

D.3. Consideration

63 I accept that s 23 of the FCA Act confers a broad power on the Court to make orders that it considers appropriate but I am not satisfied for the following reasons that the power should be exercised in the present case to amend unilaterally, in a significant manner, an agreed fact after a three week trial has concluded.

64 *First*, the Evidence Act provides for a specific procedure by which a party can seek to qualify an admission made in a statement of agreed facts tendered pursuant to s 191 of the Evidence Act. The procedure does not involve any unilateral amendment to the agreed fact but rather permits a party, subject to the leave of the Court, adducing evidence "to contradict or qualify an agreed fact": s 191(2) of the Evidence Act. Such leave may be given on such terms as the Court thinks fit and without limiting the matters the Court can take into account, the Court is required, in determining whether to grant leave, to take into account (a) the impact on the length of the hearing, (b) any unfairness to a party or a witness, (c) the importance of the evidence, (d) the nature of the hearing, and (e) the power, if any, to adjourn the hearing or make any other direction in relation to the evidence: s 192(2) of the Evidence Act.

65 Rather than seek to invoke this procedure the Applicant has asked the Court for consent for it to amend unilaterally an agreed fact. It is not apparent how a Court can, consistently with

established principles of justice, make an order retrospectively having the effect of amending a fact that had been admitted into evidence pursuant to s 191 of the Evidence Act. In substance, the Applicant is asking the Court to impose an agreed fact on a party that has not consented to that fact. That is a fundamentally different proposition to the Court having regard to evidence that it has given leave to adduce pursuant to s 191(2) and s 192 in assessing the weight it might give to an agreed fact.

66 *Second*, I do not accept that there is any relevant ambiguity in [24]. Moreover, the use of the qualification for "some Group Members" in other paragraphs of the statement of agreed facts emphasises the importance of the absence of such a qualification for [24]. The Court would not readily infer that it was an oversight or accidental. As the correspondence between the parties in relation to the formulation of [24] makes plain, on 7 December 2023 the Applicant proposed that [24] be included in the statement of agreed facts in its exact terms, by letter dated 25 January 2024 Count sought an amendment to [24] but by letter dated 27 February 2024, the Applicant rejected the amendment.

67 *Third*, and relatedly, the submissions advanced by the Applicant in support of its ambiguity contentions are thinly disguised and impermissible attempts to point to evidence that contradicts or qualifies the agreed fact in [24], contrary to s 191(2) of the Evidence Act or otherwise are not matters that would displace the clear and unambiguous wording of [24].

68 *Fourth*, I accept [24] is an important agreed fact for the case that the Applicant seeks to advance in the proceeding but I am equally satisfied that it is an important agreed fact that Count relies upon in answer to the claims advanced by the Applicant. In assessing the weight to be given to prejudice to the parties, the unfortunate issue for the Applicant is that it not only agreed to the inclusion of [24], it drafted the precise terms of the paragraph.

69 *Fifth*, given the application to amend [24] was not made, or even foreshadowed, until after Count had conducted the trial and made its closing submissions, any order made now to amend the agreed fact would likely cause substantial prejudice and unfairness to Count, not least the opportunity to lead evidence to support [24] in its currently agreed form. It would, contrary to the Applicant's submissions, rather be antithetical to the purpose and objective of CPN 1 to accede to the Applicant's request to grant leave to permit the Applicant to unilaterally amend [24] given the time at which the application was made.

E. COUNT AND CENTENARY

E.1. Franchise business of Count

70 At all times during the Relevant Period, Count was a holder of an AFSL and conducted a franchise business in which it authorised Member Firms to provide financial advice under its AFSL. The Member Firms included employed advisers of corporate firms and partnerships who were also authorised representatives of Count. Count did not employ any advisers.

71 The number of Member Firms authorised by Count to provide financial advice under its AFSL during the Relevant Period varied between 569 and 936 firms and individuals.

72 Count generated nearly all of its revenue through the Member Firms and the providers of products which were purchased by clients of the Member Firms. In return for Member Firms sharing the revenue they generated from their clients, Count permitted the Member Firms to operate under its AFSL and its brand. In addition, Count provided operational and compliance support and ongoing training to Member Firms.

73 Count was highly reliant on revenue from product providers. In FY14 approximately 64% of Count's revenue came from platforms. During the Relevant Period, Count received in aggregate $154,863,136.48 in Commissions and the total Commissions and Rebate expenses paid out by Count exceeded $400,000,000.

E.2. Count's sources of revenue

74 Count obtained revenue from the following principal sources:

(a) membership fees paid by Member Firms;

(b) fees paid by Member Firms for attendance at Count's annual conference;

(c) Rebates paid by product providers, typically on a minimum volume basis but also subject to other criteria;

(d) Splits, being funds retained by Count on Commissions or advice fees payable to Member Firms by their clients or product providers, at variable rates over time and as between Member Firms;

(e) LAFs, being fees paid by clients of Member Firms to Count on specific platform products, generally calculated as a percentage of the value of funds under management held by the client in the platform product;

(f) CFSFs, being licensee service fees, structured in the same manner as LAFs, but used to describe fees paid on a specific Colonial First State wholesale product;

(g) LSFs, being management fees charged by Member Firms in relation to listed security portfolios, calculated by reference to the sum of those funds under management;

(h) sponsorship and payments from education providers; and

(i) software, paraplanning and other support fees charged to Member Firms.

75 Rebates paid by platform providers were the largest source of revenue, that was retained by Count, during the Relevant Period. The accrual of Rebates was an integer in the calculation of "CTC points" in the CTC Program, but Rebates were not otherwise shared with Member Firms.

E.3. Count's Representatives

76 Count entered into "Authorised Representative Agreements" with Member Firms.

77 On 25 February 2005, Count authorised Centenary as a Member Firm to provide financial advice, including financial services, on its behalf. During the Relevant Period, up to 3 April 2020, Centenary was a corporate representative of Count, and Michael Williams was an authorised representative of Count, and employee of Centenary. Mr Williams became an authorised representative of Count on 1 June 2006. Mr Duffield was an authorised representative of Count and employee of Centenary from 22 May 2003 until approximately February 2013.

78 Count promoted its Count Representatives to retail clients on its website in the following terms, noting that on or about 20 March 2018, Count amended its website to remove "and independent" from the last sentence below:

> WHAT WE OFFER
>
> The right adviser for you depends on your personal requirements. At Count we believe it's essential you find someone you are comfortable with and who you can trust. And [sic] someone who will provide you with professional advice that is based on your best interests.
>
> Why choose a Count adviser?
>
> …
>
> - The peace of mind that comes from dealing with a professional
> - We're working for you.
>
> Count advisers recommend investments and strategies based on their suitability to your specific needs. Each investment we recommend has been through our rigorous and

independent research process.

79 Count represented in the December 2013 ROA, March 2018 SOA, and it's website to prospective retail investors that:

(a) it could help them achieve their financial goals;

(b) its "Count Wealth Accountants" were "looking after your financial life";

(c) "our advisers operate at the highest industry education standards";

(d) "we can offer you choice and flexibility to keep your financial future on track";

(e) "[w]ith access to a wide range of quality investment and insurance solutions, Count advisers can offer you choice and flexibility when it comes to mapping out your financial future"… "a reputation built on trust"; and

(f) "A count adviser can help you: … work out the level of cover you need and … can afford; [p]rovide guidance on where to invest your money."

80 Centenary represented to the Applicant that (a) "our strategy recommendations will help you achieve your goals and needs" and "our experience is your peace of mind" in its December 2013 ROA, and (b) each of its financial planners were experts in its Financial Services Guides.

81 The majority of Centenary's revenue was derived from the payment of Commissions. During the Relevant Period, Centenary received more than $2,700,000 in Commissions.

F. THE APPLICANT'S PRODUCTS

F.1. Overview

82 The Applicant's personal case against the Applicant's Representatives and Count is directed at the provision of personal advice by the Applicant's Representatives in relation to the Applicant's Products during the Relevant Period.

F.2. Macquarie Cash Management Account

83 In or about April or May 2009, Mr Duffield provided the April 2009 ROA, a record of advice dated 21 April 2009 to the Applicant in which he recommended that the Applicant place $260,000 in the Macquarie Cash Management Account from the funds held in the Applicant's Macquarie Cash Management Trust. The April 2009 ROA was four pages in length.

84 The April 2009 ROA noted that after meeting with Mrs and Mr Hunter, it had been confirmed that their personal situation had either not altered or was deemed not to have altered

significantly from that previously recorded and therefore the recommendations were based on the personal and financial information set forth in the May 2008 SOA and the October 2008 ROA (although mistakenly referred to as an October 2009 ROA), each of which is considered at [102] and [109] to [111] below.

85 There was no evidence of any Distribution Agreement, being contractual arrangements between Count and the Issuers of the relevant products for the sale and distribution in force between Macquarie and Count at the time that the Applicant accepted the recommendation by Mr Duffield to place funds in the Macquarie Cash Management Account.

86 Subsequently, however, on or about 30 June 2012, Count entered into a cash products distribution agreement with Macquarie. The agreement provided for the payment of commissions (described as "distribution commission") to Count, promises by Count to promote Macquarie Cash Management Accounts and a sales target, but did not include any promises by Count to place Macquarie Cash Management Accounts on the APL or include any lapse rate incentive. The agreement provided Macquarie with an unfettered discretion to cease paying commissions if less than 500 new Macquarie Cash Management Accounts were opened in any year, less than $250 million was held in all accounts or the average account balance fell below $30,000. In addition, Macquarie agreed to pay Count up to $6.5 million each year on cash deposit products. The agreement included a clause that Count would keep all information that it might acquire pursuant to the agreement and the distribution commissions payable under the agreement confidential but did not include any confidentiality obligation with respect to the agreement itself.

87 On or about 9 December 2014, the Applicant, through Mrs Hunter, indicated that it wished to close the Macquarie Cash Management Account.

88 On or about 31 July 2015, the Applicant applied to close its Macquarie Cash Management Account.

89 By 4 August 2015, all funds were withdrawn from the Macquarie Cash Management Account. The Applicant otherwise held its Macquarie Cash Management Account until approximately 1 September 2015.

90 In the period between 1 July 2012 and 1 September 2015, Centenary received Commissions with respect to the Macquarie Cash Management Account in the amount of $337.08.

91 During the period of approximately 1 July 2014 to 30 June 2015, the Applicant paid ongoing service fees to Count and Centenary, in an amount of $5,500, a proportion of which was retained by Count.

F.3. Roslyn and Neal TCP Policies

92 On or about 1 May 2009, the Roslyn TCP Policy, a new policy schedule, was issued by CMLA for a CommInsure Total Care Plan life insurance policy listing the Applicant as the "policy owner" and Mrs Hunter as the insured. The Roslyn TCP Policy was held until at least 1 May 2020. In the period between 1 May 2013 and 1 May 2020, Centenary received Commissions with respect to the Roslyn TCP Policy in the amount of $3,591.67.

93 On 30 July 2009, CMLA issued a second policy schedule for a CommInsure Total Care Plan life insurance policy, listing the Applicant as the "policy owner" and Mr Hunter as the insured, being the Neal TCP Policy. The Neal TCP Policy was held until at least 30 July 2020. In the period between 1 August 2012 and 1 August 2019, Centenary received commissions with respect to the Neal TCP Policy in the amount of $7,579.78.

94 During the period in which the TCP Policies were in force, the relationship between Count and CMLA was governed by three successive Distribution Agreements.

95 In the period prior to 1 July 2011, the operative Distribution Agreement was a distribution agreement between Count and CMLA dated 3 June 2003. The agreement provided for the payment of Commissions to Count and an asset and renewal commission in relation to the "in force portfolio" but did not include any other provision of incentive rebates, promises by Count to promote CMLA products or place them on the APL, lapse rate incentives or sales targets. The agreement included a clause that Count would keep all information that it might acquire pursuant to the agreement confidential but did not include any confidentiality obligation with respect to the agreement itself. This was the CMLA Distribution Agreement that was in force when the Applicant became the owner of each of the TCP Policies.

96 Subsequently, in the period between 1 July 2011 and 30 June 2012, the operative CMLA Distribution Agreement was a relationship agreement between Count and CMLA dated 15 September 2011, but with effect from 1 July 2011. The agreement provided for the payment of incentive rebates to Count together with lapse rate incentives and sales targets but did not otherwise include any obligation to place them on the APL or promises by Count to promote CMLA products, other than a general "support" obligation that included undertaking "speaking

spots and CommInsure branding opportunities" at professional development days, conferences and workshops. The agreement was marked confidential but did not include any confidentiality clauses.

97 Then finally, in the period from 1 July 2012, the operative CMLA Distribution Agreement was a preferred relationship agreement between Count and CMLA executed on 24 April 2013, but with effect from 1 July 2012. The agreement provided for the payment of incentive rebates to Count, together with lapse rate incentives, sales targets and a promise by Count to place CMLA products on the APL, but did not provide for the payment of commissions nor include promises by Count to promote CMLA products, other than a general "support" obligation including at professional development days, State based events and conferences, invitations to CommInsure technical resources to present at plenary sessions and workshops, invitations to attend Count's annual conferences and the opportunity to engage with Count Representatives at professional development events. The agreement was marked confidential and included a clause that each party agreed, unless otherwise required by law or regulation to keep the terms of the agreement confidential.

F.4. AMP Policy

98 On 2 March 2018, the Applicant acquired the AMP Policy, an AMP Elevate Life Insurance Policy, issued by AMP Life Limited, nominating Shaun Hunter as the insured.

99 The AMP Policy was issued during the Relevant Period. The scope of the advice provided and the extent of the relevant disclosures with respect to the AMP Policy are addressed below in my consideration of the Relevant Period Advice.

G. PRE-RELEVANT PERIOD ADVICE

G.1. Overview

100 As explained above, three of the four Applicant's Products were acquired prior to the Relevant Period. It is therefore necessary to have regard to the circumstances in which those products were acquired by the Applicant.

G.2. The Applicant's initial relationship with Centenary

101 In or about 2007, Mrs Hunter, on behalf of the Applicant, first approached Centenary for formal financial advice. Mr Williams was asked, through Mr Duffield, to provide assistance to the

Applicant for the purpose of removing Gary Foster and Jill Foster as directors of the Applicant and renaming the Hunter SMSF.

G.3. May 2008 SOA

102 In or about May 2008, Mr Williams provided the May 2008 SOA to the Applicant, a statement of advice dated 20 May 2008. At the time the May 2008 SOA was provided to the Applicant, Mrs Hunter, but not Mr Hunter, had existing life and TPD insurance through the Hunter SMSF. Centenary recommended in the SOA that Mr Hunter take out TPD cover through the Hunter SMSF.

G.4. Financial Services Guide

103 Prior to the provision of the May 2008 ROA, Centenary provided the Applicant with a Financial Services Guide. The Financial Services Guide included a high level disclosure of the financial services and products provided by Count and the Count Representatives together with a brief explanation of the franchise basis on which Count's financial advisers operated.

G.5. Total Financial Care Agreements

104 From late May 2008, the Applicant entered into formal contractual arrangements with Centenary for the provision of ongoing advice services. The contractual arrangements were recorded in a series of agreements which were described as Total Financial Care Agreements. The Total Financial Care Agreements were drafted by Mr Williams based on templates supplied by Count. The templates for at least the Total Financial Care Agreements entered into in 2015 and 2017, provided for the authorised representative of Count to vary the specific services to be provided and the fees payable for those services. Other documents that specified standards for licensees with regard to Total Financial Care Agreements provided for variations to the frequency with which the specific services were to be provided. From approximately March 2018, the Total Financial Care Agreements were known as Ongoing Service Agreements.

105 In late May 2008, Mr Williams provided the May 2008 TFCA to the Applicant, being a Total Financial Care Agreement dated 20 May 2008. The May 2008 TFCA offered the Applicant on a stipulated periodic basis (a) face-to-face interviews reporting on the performance of the Applicant's portfolio and reporting on wealth protection, income needs, cash flow, budgeting and tax, (b) portfolio reports, and (c) copies of reports prepared by Count.

106 The fee that was to be paid by the Applicant under the May 2008 TFCA was an annual fee of 0.55% of the total funds that the Applicant had invested in an investment portfolio described as the Skandia One Fund. The May 2008 SOA had recommended that the Applicant make an additional investment in the Skandia One Fund of $280,000 from funds held in the Applicant's Macquarie Cash Management Trust. This investment was not made, however, because the Applicant decided not to proceed with it due to market volatility. Had the additional Skandia One Fund investment been made, the annual fee payable to Centenary would have been approximately $3,325 ($604,465 (being $280,000 + $324,465) x 0.55%).

107 During the Relevant Period, the fee that was imposed under the Total Financial Care Agreements was initially an annual fee of $5,500. This fee was subsequently reduced to $2,200 from about July 2017 because the Applicant had liquidated its investment portfolio to purchase an investment property. On or about 6 June 2017, Mr Williams recorded in a file note that the fee was reduced because there would be "less work involved in the investment side".

108 During the initial trial, Count agreed to repay to the Applicant all fees that had been paid under the Total Financial Care Agreements.

G.6. October 2008 ROA

109 From May 2008, Mr Williams took steps to have the name listed on Mrs Hunter's life and TPD policy changed to record the change in the name of the Applicant and to arrange life and TPD insurance cover for Mr Hunter.

110 On or about 3 October 2008, Mr Duffield provided the October 2008 ROA to the Applicant, being a record of advice which repeated the recommendation made in the May 2008 SOA that Mr Hunter take out a life and TPD policy with CommInsure. The October 2008 ROA was a five-page document. It was noted in the October 2008 ROA that due to "recent market volatility", Mr and Mrs Hunter had decided not to proceed with a recommendation made in the May 2008 SOA to invest surplus cash from the Macquarie Cash Management Trust in highly rated managed funds through the Skandia One Fund.

111 The October 2008 ROA noted that after meeting with Mrs and Mr Hunter, it had been confirmed that their personal situation had either not altered or was deemed not to have altered significantly from that previously recorded and therefore the recommendations were based on the personal and financial information set forth in the May 2008 SOA and the Financial Needs Analyser also dated 20 May 2008.

G.7. May 2011 ROA

112 On or about 31 May 2011, Mr Williams issued a further record of advice to the Applicant dated 31 May 2011, being the May 2011 ROA. Mr Williams confirmed in that record of advice that, based on the recommendations made in a record of advice of 10 September 2010 and subsequent discussions in December 2010, all the Applicant's managed funds had now been liquidated and $140,000 worth of CBA Retail Bonds had been purchased in December 2010 and $247,000 worth of Australian equities had been purchased in March 2011.

G.8. December 2013 ROA

113 On or about 18 December 2013, Mr Williams issued the December 2013 ROA to the Applicant dated 18 December 2013 containing investment recommendations for the Applicant's share portfolio that was being managed by the Applicant's Representatives. The December 2013 ROA was an eight page document.

114 The December 2013 ROA recorded that the Applicant's total investments had a value of $738,321.06, comprising an amount of $13,893.63 in the Applicant's CBA Cash Account, $463,856.90 in the Applicant's share portfolio, and cash and term deposits with Macquarie in an aggregate amount of $260,570.53.

H. RELEVANT PERIOD ADVICE

H.1. Overview

115 The Applicant contends that during the Relevant Period it received personal advice on six occasions, constituting the Relevant Period Advice. It contends that the Relevant Period Advice contained an express recommendation to pay or continue to pay Commissions and/or an implicit recommendation to pay or continue to pay Commissions and/or an express or implicit recommendation to pay Commissions in addition to ongoing service fees in relation to the Applicant's Products.

116 Further, the Applicant contends that the advice provided in the Relevant Period Advice did not disclose or contain the Advice Non-Disclosures, being:

(a) that ongoing Commissions and Other Benefits were being received by the Applicant's Representatives in relation to the Applicant's Products;

(b) that the Applicant's Products would be materially cheaper if the Commissions were "dialled down" or "rebated";

(c) 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 Other Benefits;

(d) as to the extent of a conflict arising as a result of the payment of Commissions and/or receipt of Other Benefits, including that:

(i) the Applicant's insurance products would be materially cheaper if the Commissions were "dialled down" or switched off;

(ii) the CTC Program incentivised advisers to recommend products that promoted the interests of Count;

(iii) the Count remuneration policies incentivised advisers to only recommend products that were on the APL;

(iv) the Applicant's Representatives were ranked by Count on the revenue they generated for Count and financially rewarded for their revenue; and

(v) the Splits, and the variable remuneration received as a result of the Splits could give rise to a conflict;

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

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

(g) any advice to stop paying the Commissions;

(h) that it was possible to obtain the same products without paying Commissions;

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

(j) 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

(k) that the Applicant was paying Commissions in relation to the Applicant's Products in addition to ongoing service fees.

H.2. 31 July 2015 file note and review questionnaire

117 On 31 July 2015, Mr Williams and Mr Hohnen, together with Zeljko Butorajac, one of the Hunter SMSF's accountants, met with Mrs Hunter. The matters discussed at the July 2015

Meeting included a request by the Applicant to close the Macquarie Cash Management Account, and personal insurance.

118 Mr Hohnen made both handwritten notes and a typed file note of the July 2015 Meeting. His handwritten notes included the following summary of the discussion of insurance issues (as written):

> Discussed INSURANCE However Ros indicated that there was no need to change as cashflow not a issue. We also discussed Restructuring in particular the waiting period as Neal has 12 months Annual leave however Ros indicated she was happy to keep the current set up.

119 Mr Hohnen's typed file note records that Mrs Hunter had indicated in a document described as an "FNA", which in context I infer was a Financial Needs Analyser that she had completed, that the first of the "Top of Mind/Goals and objectives" that she wanted was:

> 1. Review the insurances to make sure they were right and also the most cost effective.

120 Mr Hohnen's typed file note also recorded the following discussion concerning insurance issues:

> **Personal Insurance**
>
> Had a discussion about their current insurance. Ros indicated that they are happy with the levels of cover they have in place. We indicated to Ros that we completed research however the cost savings would be minimal. Ros indicated they were happy to leave as is however they were concerned about the cost of the current premiums. Ros indicated that Neal almost has 12 months of annual leave. As a result of this we suggested to Ros to increase the waiting period on Neal's cover however she declined. We also discussed changing the structure if cashflow was an issue however Ros indicated that it was not. With regards to cover for Sean and Deane we discussed this however Ros indicated that the boys could not afford this. We then had a further discussion about if something happened to them then Ros and Neal would need to cover them as such this could affewct [sic] them financially and as such impact on their retirement if they had to support them financially. Ros agreed with this and indicated that Shaun had some cover in various Super Fund's that he has. Ros indicated she would send through to us and we could review for her and come back with our suggestions.

121 Count submits that there is nothing on the face of Mr Hohnen's handwritten notes and typed file note to suggest that Mr Williams provided any advice to the Applicant to "renew or continue to hold" the TCP Policies.

122 Mr Hohnen's typed file note records that Mrs Hunter wanted advice on whether the current insurance arrangements were "right" and the "most cost effective". It records that Mrs Hunter raised concerns about the cost of the current premiums and she was told that Centenary had

"completed research however the costs savings would be minimal". In addition, the typed file note recorded:

> We also discussed changing the structure if cashflow was an issue however Ros indicated that it was not.

123 No specific advice may have been provided about the levels of cover, but the Applicant submitted that Mr Hohnen's file notes reflected personal advice to "renew or continue to hold" the TCP Policies and an express or implicit recommendation to continue to pay Commissions in respect of those products. I do not agree.

124 Mrs Hunter did not give any evidence of the discussion at the July 2015 Meeting.

125 Neither the typed file note nor the handwritten notes of the July 2015 Meeting record or otherwise evidence any recommendation or advice given to Mrs Hunter that the Applicant retain or continue to hold the TCP Policies. The notes record that Mrs Hunter declined the invitation to restructure the policies because cash flow was not an issue for the Applicant and they otherwise do not record Mrs Hunter expressing any interest in pursuing alternative policies.

H.3. August 2015 ROA

126 On or about 4 August 2015, Mr Williams completed and provided the August 2015 ROA to the Applicant that was directed at an investment of part of the Applicant's cash funds, and estate planning. Mr Williams made the following recommendations to the Applicant in the August 2015 ROA:

(a) invest $123,000 from the Applicant's CBA Cash Account into five exchange traded funds;

(b) sell the Applicant's shares in South32 in an amount of $1,715; and

(c) purchase further shares in Newcrest Mining in an amount of $1,715 to add to the Applicant's existing holding of $4,316 worth of shares in Newcrest Mining.

127 The August 2015 ROA otherwise recorded that the Applicant wished to retain its current levels of insurance and the same structure of cover.

128 The scope of the advice provided in the August 2015 ROA was stated to be:

- Superannuation planning
- Retirement planning

- Insurance planning
- Estate planning

129 The provision of the August 2015 ROA to the Applicant constituted the provision of personal advice by Centenary to the Applicant with respect to the investment of funds held in the Applicant's CBA Cash Account, the sale of the Applicant's shares in South32 and the purchase of shares in Newcrest Mining.

130 The August 2015 ROA did not include provision of any advice to renew or continue to hold the Macquarie Cash Management Account or the TCP Policies nor did it include any recommendation, express or implied to continue to pay Commissions in respect of the Macquarie Cash Management Account or the TCP Policies. As to insurance, it only confirmed that the Applicant wished to retain its current levels of insurance and structure.

131 On or about 6 August 2015, Centenary issued the Applicant with a further Total Financial Care Agreement.

H.4. November 2015 ROA

132 In or about late November 2015, Mr Williams prepared and provided the November 2015 ROA dated 19 November 2015 to the Applicant concerning a Retail Entitlement Offer announced by Santos Limited.

133 Mr Williams advised the Applicant in the November 2015 ROA that:

(a) based on its existing holding of 1,200 Santos Limited shares, the Applicant should accept its entitlements under the Retail Entitlement Offer and purchase 706 new shares at $3.85 a share; and

(b) the cash required to complete the purchase would be $2,717.65, leaving the Applicant with an available cash balance of $143,313.26.

134 The provision of the November 2015 ROA to the Applicant constituted the provision of personal advice by Centenary to the Applicant directed at accepting its entitlement to shares in Santos Limited under the Retail Entitlement Offer. It did not include the provision of any advice to renew or continue to hold the Macquarie Cash Management Account or the TCP Policies nor did it include any recommendation, express or implied to continue to pay Commissions in respect of the Macquarie Cash Management Account or the TCP Policies.

H.5. July 2016 Advice

135 On 19 July 2016, Mr Williams sent an email to Mrs Hunter "confirming" their "conversation of yesterday". The email records what Mrs Hunter had told Mr Williams about the purchase of an investment property by the Hunter SMSF and notes that "[w]ith regard to our insurance email you are happy to hold with current policies". The reference to "our insurance email" is a reference to an email from Scott Relf of Centenary to Mr and Mrs Hunter on 13 July 2016 which included a discussion of potential cost savings on the Neal TCP Policy.

H.6. July 2017 ROA

136 On 19 July 2017, Centenary and the Applicant entered into a further Total Financial Care Agreement. Mr Williams also prepared and provided to the Applicant the July 2017 ROA dated 19 July 2017 directed at funding the purchase of an investment property.

137 The July 2017 ROA recorded that:

(a) the Applicant's share portfolio would be sold for an amount of approximately $284,458;

(b) the proceeds of the sale of the Applicant's share portfolio would be deposited into the CBA Cash Account which would increase the balance held in the account to $740,373.85; and

(c) financial advice would be provided in relation to any surplus funds remaining after the settlement of the purchase of the investment property.

138 The provision of the July 2017 ROA to the Applicant constituted the provision of personal advice by Centenary to the Applicant directed at the sale of the Applicant's share portfolio to fund the acquisition of an investment property and the investment of any surplus funds. It did not include provision of any advice to renew or continue to hold the Macquarie Cash Management Account or the TCP Policies nor did it include any recommendation, express or implied, to continue to pay Commissions in respect of the Macquarie Cash Management Account or the TCP Policies.

139 In the period between 7 August 2016 and 7 August 2017 the Applicant had paid an ongoing service fee to Count and Centenary, in an amount of $5,500, a proportion of which was retained by Count.

140 In the period from approximately 19 July 2017 to July 2018, the Applicant paid service fees of some $2,200, which were subsequently the subject of a partial refund of $1,100.

H.7. March 2018 SOA

141 On 2 March 2018, the Applicant acquired the AMP Policy. Shaun Hunter was nominated as the insured in the AMP Policy.

142 The AMP Policy was acquired prior to the issue of a statement of advice as the Hunter Family required coverage in place in order to settle on a property on 2 March 2018.

143 On or about 5 March 2018, a statement of advice was subsequently prepared directed at life insurance coverage for Shaun Hunter, being the March 2018 SOA. The March 2018 SOA identified the alternative products considered by Centenary, explained why the AMP Policy was assessed to be more appropriate and disclosed the Commissions and fees payable under the AMP Policy. The advice addressed in the March 2018 SOA was stated to be limited to "Insurance planning – Life Only" and the "Advice not addressed" was expressly stated to comprise:

- Superannuation
- Retirement Planning
- Estate Planning
- Investments
- Insurance planning – TPD, Trauma & Income Protection

144 The provision of the March 2018 SOA plainly, by its disclosure of the receipt of Commissions, included an implicit recommendation to pay Commissions, at least indirectly, in respect of the AMP Policy but did not otherwise include the provision of any advice to renew or continue to hold the Macquarie Cash Management Account or the TCP Policies nor did it include any recommendation, express or implied to continue to pay Commissions in respect of the Macquarie Cash Management Account or the TCP Policies.

145 At the time in which the AMP Policy was acquired by the Applicant, the only operative Distribution Agreement in evidence was the AMP Distribution Agreement, a licensee agreement dated 20 June 2003. The agreement provided for the payment of Commissions to Count but did not include any other provision of incentive rebates, promises by Count to promote AMP products or place them on the APL, lapse rate incentive or sales targets. The AMP Distribution Agreement did not include any confidentiality obligations with respect to the terms of the agreement.

146 The Applicant also sought to rely on an undated template agreement entitled "AMP Financial Services (AMPFS) Distribution Agreement" as providing evidence of AMP offering Count volume-based incentives or commissions. The document was produced to the Court on subpoena in response to a request for all distribution, facilitation or licensee agreements in force between AMP and Count during the Relevant Period. It was produced to the Court under cover of a letter and attached schedule from a Claims Data Manager of Resolution Life Australasia Limited which stated that the AMP Template Agreement was produced on the basis that it:

> … is an example of the agreement that would have been signed at the time between AMP Life Limited and Count Financial Limited. This agreement would have replaced the original Licensee Agreement seen as Attachment (2) [AMP Distribution Agreement]. We reached out to AMP Limited to locate a copy of the executed agreement as it was entered into prior to the sale of AMP Life to Resolution Life but they were unable to find the original copy). We were also unable to locate a record of this agreement on our system.

147 The RLAL Communication was only admitted into evidence subject to s 136 of the Evidence Act ruling that it was only admitted as to fact of communication and not as to the truth of its contents. In the circumstances, I am not persuaded that there is a sufficient evidentiary foundation to find that the AMP Template Agreement was an operative agreement governing the relationship between Count and AMP at the time that the AMP Policy was issued to the Applicant.

148 On 1 April 2018, Centenary received a commission of $790.27 with respect to the AMP Policy. The AMP Policy was held until at least 19 February 2019.

H.8. Renewal of Applicant's Products

149 The Applicant contends that the Relevant Period Advice included advice to renew or continue to hold the Macquarie Cash Management Account and the TCP Policies. The Applicant contends that advice to renew or continue to hold (a) the Macquarie Cash Management Account can be inferred from the August 2015 ROA, and (b) the TCP Policies can be inferred from discussions between the Applicant and Mr Williams, the August 2015 ROA and the July 2017 ROA, and that Mr Williams effected the insurance cover on the Applicant's behalf with CMLA (including renewals during the Relevant Period).

150 I do not accept those contentions.

151 The August 2015 ROA did not include any advice to renew or continue to hold the Macquarie Cash Management Account. Rather, the August 2015 ROA referred to advice provided prior to the Relevant Period recommending that cash be retained in the Macquarie Cash Management Trust, the predecessor to the Macquarie Cash Management Account. The August 2015 ROA erroneously referred to a statement of advice dated "01 January 2007" but I am satisfied that in context it must have been a reference to the May 2008 SOA. No other statement of advice was provided to the Applicant prior to August 2015.

152 Nor can the references in the July 2017 ROA to the scope of the advice provided as including superannuation planning and retirement planning be plausibly construed as constituting any advice to renew or continue to hold the TCP Policies.

153 The Applicant also seeks to rely on alleged concessions made by Mr Williams in cross examination that he would check the market prices and terms at the times that the TCP Policies were renewed during the Relevant Period. Mr Williams accepted that from time to time in the course of renewing those policies he conducted enquiries to determine if the policies were on the best available terms. He stated that if he was satisfied that alternative policies provided significant benefits, he would ask Mrs and Mr Hunter if the Applicant wished to retain the current policies or move to the policy providing the benefits. He stated that he would provide Mrs and Mr Hunter with "options", by way of example, by stating that there were alternative products that could save the Applicant $100 to $200. He denied, however, that he ever disclosed any alternative products or ever made any recommendation to Mrs and Mr Hunter during the Relevant Period that the Applicant retain the TCP Policies or acquire any alternative policies. He stated that had he recommended a particular policy he would have had to prepare and provide a Record of Advice to the Applicant.

154 I accept the evidence of Mr Williams summarised above, particularly in the absence of any evidence from Mr or Mrs Hunter to the contrary. I appreciate the distinction between asking a client *whether* they wanted to retain a policy or acquire a new policy with significant benefits and *recommending* that a client acquire a new policy with significant benefits might be thought to be somewhat subtle. I accept it is a material distinction. The absence of any evidence of any specific request for advice on alternative policies, other than the generic request responded to at the July 2015 Meeting, and the absence of any recommendation strongly militates against the presentation of unspecified "options" being construed as the provision of financial advice.

H.9. Other specific issues raised for determination

H.9.1. Recommending non-APL products

155 The Applicant contends that Centenary was only incentivised by Count to sell products to clients that were on the APL.

156 The authorised representative agreement that governed Centenary's relationship with Count included the following clauses:

> 4.23 Non Approved Products
>
> (a) Subject to sub-clause 4.23(b) below, the Count Authorised Representative may only recommend products that are on the APL. The APL may be amended from time to time to include new products or remove older products at the sole discretion of Count.
>
> (b) Subject to any exemptions in the Prohibited Products and Service Policy, the Count Authorised Representative must ensure that in the event a Client requests an investment or financial product that is not approved by Count, the Count Authorised Representative does not provide or engage in services prohibited by Count.

157 Clause 4.23 in its terms did not prohibit the Count Representative from "recommending" products that were not on the APL if a client "requested" a product that was not on the APL. The entitlement to recommend a non-APL product was, however, subject to an understandable qualification that the adviser did not provide or engage in services that would otherwise be prohibited by Count.

158 Further, Mr Williams gave the following evidence, that I accept, when a contention was put to him in cross examination that Centenary was required to sell only products on the APL, after being directed to cl 4.23 of Centenary's authorised representative agreement:

> Does that refresh your recollection that Centenary was required to only sell products that were on the APL?---No. Because we had the option to look at other products. In a client came to us with a product that wasn't on the APL we would have to consider the merits of that product against those products that were on the APL.
>
> And what if a client wanted to – was interested in a product that was not on the APL?---We would explore that option.
>
> And then if you decided that product was worthwhile for the client, what would you do then?---We would approach Count for an exemption.
>
> So you had to approach Count to seek an exemption to be able to sell a product that was not on the APL?---Correct.

159 The evidence given by Mr Williams is corroborated by Count documents recording the extent to which Count approved requests for approval for products not on the APL. By way of

example these documents record that Count approved (a) 167 of 169 requests for approval between 1 April 2016 and 30 May 2016, (b) 152 of 157 requests for approval between 1 June 2016 and 31 July 2016, and (c) 175 of 183 requests for approval between 1 January 2017 and 28 February 2017 (noting the document incorrectly referred to "2016"). Further, a Count "deep dive" document prepared by CBA records that as at June 2017, there were approximately 11,000 clients of Count who held non-APL investment and superannuation products with total funds under administration of $500,000,000.

H.9.2. Obtaining the Applicant's Products without Commissions

160 The Applicant relies on the following evidence to contend that the Applicant could have acquired the Applicant's Products at materially more advantageous terms if it was made aware that the Commissions on the products could be dialled down to zero.

161 *First*, an "insurance commission information" brochure for the AMP Policy, that was only available to advisers stated that "the dial down facility allows a reduced commission payment to be selected for all new business plans resulting in premium reductions as outlined in Appendix A", which in turn demonstrated that if no commission was taken, the product would be 20.37% cheaper.

162 *Second*, an "adviser guide" issued on 1 April 2017 that applied to the TCP Policies that acknowledged the possibility of premium discounts but not the amount.

163 *Third*, the following evidence given by Mr Williams when asked in cross examination as to why he had moved the Applicant from the Macquarie Cash Management Account to the CBA Cash Account:

> Why did you recommend a move from the Macquarie account to the CBA account?---To reduce the fees and increase the return.
>
> What were the fees that were being reduced?---Point 33 was the trail that Macquarie paid, split 85/15 with Count.
>
> CBA, that had a trail commission?---Not to my knowledge.
>
> So when you went from a trail commission paying product with Macquarie to CBA, that reduced the cost to the client?---Yes.
>
> Right?---That was the intention behind that.

164 I do not accept that the evidence relied upon by the Applicant establishes that any of the Applicant's Products could have been acquired on materially more advantageous terms. The documents other than the AMP brochure are at best, equivocal.

165 Mr Williams gave uncontradicted evidence that once a policy had been commenced, it was not possible to dial down or switch off the Commissions, at least for the TCP Policies issued by CMLA. This evidence was corroborated by the following statement made in adviser guides issued on both 11 May 2014 and 1 April 2017 by CommInsure with respect to the TCP Policies within the section titled 'Commission structure rules":

> Commission structures once set on a policy apply for the entire lifecycle of that policy. Any future increases/additions on the policy will be performed taking that commission structure into account. For example, if the policy has a premium discount due to an initial commission dial-down, any increases/additions will pay reduced or nil initial commission in exchange for continuing the premium discount.

166 Moreover, and critically, none of the evidence establishes that any of Mr Williams, Mr Duffield or Mr Hohnen would have agreed to dial down, if it were possible, or otherwise rebate the Commissions to which Centenary was otherwise entitled on the Applicant's Products.

167 Further, and in any event, the unlikelihood of Centenary rebating Commissions to the Applicant without a commensurate increase in adviser fees, was emphasised by Mr Williams in the following evidence that he gave when asked to clarify why he considered the receipt of Commissions did not give rise to a conflict of interest:

> The way that we structured our remuneration was that it – a total figure and if the figure we chose, in this instance, was 5500, and the commission that we received, looking in front of me here, was five or $600, then 30 that was a combined fee for looking after the client. If we had rebated those fees, we would have increased the ongoing fee to the client from five-five to six-two or whatever was commensurate with the insurance that we would have rebated. So the client would have paid the same fee.

H.9.3. Benefits or services in exchange for Commissions

168 The Applicant contends that it received no benefits or services in exchange for the payment of Commissions. It submits that the Distribution Agreements make plain that the Commissions received by Count and Centenary were simply a marketing fee paid to them by the providers of the Applicant's Products.

169 It submits that any financial advice or services provided to the Applicant during the Relevant Period were provided under the Total Financial Care Agreements for which the Applicant paid significant amounts to Centenary.

170 It also seeks to rely on the following admission made by Count in its defence at [75](c)(ii) that:

> … Count did not require its Representatives to provide any service in exchange for Commissions or charge an ongoing service fee, rather than both or a combination of both…

171 I do not accept that the Applicant received no "benefits or services" in return for the payment of Commissions for the following reasons.

172 *First*, the agreed fact in [24] of the statement of agreed facts makes plain that the Commissions formed part of the remuneration received by Count Representatives for the provision of financial advice.

173 *Second*, the services provided in the Total Financial Care Agreements did not extend to the provision of advice for the acquisition of specific financial products or services.

174 *Third*, as Mr Williams explained in his evidence referred to at [153] to [154] above, Centenary viewed the remuneration that it received as a total package and had it rebated the Commissions on the Applicant's Products it would have increased the fee payable under the Total Financial Care Agreements by a commensurate amount.

175 *Fourth*, the admission made in Count's defence must be read in the context of the allegation in the 2FASOC at [75.2] that was pleaded in the following terms:

> 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;

176 Count only admitted that the Count Licensee Standards, training or guidance did not require the Count Representatives to provide any service in exchange for the Commissions.

H.10. Agreed factual and legal issues for determination

177 For the foregoing reasons, I answer the parties' agreed factual and legal issues for determination with respect to the Relevant Period Advice and the Applicant's Products as follows:

1. The Relevant Period Advice did not include provision of advice to renew or continue to hold those of the Applicant's Products that were acquired prior to the Relevant Period.

2. The Relevant Period Advice did not include a recommendation (express or implied) to the Applicant to continue to pay Commissions in respect of the Macquarie Cash Management Account or the TCP Policies but did implicitly include a recommendation for Commissions to be received by Count and Centenary in respect of the AMP Policy by reason of the disclosure of Commissions in the March 2018 SOA.

3. The receipt of Commissions or Other Benefits by the Applicant's Representatives in relation to the Applicant's Products during the Relevant Period did not give rise to a potential conflict of interest between the interests of the Applicant and the interests of the Applicant's Representatives because the Relevant Period Advice was limited to the AMP Policy and the receipt of Commissions with respect to the AMP Policy was disclosed to the Applicant and constituted part of the agreed remuneration for the acquisition of the AMP Policy. The receipt of Commissions or Other Benefits by the Applicant's Representatives in relation to the Applicant's Products acquired prior to the Relevant Period did not give rise to a potential conflict of interest between the interests of the Applicant and the interests of the Applicant's Representatives because the receipt of Commissions with respect to the Macquarie Cash Management Account and the TCP Policies had been disclosed prior to the Applicant's application for those products. In both cases, the Other Benefits and CTC Benefits were otherwise also disclosed prior to or during the Relevant Period and were largely incidental to the receipt of the Commissions and not sufficiently material to give rise to a potential conflict of interest.

4. The Applicant's Representatives disclosed to the Applicant the matters that are alleged in the 2FASOC at [26.1] and [26.11] to constitute the Advice Non-Disclosures but did not disclose to the Applicant any of the matters alleged in the 2FASOC at [26.2] to [26.10].

5. In respect of each of the Applicant's Products, I am not satisfied that it was possible, during the Relevant Period, for the Applicant to obtain the same products without indirectly paying Commissions unless the Applicant's Representatives agreed to rebate the Commissions to the Applicant.

6. I am not satisfied that it was possible, during the Relevant Period, for the Commissions referrable to the Macquarie Cash Management Account to be "dialled down", "switched off", or "otherwise turned off". Commissions may have been dialled down under the AMP Policy and at least "premium discounts" may have been available for the TCP Policies, but only with the agreement of the Applicant's Representatives.

Further, the Applicant's Representatives could have rebated Commissions to the Applicant that they had received referrable to the Applicant's Products but they were not under any legal obligation to do so.

7. To the extent that it was possible for Commissions payable in respect of the Applicant's Products to have been "dialled down", "switched off", "rebated" or "otherwise turned off", I am not satisfied that the Applicant's Products would necessarily have been materially cheaper to acquire because it would depend on whether the Applicant's Representatives agreed to any dialling down, switching off, rebating or other turning off of the Commissions and not commensurately increasing or implementing fees for the provision of advice in relation to the acquisition of the Applicant's Products.

8. In relation to the Relevant Period Advice provided to the Applicant:

    8.1 No benefits or services were provided to the Applicant in exchange for the payment of Commissions beyond advice with respect to the acquisition of the Applicant's Products noting the payment of Commissions, including trail commissions, was agreed remuneration for the advice leading to the acquisition of the Applicant's Products.

    8.2 I do not accept that the advice provided by the Applicant's Representatives to the Applicant was, or could reasonably be expected to be, influenced by the Commissions and/or Other Benefits in a manner adverse to the Applicant given the receipt of the Commissions was agreed remuneration for the advice provided leading to the acquisition of the Applicant's Products and the Other Benefits were structured to provide incentives to Centenary to be more profitable rather than influence the Applicant's Representatives to act in a manner that was adverse to the Applicant.

I. FIDUCIARY DUTY CLAIMS

I.1. Overview

178 Both the existence of any fiduciary duty on the part of the Count Representatives including the Applicant's Representatives, and in turn Count, and any breach of such a duty are disputed by Count.

179 The Applicant contends that the fiduciary duty arises because the Count Representatives undertook to provide advice to the Applicant and Group Members, including by undertaking to provide ongoing advice and holding themselves out as expert financial advisers or expert

accountants. The Applicant's ultimate position as advanced during the course of the hearing was that it relied exclusively on the Financial Services Guide, at least for the fiduciary claims that it advances on behalf of Group Members, to make good those contentions. As senior counsel for the Applicant submitted, the Applicant is "happy to live or die on what's in the Financial Services Guide" but he did clarify in his oral closing submissions that he continued to rely on facts specific to the Applicant to contend that Count and the Applicant's Representatives were in a fiduciary relationship with the Applicant.

I.2. Relevant principles

180 There is no generally agreed and unexceptionable definition of who is a fiduciary: ***Grimaldi** v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 at [177] (Finn, Stone and Perram JJ). The characteristics which define a fiduciary relationship cannot be exhaustively defined: ***ABN AMRO** Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65 at [1066] (Jacobson, Gilmour and Gordon JJ).

181 The critical features of a fiduciary relationship were identified by Mason J in ***Hospital Products** Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97:

> The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of" and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

182 In ***Breen** v Williams* (1996) 186 CLR 71 at 92, Dawson and Toohey JJ stated:

> The difficulty in dealing with the appellant's contention is that the law has not, as yet, been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary in his or her relations with another. There are accepted fiduciary relationships, such as trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners, which may be characterised as relations of trust and confidence.

183 The absence of any precise formulation of when a person is to be considered a fiduciary was also emphasised by Gaudron and McHugh JJ in *Breen* at 106:

> Australian courts have consciously refrained from attempting to provide a general test for determining when persons or classes of persons stand in a fiduciary relationship with one another. This is because, as counsel for Dr Williams pointed out, the term "fiduciary relationship" defies definition.

184 Further, in *Breen*, Gaudron and McHugh JJ identified at 107 the following circumstances that have been identified that point towards, but do not determine the existence of a fiduciary relationship:

> … These circumstances, which are not exhaustive and may overlap, have included: the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.
>
> (Footnotes omitted.)

185 The Full Court in *Grimaldi* provided at [177] the following answer to the question of who is a fiduciary:

> … the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest…

186 The following principles governing the existence of fiduciary relationships outside established categories can be distilled from the authorities.

187 *First*, in order to determine whether fiduciary obligations exist outside an established category of fiduciary relationships it is necessary to have regard to the particular circumstances of the case: *ABN AMRO* at [1066] (Jacobson, Gilmour and Gordon JJ). It is necessary, consistently with the statements by Gibbs CJ in *Hospital Products* at 71-72, for the Court to examine carefully all the facts and circumstances in determining whether and to what extent a fiduciary duty may have arisen: *Australian Securities Investments Commission v* ***Citigroup Global*** *Markets Australia Pty Ltd* (2007) 160 FCR 35; [2007] FCA 963 at [272] (Jacobson J); ***Porter*** *& Anor v Mulcahy & Co Accounting Services Pty Ltd & Ors* [2021] VSC 572 at [493] (Delany J).

188 *Second*, where the parties are in a contractual relationship, the determination of whether a party is subject to fiduciary obligations and the scope of any fiduciary obligations is to be resolved by construing the contract as a whole in the light of the surrounding circumstances known to the parties and the purpose and object of the transaction, consistently with the ordinary principles of contractual construction: *Citicorp Global* at [281] (Jacobson J).

189 As Beazley JA, stated in ***Pavan*** *v Ratnam* (1996) 23 ACSR 214 at 224:

> The characteristics of a fiduciary have been dealt with recently by the Supreme Court of Canada in *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, where La Forest J at 175 described the fiduciary duty as "until recently ... a legal obligation in search of a principle".
>
> In identifying a fiduciary, his Honour stated at 176:
>
> > . . . outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.
>
> So defined, the relationship between the respondent and the appellant could not be described as involving a fiduciary relationship. However, this statement is too narrow (and too narrow in terms of his Honour's overall identification of the fiduciary obligation). For example, so expressed, it fails to acknowledge that a fiduciary may, with the informed consent of the party to when the duty is owed, act in the fiduciary's own interest…
>
> In my opinion, despite the optimism of La Forest J, there are difficulties in attempting to find an all embracing statement of principle to categorise a relationship which, as Mason J pointed out in *Hospital Products* is "infinitely varied". It is preferable to approach the matter by looking at all the circumstances of the case and determining whether there are factors which solely, or in combination, establish the nature or the relationship as a fiduciary one…

190 In *Howard v Commissioner for Taxation* (2014) 253 CLR 83; [2014] HCA 21, French CJ and Keane J stated at [34]-[35]:

> The scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship. It is to be "moulded according to the nature of the relationship and the facts of the case". …
>
> Overbroad assertions of fiduciary duties, uninformed by a close consideration of the facts and circumstances of the particular case, are sometimes made for reasons which have nothing to do with the protective rationale of those duties.
>
> (Footnotes omitted.)

191 *Third*, finding an actual relationship of confidence is neither necessary nor sufficient evidence of the existence of a fiduciary relationship, as Gibbs CJ explained in *Hospital Products* at 69:

> In the decided cases, various circumstances have been relied on as indicating the presence of a fiduciary relationship. One such circumstance is the existence of a relation of confidence, which may be abused… However, an actual relation of confidence — the fact that one person subjectively trusted another — is neither necessary for nor conclusive of the existence of a fiduciary relationship; on the one hand a trustee will stand in a fiduciary relationship to a beneficiary, notwithstanding that the latter at no time reposed confidence in him, and on the other hand an ordinary transaction for sale and purchase does not give rise to a fiduciary relationship simply because the purchaser trusted the vendor and the latter defrauded him.

192 Relatedly, the existence of a fiduciary relationship does not depend upon the motivation or desire of one party to establish a relationship of trust or confidence. Rather it turns on whether

the relationship involves the requisite undertaking, determined as a matter of objective characterisation, rather than by having regard to the subjective expectations of the parties: *ABN AMRO* at [1066] (Jacobson, Gilmour and Gordon JJ).

193 In *ABN AMRO*, the Full Court stated at [1071]:

> Contrary to LGFS' contention on appeal, the facts were sufficient to constitute a fiduciary relationship in which LGFS undertook to act in the NRB Councils' interests rather than its own: see [1021]-[1030] above. The existence of such a duty followed analysis of the history of the relationship between LGFS and each of the NRB Councils, including how LGFS marketed itself to the PA Councils…

194 *Fourth*, reliance is an important element in determining whether a fiduciary duty has arisen. In ***Daly*** *v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 384-385, Brennan J cited with approval the following statements made by Sir Eric Sachs in *Lloyds Bank v Bundy* (1975) 1 QB 326 at 341 concerning cases in which a relationship giving rise to a fiduciary duty has been found to exist:

> Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded

195 Similarly, the significance of reliance and its relationship to trust and confidence is readily apparent from the reasons of Rares J in ***Wingecarribee*** *Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028; (2012) 301 ALR 1 at [743]-[745]:

> Here, before Swan invested in the Forum AAA product, Mr Frewing and Mr Senathirajah made clear to Grange that in arriving at a decision about investing the council's funds in such a sophisticated financial product, they were dependent on Grange's advice. Grange held itself out to Swan at all times from about mid-2003 (when Mr O'Dea began offering advice about rewriting Swan's investment policy and investing in the Forum AAA SCDO) as an adviser on matters of investment and undertook to advise Swan on those matters. Swan reposed trust and confidence in Grange acting as its adviser on investing the council's money in financial products. Grange undertook, from when it negotiated the Forum AAA transaction, to act in the interests of Swan in the exercise of the council's investment powers and discretions that affected Swan's interests in a legal or practical sense.
>
> I am satisfied that Mr Senathirajah and later, Mr Downing, as the persons with the day to day conduct of the relationship between Swan and Grange, relied on Grange's advice and recommendations in relation to Swan's dealings with Grange. For the reasons I have given earlier, I am also satisfied that despite Swan not having called Mr Frewing and Mr Poepjes, a commonsense cause of Swan's investment decisions in relation to buying, selling and holding financial products traded by Grange was the reliance placed on Grange's advice and recommendations by Mr Senathirajah and, later Mr Downing: at [162] and [408]–[409] above.
>
> For these reasons, I am satisfied that, in respect of their dealings prior to entry into the

Swan IMP agreement, Grange owed Swan fiduciary obligations.

196 *Fifth*, vulnerability has only a limited relevance to the existence and content of a fiduciary relationship. As the plurality of the High Court stated in *Naaman v Jaken Properties Australia Pty Ltd* [2025] HCA 1: (2025) 421 ALR 227 at [43] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ):

> But vulnerability is not the touchstone of a fiduciary relationship. Vulnerability is relevant to the existence of a fiduciary relationship only to the extent that the vulnerability in question is suggestive of a responsibility on the part of the putative fiduciary to act in the interests of the vulnerable party to the exclusion of the interests of the putative fiduciary.
>
> (Footnotes omitted.)

197 The relevant disadvantage or vulnerability does not arise because of any notion of "weakness" but rather because one party has agreed that another party may act on their behalf and thereby placed themselves in a position in which they are dependent in a practical or legal sense on another person to have regard to their best interests. As Beazley JA stated in *Pavan* at 224:

> The cases establish that a number of factors may characterise a relationship as being of a fiduciary nature. They include: vulnerability, reliance and the presence of loyalty, trust and confidence. The notion of vulnerability, as used in this context, is not to be understood in the sense of any "weaker party" concept. Rather, it refers to the circumstance where another party agrees (not necessarily contractually) "to act on behalf of or in the interests of another and, as such, is in a position to affect the interests of that other person in a legal or practical sense. As such, fiduciary relationships are marked by vulnerability in that the fiduciary can abuse the power or discretion given him or her to the detriment of the beneficiary": see *Hodgkinson* per La Forest at 168.

198 *Sixth*, a person may be in a fiduciary relationship as to some aspects of a relationship but not with respect to other aspects. By way of example a bank may be in a fiduciary relationship with its clients in providing financial advice to the clients as to the suitability of an investment, but may be expected to act in its own interests in taking security for the loan it might advance to facilitate the making of that investment: *Citigroup Global* at [285] (Jacobson J), citing *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 at 391 (Davies, Sheppard and Gummow JJ).

I.3. Existence of a fiduciary relationship

I.3.1. Overview

199 The Applicant contends that the established categories of fiduciary relationships should be extended to include the relationship between a financial adviser and a client, to the extent that has not already been done.

200 Alternatively, if that proposition is not accepted, the Applicant contends that in the present circumstances both Count and the Applicant's Representatives owed fiduciary duties to the Applicant and similarly, both Count and the Count Representatives owed fiduciary duties to Group Members.

201 Before addressing each of these contentions, it is necessary to explain how the fiduciary claims have been pleaded and ultimately advanced by the Applicant. The evolution in the way in which the claims have been advanced is particularly significant for the determination of the fiduciary claims sought to be pursued by the Applicant on behalf of Group Members. It is also readily apparent that the claims have been advanced in an intermingled manner that has the tendency to obscure the challenges faced by the Applicant in pursuing fiduciary claims on behalf of Group Members.

I.3.2. The pleaded fiduciary claims as ultimately advanced

202 The applicant's fiduciary claims are principally advanced in the 2FASOC at [95] to [100].

203 The foundation for the fiduciary claims is pleaded at [95] in the following terms:

> 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.

204 In the 2FASOC the previous "some" qualification for Group Members was deleted, Count was now also alleged to have engaged in activities by reason of the matters alleged in [43], and the alleged holding out that Count Representatives had expertise in providing financial advice was extended to Group Members.

205 In turn, it was alleged in the 2FASOC at [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].*

206 As to particulars (iv) and (v), s 941B of the Corporations Act provides that an authorised representative of a financial services licensee must provide a financial services guide to a client if they provide a financial service to a retail client and the financial services guide must not be given to the client unless its distribution by the authorised representative has been authorised by the financial services licensee.

207 As to particular (vi), the reference to [62] of the affidavit of Michael Spurr affirmed on 17 November 2023 was to Mr Spurr's evidence in that paragraph that at all times during the Relevant Period, all Member Firms that were entitled to participate in the CTC Program were required to provide a Financial Services Guide to their clients and include a disclosure of the details of the CTC Program.

208 The Applicant relied on each of [43.1] to [43.4] for its personal fiduciary claim against Count and the Applicant's Representatives, but ultimately only pressed the allegations in [43.2] and [43.3] in its fiduciary claims advanced on behalf of Group Members. The practical effect of these developments was that the fiduciary claim advanced on behalf of Group Members was based only on an undertaking by the Count Representatives to provide advice and holding themselves out as being expert financial advisers or expert accountants and was otherwise confined to particulars (iii) to (vi).

209 Then, at [96] it is pleaded that by reason of the matters alleged in [2], [22], [23] and [43] of the 2FASOC, the Applicant and all or some Group Members were dependent on the financial advice given to them by the Count Representatives, on behalf of Count, in deciding which

Relevant Products to acquire, renew or continue to hold. In turn, it is relevantly alleged that Count was a holder of an AFSL and carried on a business of providing financial services to clients (at [2]), the Count Representatives gave personal advice in relation to the Relevant Products and facilitated the sale of the Relevant Products to the Applicant and Group Members on behalf of Count (at [22]) and the Applicant and Group Members were retail clients of Count during the Relevant Period within the meaning of s 761G(1) of the Corporations Act (at [23]).

210 Next, it is alleged at [97] that during the Relevant Period there was an actual conflict of interest between on the one hand, the interests of the Applicant and Group Members and on the other hand, the interests of Count and the Count Representatives.

211 The existence of a fiduciary duty is then alleged at [98] as follows:

> 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.

212 Finally, it is alleged that Count and Count Representatives, breached their fiduciary duties owed to the Applicant and Group Members, at [99] and [100], respectively.

213 Although pleaded in a rolled up manner, in substance the Applicant advanced two discrete fiduciary cases. *First*, a claim on its own behalf that both Count and the Applicant's Representatives owed it fiduciary duties. *Second*, a claim that Count and the Count Representatives owed Group Members fiduciary duties.

I.3.3. Extension of established categories of fiduciary relationships

214 As explained at [199] above, the Applicant contends that to the extent that it has not previously done so, this Court should now recognise that the established categories of presumptive fiduciary relationships of lawyer/client, agent/principal, trustee/beneficiary, director/company, employer/employee and between joint venture partners should be extended to include the relationship between a financial adviser and a client. The Applicant contends that the presumptive fiduciary relationship should be limited to the provision of financial advice by a financial adviser to their client. It submits that such a finding would be "consistent with a significant and ever-growing body of jurisprudence" and would be consistent with the core

premise of the FoFA reforms which, in their effect, seek to impose statutory fiduciary obligations on advisers.

215 The Applicant submits that there is no logical basis to contend that the duties owed by a lawyer to a client should be any greater than those owed by a financial adviser to their client. It submits each deals with important and sensitive matters for their clients.

216 I am not satisfied that the Court should extend the established categories of fiduciary relationships to include financial advisers who undertake to provide financial advice to clients.

217 While the Court has recognised that financial advisers may owe fiduciary duties to clients, in each case that finding has only been made after considering all the relevant circumstances, including (a) the specific nature of the advice sought by the client and provided by the adviser, (b) specific contractual terms, (c) the existence and scope of assumptions of responsibility, trust and confidence by the adviser, and (d) the extent of reliance by, and vulnerability of, the client, in the sense of dependence.

218 The need to focus on the individual circumstances of the relationship between a financial adviser and their client was emphasised by Beach J in ***Stack*** *v AMP Financial Planning Pty Ltd (No 2)* [2021] FCA 1479; (2021) 401 ALR 113 in which his Honour stated at [73]:

> But the respondents say that the question of whether a fiduciary duty exists in any given adviser-client relationship will depend upon the individual circumstances of that relationship. I agree. So much is clear, and indeed not disputed by the applicants. Questions going to the existence of a fiduciary duty are individual ones.

219 Further, as Young JA stated in *Simpson v Donnybrook Properties Pty Ltd* [2010] NSWCA 229 at [65]:

> There is no doubt that at least some investment advisors will owe fiduciary duties. However, it is an error to think that merely because one can put the tag "investment advisor" on a defendant that he or she will be a fiduciary*: Pilmer v Duke Group Ltd* [2001] HCA 31; 207 CLR 165, 197. It will depend on the circumstances of the case, *ASIC v Citigroup Global Markets Australia Pty Limited (No 4)* [2007] FCA 963; 160 FCR 35, 75 at [266].

220 Moreover, there is no established or definitive meaning that could be given to "financial advice". At one extreme it might comprise a simple recommendation that perhaps now might not be a good time to invest in international shares and at the other extreme, comprehensive financial investment strategies and retirement planning. Inevitably, more so than with established categories of fiduciary relationships, the provision of "financial advice" has an

inherent commercial dimension that may or may not be consistent with the imposition of fiduciary obligations.

I.3.4. Non-presumptive fiduciary duties owed to the Applicant

Legal principles

221 Fiduciary duties have been found to have arisen in commercial professional relationships that fall outside the established categories of fiduciary relationships, including relationships between some investment advisers and their clients. The cases in which such findings have been made, however, have emphasised that regard must be had to the individual circumstances of the relationship between an adviser and a client.

222 In *Wyse & Young International Pty Ltd v Sanna* [2019] NSWSC 683 at [203], Brereton J described the role of an accountant or financial consultant as 'not ordinarily' fiduciary:

> The relationship between an accountant or financial consultant and a client is not ordinarily a fiduciary one, although it can be, as I sought to explain in *Torlonia v Wright*, in which I held that the particular features of the relationship in that case rendered it a fiduciary one:
>
> > …
> >
> > 21. In my judgment, Ms Torlonia's reposing of trust and confidence in Mr Wright, her vulnerability arising from her overseas residence and limited understanding of commerce and finance, and her entrusting of her Australian affairs to him in such a manner as gave him practical control over them… amply supports the conclusion that the relationship between them was a fiduciary one…
>
> (Footnotes omitted.)

223 At [207], Brereton J added:

> In the present case, at least in respect of the impugned transactions, Mr Dimitriou (and his companies) were not acting in a representative capacity; they were not acting on behalf of the defendants. They were, in reality, lenders of last resort, who offered to assist the Sannas to save their property by advancing the requisite funds to procure the release of the AETL security when another source had fallen through and mortgagee possession and sale was imminent. Whatever might be the position concerning other aspects of their relationship, qua lenders they did not undertake or agree to act for or on behalf of or in the interests of the Sannas in the exercise of any power or discretion, and they were not obliged to act exclusively in the interests of the Sannas. At least in that respect, Mr Dimitriou was no more a fiduciary than is a bank manager who enjoys the trust and confidence of his or her clients, and who in the course of the banker-customer relationship approves a loan to them on security of their home.

224 A fiduciary relationship has been found to exist where a stockbroking firm had held themselves out to act as an adviser on investment matters, had undertaken to provide advice to a client and

the client had relied on that advice: *Daly* at 377 (Gibbs CJ); ***Aequitas** Ltd v Sparad No 100 Ltd (formerly Australian European Finance Corp Ltd)* [2001] NSWSC 14 at [307] (Austin J).

225 In *Citigroup Global* at [327]-[328] Jacobson J concluded that had it not been for the express terms of a mandate letter, a fiduciary relationship might have been found to have arisen between a client and an investment bank. In that case, his Honour found that the investment bank had given strategic advice that involved the use of its financial acumen, judgment and expertise to a company on the wisdom and merits of a takeover bid, where the investment bank emphasised its "access to global players", its abilities not just as a funder but also as an adviser, and promised to back the transaction "to the hilt even if it gets a little hairy".

226 In *Porter*, an accountant and his firm were alleged to have breached a retainer with a client and acted in breach of its fiduciary duty by realising the client's opportunity to purchase and using the client's confidential information to acquire a controlling interest in a manufacturing company. Justice Delany found the accountant and his firm owed fiduciary duties to the client. His Honour was satisfied that the retainer was to provide accounting, taxation, structuring and financial advice in relation to the proposed purchase by the client of a controlling interest in the manufacturing company.

227 In finding the existence of a fiduciary relationship, Delany J placed particular reliance on (a) representations made by the accountant that he and his firm would be "by [the client's] side", (b) that the retainer sat within a full suite of services relationship that had been in place for over a decade, (c) implied terms of confidentiality on information provided by the client to the accountant, (d) evidence that the client trusted the accountant "implicitly" as his adviser and the accountant knew of that trust reposed in him, and (e) the provision of confidential information by the client under the retainer gave the accountant a power over the client that could detrimentally affect the interests of the client: *Porter* at [503]-[514].

228 Moreover, Delany J observed that while some aspects of a commercial professional relationship may be commercial, other aspects may be fiduciary, it is not an "all or nothing situation": *Porter* at [492].

Submissions

229 The Applicant contends that even if the relationship between a financial adviser and their client was not recognised as falling in a presumptive fiduciary category, the Applicant's specific circumstances make plain that it was owed fiduciary duties by Count and the Applicant's

Representatives. It submits that it was essential for Count's business model that clients trusted its advisers, Count's objective was to create a relationship of trust and confidence, and its website conveyed similar promises to those made in the Financial Services Guide.

230 Relatedly, the Applicant submits that Mr Williams accepted in cross examination (a) that it was important for clients to trust him and Centenary, (b) both the existence of a fiduciary duty and the scope of the fiduciary duty, and (c) that the consistent message he conveyed to his clients, including the Applicant, was that "our experience is your peace of mind" and "empowering clients with essential knowledge".

231 Count submits that no fiduciary duty was owed by any of the Applicant's Representatives to the Applicant because (a) the terms of the Total Financial Care Agreements are inconsistent with the existence of a fiduciary relationship because they provided that the Applicant retained an absolute discretion over all its investments, (b) the manner in which advice was provided to the Applicant was not consistent with the exercise of any significant degree of power, discretion or reliance, and (c) the deterioration in the relationship between Mrs Hunter and Mr Williams by June 2016 was inconsistent with any notion that the Applicant continued to repose trust and confidence in the Applicant's Representatives beyond that time.

Consideration – fiduciary duties owed by the Applicant's Representatives

232 The fiduciary duty claims advanced by the Applicant, on its own behalf, against the Applicant's Representatives necessarily give rise to two enquiries. *First*, the identification of the conduct of the Applicant's Representatives that underlies the allegation that they owed fiduciary duties to the Applicant. *Second*, the basis on which it is alleged that the Applicant's Representatives owed fiduciary duties to the Applicant with respect to that conduct.

233 As to the first issue, the relevant conduct of the Applicant's Representatives is alleged to be the provision to the Applicant of the Relevant Period Advice in relation to the Applicant's Products. For the reasons explained at [115] to [154] above, I have concluded that the only conduct alleged to fall within the Relevant Period Advice that constituted personal advice to the Applicant in relation to the Applicant's Products was the provision of the March 2018 SOA in connection with the issue of the AMP Policy.

234 As to the second issue, as explained at [208] above, the Applicant's fiduciary case advanced on its own behalf against the Applicant's Representatives is not limited to the provision of the Financial Services Guide. I turn now to address that case.

235 In all the circumstances, I have concluded that Centenary, Mr Williams and Mr Hohnen owed fiduciary duties to the Applicant in connection with the personal advice that was provided to the Applicant in relation to its acquisition of the AMP Policy. More specifically, I have concluded that each of Centenary, Mr Williams and Mr Hohnen owed a fiduciary duty to the Applicant to avoid any real or substantial possibility of conflict between their interests and the interests of the Applicant and not to use improperly their position to gain an advantage for themselves arising from or otherwise in connection with the Applicant's acquisition of the AMP Policy. I have reached those conclusions for the following reasons.

236 *First*, I accept that in determining whether the Applicant's Representatives owed any fiduciary duties to the Applicant, as alleged, it is necessary to have regard to the terms of the Total Financial Care Agreements. The retention of what was described in the Total Financial Care Agreements as "an absolute discretion" whether to accept advice that is proffered by a financial adviser cannot be determinative of whether fiduciary obligations were owed to the Applicant in connection with the acquisition of the AMP Policy. Moreover, the relevant enquiry, at least in that regard, is not whether a client is contractually committed to acting on advice that is provided but rather whether the client was dependent upon or otherwise relied on the advice in making a decision to acquire, renew or continue to hold a financial product.

237 *Second*, I accept that by the provision of the Financial Services Guide to clients and prospective clients, including the Applicant, Count and its advisers sought to create a relationship of trust and confidence. As submitted by the Applicant, the Financial Services Guide included representations that advice would be provided in the client's best interests, if conflicts of interest arose, advisers would educate clients and help them make informed decisions about the future, provide a financial plan to give them greater control over their financial future, and included details of advisers' years of experience and qualification.

238 Given the passage of time, I place little weight on Mrs Hunter's evidence that she cannot recall receiving or otherwise being aware of the contents of the Financial Services Guide. I prefer the evidence of Mr Williams, given by reference to his usual practice, that in May 2008 prior to providing Mrs Hunter with a copy of the May 2008 SOA that he "went through" the then current Financial Services Guide with Mr and Mrs Hunter. Mr Williams also gave evidence, that I accept, that he subsequently provided copies of the Financial Services Guide, whenever it was updated, to the Applicant by "bulk email", as a client of Centenary and on each occasion that he gave advice to the Applicant.

239 In *Porter*, Delany J stated at [494], that a fiduciary relationship has been found to exist in the following circumstances:

> (a) there has been an undertaking by the adviser to act in the interests of another and not in his or her own interests;
>
> (b) the financial adviser has held themselves out as an expert on financial matters and undertaken to perform a financial advisory role for the client;
>
> (c) the adviser has provided strategic advice which involved the use of financial acumen, judgment and expertise to further the client's interests.
>
> (Citations omitted.)

240 I do not understand Delany J to be saying that the existence of these three matters is *sufficient* to give rise to a fiduciary relationship. Rather, in context, his Honour was only stating by reference to authorities, including *Daly* at 377, *Aequitas* at 307 and *Citigroup Global* at [327], that where a financial adviser has been found to owe fiduciary duties these three matters have been found to be present. None of the authorities cited by Delany J suggest that a fiduciary relationship will necessarily arise if those three elements are present.

241 Subject to that qualification, I note that the following representations made in the Financial Services Guide dated 1 July 2017, in the context of the pro-forma requirement for each adviser to list their years of experience and qualifications in part 2 of the guide, satisfied each of the three elements identified by Delany J in *Porter* at [494]:

> Where we have identified a conflict of interest, we will act as a reasonable advice provider without a conflict would do, including providing advice that is in the client's best interests. where we have identified a conflict of interest, we will provide advice that is in the client's best interests
>
> …
>
> Our advisers educate clients…
>
> …
>
> [Count is] a Professional Partner of the Financial Planning Association of Australia (FPA). Count is a professional partner of the FPA.
>
> …
>
> Our advisers … help [clients] make informed decisions about their future … by providing you with a financial plan which gives you greater control over your financial future.

242 Moreover, the Financial Services Guide included a representation that Count was:

> a Professional Partner of the Financial Planning Association of Australia (FPA). The FPA is the professional association for qualified financial advisers in Australia and we are committed to its Code of Ethics and Code of Professional Conduct.

243 In turn, the FPA Code of Professional Practice stipulated under the heading "Fiduciary duty is primary" that:

> The member identifies and acts 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.

244 *Third*, the provisions of the Total Financial Care Agreements were consistent with the Applicant's Representatives exercising a significant degree of power and having significant discretion in their dealings with the Applicant and corresponding reliance on the part of the Applicant.

245 The May 2008 TFCA provided for the Applicant's Representatives to report to the Applicant every three months in a formal face to face interview on the performance of the Applicant's portfolios, its wealth protection and income needs, cash flow and budgetary position and the tax position on its investments, in return for an annual fee calculated as 0.55% p.a. of the total Skandia One Fund.

246 By 1 November 2012, the Applicant's Total Financial Care Agreement was varied to provide for meetings every six months to discuss the performance and quality of the Applicant's investments, its tax and cash flow position relative to it budgetary requirements, its debt levels to ensure cost and tax effectiveness, the adequacy of personal insurance levels, estate planning requirements and legislative changes that might impact on its financial plans and strategies, together with other reporting obligations, in return for an annual ongoing service fee of $5,500.

247 From 7 August 2015, the Applicant's Total Financial Care Agreement provided that the services to be provided to the Applicant included a bi-annual review of its "tailored strategy", customised portfolio management and rebalancing, "active monitoring" of its investment portfolio's research status and updates on investment markets, the impact of Federal Budgets and relevant legislative changes. The annual agreed fee of $5,500 was now to be supplemented with an additional "listed securities fee" of $1,200 to be paid monthly from the balance of the Applicant's CBA Cash Account.

248 *Fourth*, I accept the following evidence given by Mrs Hunter in her first affidavit of the extent to which she, as the principal decision maker of the Applicant, relied upon the advice provided to her by the Applicant's Representatives:

> 24. Over the 14-year relationship with Centenary Financial and its financial advisers, I relied on Michael and the other financial advisers at Centenary Financial to do the right thing by my family and the Hunter Fund. I relied on

> their expertise and experience and the advice they gave us, and in most instances, I agreed with the strategies and recommendations in their advice. In basic terms, I trusted that these financial advisers had the Hunter Fund's best interests in mind when providing advice and expected them to act in those interests.
>
> 25. My usual practice on receiving documents from Michael and the other financial advisers at Centenary Financial was to listen to what they told me and let them draw my attention to the relevant parts of the written documents provided to me. I trusted them to draw important matters to my attention.

249 The evidence was not challenged in cross examination by Count other than to suggest that by sometime in 2014, Mrs Hunter had ceased to trust what Mr Williams was telling her as reflected in "the terms of the withering email" Mrs Hunter sent Mr Williams on 6 June 2016. The suggestion was misconceived. The email only served to emphasise the reliance that Mrs Hunter placed on Mr Williams. Mrs Hunter expressed her concern that she had been provided with incorrect information and then emphasised the reliance that she placed on Mr Williams and Centenary by making the following statements:

> We have had an association for at least the last 12 years and want to be assured that all future advise that is given both verbally and in writing has been checked and is correct before being passed on to us.
>
> …
>
> This money is the future of my family and we want to feel confident in the advice that is being passed on to us.

250 Moreover, any alleged lack of trust was dispelled by Mrs Hunter's request for investment advice from Mr Williams in her 6 June 2016 email, the advice that she had received from Mr Willliams in his email to her of 10 June 2016 and her email to Mr Williams on 14 June 2016 in which she advised Mr Williams of the steps she had taken in relation to the purchase of an investment property.

251 Nor do I accept, contrary to submissions advanced by Count, that the degree of trust that Mrs Hunter placed in the advice that she was given by the Applicant's Representatives was materially diminished because, (a) she occasionally conducted her own research including when she and Mr Hunter "took it upon [themselves] to … look for an investment property", and (b) she conceded that she had rejected several recommendations made by Mr Williams, carefully considered the advice that she received from the Applicant's Representatives and only accepted recommendations that she agreed with. Giving careful consideration to advice received from a fiduciary, acting only on that advice if it was considered to be in one's best

interests and making independent decisions on related or collateral matters do not preclude the existence of a fiduciary relationship.

252 I am satisfied by reason of the matters outlined at [232] to [251] above, that Centenary, Mr Williams and Mr Hohnen owed a fiduciary duty to the Applicant in relation to the advice that was provided to the Applicant with respect to the AMP Policy (a) to avoid any conflict of interest between their interests and the Applicant's interests arising from the receipt of Commissions, Rebates and Other Benefits, and (b) not to improperly use their position to gain an advantage for themselves.

Consideration – fiduciary duties owed by Count

253 I turn now to consider the Applicant's contention that it was owed fiduciary duties by Count.

254 The Applicant submits that in all the circumstances, the Court can find that it was owed fiduciary duties by both Count and the Applicant's Representatives. The Applicant submits that the statements made in the Financial Services Guide by Count that Centenary was providing advice "on behalf of Count" and "we are responsible for the services outlined in this FSG" and because Count required these representations to be included in the Financial Services Guide, those statements are determinative of the fact that Count and the Applicant's Representatives were effectively indistinguishable.

255 The Applicant submits that by reason of s 916A of the Corporations Act, Count provided services to the Applicant through Centenary, Mr Williams and Mr Hohnen because each of them was authorised to provide and did provide financial services on behalf of Count. It submits that it was a client who could be expected to rely on the Applicant's Representatives and did in fact rely on them.

256 Count submits that the Applicant's pleaded fiduciary claim against Count is entirely derivative of the fiduciary claim it advances against the Applicant's Representatives.

257 It submits that the Applicant's contention that Count provided financial services "through" the Applicant's Representatives appears to proceed primarily on its "novel and vague" theory of attribution based on s 916A of the Corporations Act. It submits that that theory is flawed, at least, because (a) it is plainly inconsistent with the express statutory attribution rule in s 769B(7) of the Corporations Act, (b) fails to acknowledge that Pt 7.7A expressly and deliberately establishes a scheme in which the responsibilities of licensees and authorised representatives are differentiated, and (c) the reliance placed on the phrase "on behalf of" is

inconsistent with established authority that the phrase does not have "a strict legal meaning", it may be used in "conjunction with a wide range of relationships" and it is necessary to consider the context in which the phrase is used to determine its meaning: citing *Industry Research and Development Board v* ***Phai See*** *Investments Pty Ltd* (2001) 112 FCR 24; [2001] FCA 532 at [19] (Hely J).

258 The Applicant submits that Count's reliance on the statutory attribution rule in s 769B(7) to defeat its contention that the Applicant can rely on s 916A to sheet home to Count breaches of fiduciary duty by the Applicant's Representatives is misplaced. It submits that its fiduciary claim is not dependent on anything contained within Pt 7.7 or Pt 7.7A and therefore s 769G(7) can not apply because it is only concerned with a proceeding under Ch 7 that "relates to" a provision of Pt 7.7 and Pt 7.7A.

259 I do not accept that the Applicant has established that Count owed it any fiduciary duties or that any liability for any breach of fiduciary duty by the Applicant's Representatives could be attributed to Count.

260 *First*, as submitted by Count, the fiduciary duty case advanced against Count was entirely derivative of the case advanced against the Applicant's Representatives. As explained above at [203], the conduct relied upon to erect the fiduciary claim against Count was limited to the conduct of the Applicant's Representatives, as alleged in the 2FASOC at [43]. The matters alleged to give rise to the fiduciary duty owed by Count alleged in the 2FASOC at [95] did not extend beyond the matters alleged in the 2FASOC at [43].

261 *Second*, compliance with a statutory obligation to provide a Financial Services Guide to a client, cannot by itself give rise to a fiduciary relationship. It is not alleged that Count provided any advice to the Applicant during the Relevant Period or that the Applicant had any other engagement or dealings with Count.

262 *Third*, as submitted by Count, the proposition that Count provided financial services "*through*" its Count Representatives and therefore, in such circumstances, was in effect, the "*adviser*" (a) is plainly inconsistent with the express statutory attribution rule in s 769B(7) of the Corporations Act, (b) fails to acknowledge the scheme of differentiated responsibilities between a representative or provider, on the one hand, and a licensee, on the other hand, established by Pt 7.7A, and (c) is inconsistent with established authority in its reliance on the phrase "on behalf of".

263 The reliance sought to be placed by the Applicant on s 916A can fairly be described as novel. It finds no support in the broader statutory context in Ch 7 of the Corporations Act or in any extrinsic materials.

264 Section 916A(1) provides:

> A financial services licensee may give a person (the ***authorised representative***) a written notice authorising the person, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the licensee.

265 The section plainly permits a financial services licensee to authorise, by a written notice, another person to provide a specific financial service or services on its behalf. So much is not controversial: *Australian Securities and Investments Commission v AMP Superannuation Limited* [2023] FCA 488; (2023) 168 ACSR 206 at [36] (Hespe J) and *Australian Securities and Investments Commission v Allied Advice* [2022] FCA 496; (2022) 160 ACSR 204 at [13] (Rofe J). It is necessary, however, to construe the expression "on behalf of" in its statutory context within Chapter 7 of the Corporations Act.

266 Next, it is necessary to consider first s 917A and s 917E of the Corporations Act.

267 Section 917A and s 917E both fall within Div 6 of Pt 7.6 of the Corporations Act. Section 917A(1) provides that the provisions of Div 6 apply to the conduct of a representative of a financial services licensee if it was conduct (a) that related to the provision of a financial service, (b) on which a client could reasonably be expected to rely, and (c) on which the client in fact relied in good faith.

268 Given my findings at [141] to [148] above, with respect to the AMP Policy, including that the Applicant could reasonably be expected to rely and the Applicant in fact relied on that conduct, it is necessary to consider the statutory attribution rules in s 769B(7) and the clearly delineated liability of financial services licensees and their authorised representatives in Pt 7.7A of the Corporations Act. The meaning to be given to the expression "on behalf of" in s 916A must necessarily have regard to these provisions.

269 Section 917E provides:

> The responsibility of a financial services licensee under this Division extends so as to make the licensee liable to the client in respect of any loss or damage suffered by the client as a result of the representative's conduct.

270 The scope of the liability imposed on a financial services licensee pursuant to s 917E must have regard to the express statutory attribution provisions in s 769B of the Corporations Act.

271 Section 769B(1) provides:

> Subject to subsections (7) and (8), conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body, within the scope of the person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also by the body corporate.

272 In turn, s 769B(7) provides:

> Nothing in this section, or in any other law (including the common law), has the effect that, for the purposes of a provision of Part 7.7 or 7.7A, or a proceeding under this Chapter that relates to a provision of Part 7.7 or 7.7A, a financial service provided by a person in their capacity as an authorised representative of a financial services licensee is taken, or taken also, to have been provided by that financial services licensee.

273 The exclusion in s 769B(7) is only relevant to Pt 7.7 and Pt 7.7A because those parts have their own scheme for attributing responsibility and liability for conduct of an authorised representative: *Casaclang v Wealthsure* (2015) 238 FCR 55; [2015] FCA 761 at [190] (Buchanan J) (with respect to Pt 7.7, and by extension Pt 7.7A that was subsequently inserted into Ch 7 of the Corporations Act).

274 For present purposes the critical words in s 769B(7) are "a proceeding under this Chapter that relates to a provision of Part 7.7 or 7.7A". I accept that the fiduciary claim is distinct from the s 961B, s 961J and s 961L claims advanced by the Applicant but that does not have the necessary consequence that the Applicant can rely upon s 916A to attribute any breach of fiduciary duty by the Applicant's Representatives to Count.

275 Section 917A(1)(a) makes plain that s 917E is only engaged to the extent that the conduct of the representative "relates to the provision of a financial service". This in turn directs attention to the provision of Ch 7 of the Corporations Act concerning the provision of financial services. As noted above, s 769B(1), provides that conduct engaged in "on behalf of" a body corporate is taken to have also been engaged in by the body corporate. That attribution rule, however, is subject to the express exclusion in s 769B(7).

276 It is not apparent on what basis the statutory attribution rules in s 916A and s 917E can be relied on by the Applicant to attribute liability to Count, as a financial services licensee for any breach of fiduciary duty by the Applicant's Representatives. In his closing oral reply submissions,

senior counsel for the Applicant stated that the "only thing we rely upon" was the provision of a financial services guide pursuant to s 941A but expressly disavowed any reliance on any contravention of s 941A or that it provided any foundation for any cause of action. Moreover, s 941A is in Pt 7.7 and is therefore "a provision of Part 7.7" for the purposes of the exclusion in s 769B(7). It therefore follows by reason of s 769B(7) that, neither anything else in s 769B or any other law including the common law, can have the effect of making any financial service provided by the Applicant's Representatives in connection with the provision of the Financial Services Guide to the Applicant to be taken as also having been provided by Count.

I.3.5. Agreed factual and legal issues for determination

277 For the foregoing reasons, I answer the parties' agreed factual and legal issues for determination with respect to the existence and content of fiduciary duties as follows:

19. During the Relevant Period, the Applicant was owed fiduciary obligations by Centenary, Mr Williams and Mr Hohnen in relation to the acquisition of the AMP Policy. The Applicant was not owed any fiduciary obligations by Count.

20. The fiduciary obligations owed by Centenary, Mr Williams and Mr Hohnen in relation to the acquisition of the AMP Policy were to avoid any real or substantial possibility of conflicts between the interests of the Applicant and their own interests, and not to profit by reason of their position as a fiduciary.

I.4. Breach of fiduciary duties

I.4.1. Overview

278 Given my conclusion that the only fiduciary obligations owed by Centenary, Mr Williams and Mr Hohnen were in relation to the acquisition of the AMP Policy, it is strictly not necessary to consider whether there had been breaches of fiduciary duties during the Relevant Period in relation to the other three of the Applicant's Products.

279 Nevertheless, in the event that I am mistaken in my conclusion as to the scope of the fiduciary obligations owed by the Applicant's Representatives to the Applicant during the Relevant Period, I have not limited my consideration of breaches of the fiduciary duty to the AMP Policy.

280 The pleaded breaches advanced by the Applicant against Count are (a) failing to avoid the conflict of interest arising from the receipt of the Commissions, Rebates and Other Benefits, (b) improperly using its position to obtain a benefit for themselves, namely the Commissions,

Rebates and Other Benefits, (c) continuing to permit the pursuit and receipt of Commissions by the Applicant's Representatives, (d) not extending the CBA Rebate Decision to Count, (e) continuing to pursue the receipt of Commissions, Rebates and third-party payments from platform and product providers, and (f) designing its remuneration policies to maximise Rebates, Commissions and third-party payments from platform and product providers: 2FASOC at [99].

281 Further or alternatively, the Applicant contends that the Applicant's Representatives breached the fiduciary duties they owed to the Applicant by failing to avoid the conflict of interest arising from the receipt of Commissions, Rebates and Other Benefits, and improperly using their position to receive a benefit for themselves, being the Commissions and Other Benefits: 2FASOC at [100].

282 Central to the alleged breaches was an implicit, if not explicit, proposition that the receipt of any payment or benefit from the provider of a product recommended by a Count Representative gave rise to an insurmountable conflict of interest, subject only to the fully informed consent of the client.

283 By way of summary, the breach of fiduciary duties case advanced by the Applicant against the Applicant's Representatives is directed at the receipt by the Applicant's Representatives and Count of the Commissions, Rebates and Other Benefits. The extent to which these matters were agreed, either expressly or implicitly, or were otherwise disclosed to the Applicant is relevant to both any attenuation of fiduciary duty and the question of informed consent. The latter consideration arises in circumstances where the fiduciary duty had not relevantly been attenuated and there had otherwise been a breach of fiduciary duty.

I.4.2. Submissions

The Applicant

284 The Applicant submits that Count and the Applicant's Representatives breached the fiduciary duties that they owed to the Applicant by contravening both the "no conflict rule" and the "no profit rule".

285 The Applicant submits that where there is a real and substantial possibility of a conflict, the no conflict rule prohibits a fiduciary from acting in a position of conflict.

286 The Applicant submits that Count and the Applicant's Representatives were plainly in a position of conflict. It submits that the Applicant had an interest in minimising the cost of acquiring, investing in or remaining in financial products but Count and the Applicant's Representatives had an interest in the Applicant accepting their recommendations to acquire, invest in or retain products on the APL in order to maximise their Commissions, Rebates and Other Benefits. The Applicant submits that this conflict was recognised by the Chief Executive Officer of Count, Hugh Humphrey, in July 2018, by CBA at the time it became responsible for supervising the operations of Count, the FoFA reforms and by Parliament in the Revised Explanatory Memorandum.

287 The Applicant submits that the Commissions raised conflicts on three levels. First, as a volume-based payment it provided an incentive to the Count Representatives to recommend that the client acquire as much of a product or investment as possible. Second, a conflict between the Applicant seeking to acquire products or make investments at the lowest possible cost. Third, as the Commissions were only available on certain products, an incentive to recommend only Commission paying products even if other non-commission paying products were available.

288 The Applicant submits that the third conflict was particularly acute for grandfathered products as the Applicant's Representatives were "incentivised" to keep clients in those products in order to retain the ability to charge a Commission. It submits that this conflict was recognised by Mr Williams when he moved the Applicant from the Macquarie Cash Management Account, which paid Commissions, to the CBA Cash Account, which did not pay Commissions, in order to reduce fees and the cost to the Applicant.

289 The Applicant submits the conflict created by the Commissions was compounded by (a) the CTC Program, (b) the Count remuneration program and the Splits, (c) the terms of the Distribution Agreements, in particular the volume incentives, and (d) the revenue hurdles to the receipt of the Commissions and the Other Benefits.

290 The Applicant submits that a fiduciary must account for any benefits received by reason of their fiduciary position unless they have fully informed consent. It submits that fiduciary obligations, including the requirement for fully informed consent, are not attenuated in order to permit a fiduciary to conduct business in a particular way. It submits that the relevant enquiry is not whether the charging of commissions might be reasonable. Rather, it submits, the issue is whether the beneficiary of the fiduciary obligations is satisfied that the payment of the commission represents reasonable compensation for the service being provided by their

financial adviser. It submits that in order for this to occur the beneficiary must be aware that commissions, like other remuneration items, are matters to be disclosed, discussed and negotiated. In turn, it submits that this would require disclosure of all the facts that stood behind the alleged entitlement to the commission so that the client could determine whether it was in fact remuneration for a service or simply a marketing fee paid to Count which was then passed on to the financial adviser as a reward for promoting the product.

Count

291 Count submits that any Commissions, Rebates or Other Benefits fell outside the scope of any fiduciary duty that might have been owed to the Applicant. Count submits that (a) prior to the commencement of contractual arrangements between the Applicant and Centenary under the May 2008 TFCA, the relevant Commissions, Rebates and Other Benefits were disclosed in the May 2008 SOA, and (b) from the commencement of Centenary's formal advice relationship with the Applicant the retention of those Commissions, Rebates (by Count) and Other Benefits formed part of the contractual arrangements between the Applicant and Centenary.

292 Next, and relatedly, Count submits that the disclosures made to the Applicant in the Financial Services Guide cannot be considered in isolation from other written and verbal disclosures made to the Applicant of the existence of the impugned Commissions, Rebates and Other Benefits, and the quantum of the Commissions specifically applicable to the Applicant's Products.

293 Further Count submits that, even if the Court were to find a breach of a fiduciary duty owed to the Applicant, all or part of the loss suffered by the Applicant, or profit gained, would have been suffered or gained irrespectively of whether the impugned conduct had occurred.

I.4.3. Consideration

Application of fiduciary obligations

294 I am not satisfied that the Applicant's Representatives breached any fiduciary duties that they might otherwise have been found to have owed to the Applicant during the Relevant Period in relation to the Applicant's Products.

295 The nature and extent of a fiduciary duty is attenuated by any agreement reached between a fiduciary and a beneficiary and in turn this necessarily informs whether conduct of a fiduciary may have given rise to a breach of fiduciary duty.

296 It has been said that the rules governing fiduciaries have no application where prior to embarking on a "fiduciary occupation" the retention of commissions is the price for a person to take on the occupation and therefore both informed consent and disclosure would not be relevant: *Real Estate Services Council v Alliance Strata Management Ltd* (unreported, NSW Court of Appeal, 8 June 1994) at 4 (Meagher JA, Sheller and Powell JJA agreeing).

297 Relatedly, Professor Paul Finn addressed the significance of the receipt of commissions by an agent and the scope of the necessary disclosure in *Fiduciary Obligations*, The Federation Press, 2016 at 228:

> Furthermore, an agent will be permitted to retain the benefit of a discount etc. if he can show that his principal approved of his so doing. The cases, though, do not present an entirely consistent picture of what is meant by approval in this context. As a general rule the fully informed consent of the principal would seem to be required. Where, however, the benefit takes the form of a payment which is in the nature of a usual allowance given to persons in the agent's line of business, for example, an introduction fee or commission to an insurance broker, all it would seem the agent has to show is that his principal was aware that he, the agent, was going to receive some payment from the person with whom he effected his principal's business. It appears to be immaterial that the principal does not know precisely the amount of such usual allowances, provided that the agent does not actually mislead his principal as to the amount.
>
> (Footnotes omitted.)

298 In *Wingecarribee,* a fiduciary had disclosed in a schedule to an agreement that it may be entitled to other fees payable by the issuer of a security and that it was obliged on request to disclose any such fee. Justice Rares concluded at [775]-[776]:

> The critical revelation in Sch 3 is that Grange may be paid a "fee" by an issuer for placement of a security. That put the councils on notice of the possibility that Grange would be paid a "fee" and that they had a contractual right to require Grange to give them information about that "fee" if they sought this. …
>
> In those circumstances, the IMP agreement attenuated the fiduciary obligation that Grange would otherwise have owed to Swan and Wingecarribee. Grange was authorised to be paid placement fees by issuers for products it sold to the councils provided that, a council could request and require Grange to disclose any such fee. In consequence, the councils were not entitled to complain that Grange breached its fiduciary obligation merely by receiving payment, gain or profit, being payment of such a fee, from its sales to them of SCDO products.

299 In this case the receipt of Commissions and "third-party payments" or Other Benefits by the Applicant's Representatives was fundamental to the commercial basis on which they recommended financial products to the Applicant. The Rebates were exclusively received by Count and not passed on to the Applicant's Representatives. In any event, economically there was no substantive difference between the receipt of Commissions and the receipt of Other

Benefits. Both gave rise to a flow of funds from a product provider to the entity providing or facilitating the provision of financial services to a client in acquiring a financial product from a product provider.

300 It was an agreed fact for the purposes of the proceeding that Commissions formed part of the way in which financial advisers, including Count Representatives, were remunerated for the provision of personal advice.

301 It makes no sense to characterise the receipt of a commission by way of agreed remuneration as constituting a conflict of interest or the receipt of a profit in breach of fiduciary duty. Such reasoning would effectively preclude any fiduciary from receiving any agreed remuneration for any services provided to a beneficiary.

302 Further, and in any event, the receipt by the Applicant's Representatives of the Commissions, and Other Benefits was disclosed in sufficient detail to the Applicant, and at least implicitly agreed by the Applicant, by the time each of the Applicant's Products was acquired by the Applicant.

Rosyln and Neal TCP Policies

303 The most relevant disclosures for the TCP Policies were made in the May 2008 SOA.

304 The May 2008 SOA was a 73-page document. It included disclosures of fees and Commissions payable to Count and Centenary, initial fees payable by the Applicant, ongoing Commissions and advice fees, payment of a wealth protection commission, Other Benefits and incentives (including the CTC Program) and product fees.

305 The payment of Commissions with respect to the TCP Policies, together with the Macquarie Cash Management Trust (the precursor to the Macquarie Cash Management Account), was disclosed in the following terms:

Disclosure of Fees and Commissions

All fees and commissions disclosed are inclusive of GST and are estimates based on the investment amounts detailed throughout this SoA. The actual commission received may vary depending on the initial investment amount(s) received and the influence of market movements on the value of your investments.

Initial Fees - Investments		Investment $	Total %	Total $	Count %	Count $	Adviser %	Adviser $
Upfront Fee	Skandia One	$280,000	0.59%	$1,650	0%	$0	0.59%	$1,650
Total Upfront		**$280,000**	**0.59%**	**$1,650**	**0%**	**$0**	**0.59%**	**$1,650**

Ongoing Fees - Investments		Investment $	Total %	Total $	Count %	Count $	Adviser %	Adviser $
Ongoing Commission	Skandia One	$604,465	1.54%	$9,310	0.44%	$2,660	0.55%	$6,650
Ongoing Commission	Macquarie CMT	$16,160	0.33%	$53	0.05%	$8	0.28%	$45
Total Ongoing		**$620,625**	**1.50%**	**$9,363**	**0.43%**	**$2,668**	**1.07%**	**$6,695**

Wealth Protection Commission - Year 1 - Ros		Premium $pa	Total %	Total $	Count %	Count $	Adviser %	Adviser $
Income Care Essentials	CommInsure	$806	31%	$250	4.65%	$37	26.35%	$212
Life & TPD Cover		$1,076	31%	$334	4.65%	$50	26.35%	$284
Total Year 1		**$806**	**31%**	**$584**	**4.65%**	**$87**	**26.35%**	**$496**

Wealth Protection Commission - Year 1 - Neal		Premium $pa	Total %	Total $	Count %	Count $	Adviser %	Adviser $
Life Cover	CommInsure	$788	31%	$244	4.65%	$37	26.35%	$208
TPD Cover	CommInsure	$324	31%	$100	4.65%	$15	26.35%	$85
Income Protection	CommInsure	$1,750	31%	$543	4.65%	$81	26.35%	$461
Trauma	CommInsure	$1,197	31%	$371	4.65%	$56	26.35%	$315
Total Year 1			**31%**	**$1,258**	**4.65%**	**$189**	**26.35%**	**$1,070**

306 The column headed "Adviser" was a reference to Centenary and recorded the Splits that would be payable, in both percentage and absolute terms, to Centenary. I note, as I explain above at [110], the Applicant decided not to proceed with the recommended investment of its funds in the Skandia One Fund.

307 As discussed below, the receipt of Commissions from CommInsure with respect to the TCP Policies was also disclosed to the Applicant in the October 2008 ROA and the April 2009 ROA.

308 The May 2008 SOA included the following further disclosure of the receipt of ongoing commissions from Macquarie with respect to the Macquarie Cash Management Trust, and from CommInsure with respect to the Roslyn TCP Policy and the Neal TCP Policy:

- **Macquarie Cash Management Trust (CMT)**

Count is paid an ongoing commission of 0.33% per annum on your investment in the Macquarie CMT. Count will retain 15% of the commission with the remaining 85% being paid to Centenary Financial Pty Ltd. Macquarie pays this commission <<monthly>><<quarterly>> from their fees.

Wealth Protection Commission

Count is paid an ongoing commission of 31% per annum of your insurance premium from CommInsure. Count will retain 15% of the commission and the remaining 85% will be paid to Centenary Financial Pty Ltd.

Should you retain the insurance products recommended within this SoA beyond the first year, subsequent premiums will entitle Centenary Financial Pty Ltd to commission from CommInsure of 31% of each year's premium.

Example	Death & TPD Cover
Premium $5,000	Commission paid would be 31% x $5,000 = $1,550.
	From this Count will receive $232.50 and Centenary Financial Pty Ltd will receive $1,317.50

Macquarie Cash Management Account

309 The most relevant disclosures giving rise to an at least implicit agreement with the Applicant to the receipt of Commissions in relation to the Macquarie Cash Management Account was made in the October 2008 ROA and the April 2009 ROA.

310 The October 2008 ROA included the following disclosure of the Commissions that would be received from Macquarie on the Macquarie Cash Management Account, referred to as the Macquarie Cash XL:

Disclosure of Fees and Commissions

Fee Type	Provider	Investment $	Total %	Total $	Count %	Count $	Adviser %	Adviser $
Ongoing Fee	Skandia One	$294,582	0.99%	$2,916	0.44%	$1,296	0.55%	$1,620
Ongoing Fee	Macquarie CMT	$13,636	0.33%	$45	0.05%	$7	0.28%	$38
Ongoing Fee	Macquarie Cash XL	$260,000	0.10%	$260	0.015%	$39	0.085%	$221
Total		**$568,218**	**0.57%**	**$3,221**	**0.24%**	**$1,342**	**0.33%**	**$1,879**

Wealth Protection Commission – Year 1 – Neal		Premium $pa	Total %	Total $	Count %	Count $	Adviser %	Adviser $
Income Protection	CommInsure	$1,825	31%	$566	4.65%	$85	26.35%	$481
Total Year 1			**31%**	**$566**	**4.65%**	**$85**	**26.35%**	**$481**

All fees and commissions disclosed are inclusive of GST and are estimates based on the investment amounts detailed. The actual commission received may vary depending on the initial investment amounts received and the influence of market movements on the value of your investments. For more information on how the above fees and commissions are calculated, please refer to your Statement of Advice dated 20 May 2008.

311 It was stated in the October 2008 ROA that both details of fees, Commissions and/or Other Benefits received by Count or Mr Duffield and "the possible loss of benefit, costs or consequences of switching underlying investments", as a result of the advice provided", were disclosed to Mr and Mrs Hunter in the "Further Advice Client Acknowledgement Form" that was "signed and dated by the clients on 3 October 2008". The last page of the October 2008 ROA in evidence, included a section entitled "Acknowledgement of Further Advice" (the title was on the penultimate page) but the acknowledgement was not signed or dated by either Mr or Mrs Hunter.

312 The April 2009 ROA included the following disclosure of fees and Commissions payable by Macquarie to Count and Centenary with respect to the Macquarie Cash Management Account, again referred to as the Macquarie Cash XL, and also by CommInsure with respect to the TCP Policies:

Disclosure of Fees and Commissions

Fee Type	Provider	Investment $	Total %	Total $	Count %	Count $	Adviser %	Adviser $
Ongoing Fee	Skandia One	$245,543	0.99%	$2,430	0.44%	$1,080	0.55%	$1,350
Ongoing Fee	Macquarie CMT	$13,636	0.33%	$45	0.05%	$7	0.28%	$38
Ongoing Fee	Macquarie Cash XL	$260,000	0.10%	$260	0.015%	$39	0.085%	$221
Total		$519,179	0.57%	$2,735	0.24%	$1,1126	0.33%	$1609

Wealth Protection Commission – Year 1 – Neal		Premium $pa	Total %	Total $	Count %	Count $	Adviser %	Adviser $
Income Protection	CommInsure	$1,825	31%	$566	4.65%	$85	26.35%	$481
Total Year 1			31%	$566	4.65%	$85	26.35%	$481

All fees and commissions disclosed are inclusive of GST and are estimates based on the investment amounts detailed. The actual commission received may vary depending on the initial investment amounts received and the influence of market movements on the value of your investments. For more information on how the above fees and commissions are calculated, please refer to your Statement of Advice dated 20 May 2008

313 The Acknowledgement of Further Advice section in the April 2009 ROA was signed and dated by Mr and Mrs Hunter on 31 May 2009.

314 The Commissions received by Count and Centenary from Macquarie in relation to the Macquarie Cash Management Account were also disclosed in the following table in the May 2011 ROA:

Fees and Commissions Disclosure

Ongoing Fees	Investment	Total	Total	Count	Count	Adviser	Adviser
Investment Assets							
Macquarie Cash Management Account	$230,000	0.1 0%	$230.00	0.15 %	$35.00	0.85 %	$195.00
Australian Share Portfolio*	$254,903	0	0	0	0	0	0
Combank Retail Bonds)	$150,000	0.50%	$750.00	0.15 %	$112.50	0.85 %	$637.50
Total	**$634,903**		**$980.00**		**$147.50**		**$787.50**

Please refer to invoice for both initial and ongoing advice fee.

Initial Advice and set up $2,475.00

Review fee of $5500.

All fees and commissions disclosed are inclusive of GST.

315 The May 2011 ROA was only a five page document.

316 The receipt of Commissions with respect to the TCP Policies and the forerunner to the Macquarie Cash Management Account was also disclosed to the Applicant, by cross references to the May 2008 SOA in both the August 2015 ROA and the November 2015 ROA.

317 The August 2015 ROA included the following disclosure in relation to fees and charges:

> Advice fees relating to our recommendations can be found in the Disclosure of Commissions section. Product fees relating to the recommended product can be found in the Product Discussion section.

318 There was no "Disclosure of Commissions" section but the August 2015 ROA did include a "Disclosure of fees" section in the following terms:

Disclosure of fees

All fees were previously disclosed in your Statement of Advice dated 01 Jan 2007. Please refer to that SoA for details of all upfront and ongoing advice fees and commissions applying to you.

Ongoing advice - Listed securities fee

Additional to the fees disclosed in your Statement of Advice dated the 01 Jan 2007 will be charging an annual ongoing advice fee of $1,200 deducted monthly from your CBA Cash Account.

This fee was introduced in September 2014 and we have absorbed this fee to date.

We have attached a new Total Financial Care Agreement detailing ongoing fees and services.

*For Listed Securities please note:
Advised: For investments held off-platform, Count charges my firm a listed securities fee of up to 0.22% pa of your portfolio, paid monthly.
This cost is charged directly to our firm.

319 I am satisfied that the reference to "your Statement of Advice dated 01 Jan 2007" was intended to be, and would have been understood by Mr and Mrs Hunter, to be a reference to the May 2008 SOA. The only statement of advice provided to the Applicant prior to the provision of the August 2015 ROA was the May 2008 SOA. The error reflects a poor attention to detail by Mr Williams but does not deprive the cross reference of any significance given that the May 2008 SOA was the only statement of advice previously provided to the Applicant by the Applicant's Representatives.

320 The November 2015 ROA included a statement that there would be no additional cost for the advice because "it is a service that is included in our ongoing service package". I infer the reference to the "ongoing service package" was a reference to the Total Financial Care Agreement, as amended as at that date. It was also stated in the November 2015 ROA that the costs of that package and other benefits that Centenary received "have been disclosed in the previous Statement of Advice indicated above" and there were "no new benefits or other conflicts of interest to my advice other than those previously disclosed in your SOA". The "previous Statement of Advice indicated above" was described as "your previous Statement of Advice" and was referred to as "the Statement of Advice which has been presented in the past" in the "Personal circumstances" section. Again in context, I am satisfied that this was intended to be, and would have been understood by Mr and Mrs Hunter to be, a reference to the May 2008 SOA.

AMP Policy

321 The most relevant disclosures giving rise to an at least implicit agreement with the Applicant to the receipt of Commissions in relation to the AMP Policy were made in the March 2018 SOA.

322 The March 2018 SOA included the following disclosure of Commissions that Count and Centenary would receive from the premiums that the Applicant would pay to AMP under the AMP Policy:

Payments received from product providers

The insurance policy commissions paid to Count from the premiums you pay as shown in the table below.

Insurance policy	Insurance premium pa		Annual commission paid to Count (for this year)		Annual commission paid to Count (Subsequent year)
Client name and Product	$	%	$	%	$
Shaun Hunter – Hunter Family Superannuation Fund					
AMP Elevate – Life	$978.36	88.00%	$860.96	22.00%	$215.24
TOTAL	**$978.36**		**$860.96**		**$215.24**

How much will Centenary Financial receive?

Count charges Centenary Financial a fee to operate under its Australian Financial Services License. This includes a percentage of the advice fees you are charged. As an Authorised Representative of Count the balance of fees received by Centenary Financial will be $2,019.38 of the initial SOA fee, $00.00 of the implementation fee, and $00.00 of the ongoing advice fee and commissions (where payable). Centenary Financial will also receive $790.27 of the year 1 insurance commissions and $197.57 of the ongoing insurance commissions in the subsequent year while your insurance policy remains in force.

323 At or about the time that the Applicant was provided with a copy of the March 2018 SOA, Mr Hohnen also provided the Applicant with a copy of the Financial Services Guide and the product disclosure statement for the AMP Policy.

CTC Program

324 The May 2008 SOA also included the following explanation of the CTC Program:

- **Contributions to Count (CTC)**

What are CTCs?

Franchisees may be rewarded based on their contribution to Count's profit each financial year. In most cases, for each dollar Count earns as a result of business that a Franchisee writes, or fees they pay to Count, they will receive one CTC. Each Count service offered has a different CTC value, as some services are more profitable than others.

What CTCs apply to the advice provided in this advice document?

- *Approved Administration Platforms*

For investments placed by Centenary Financial Pty Ltd in one of our approved administration platforms, CTCs are calculated on your total funds invested and will continue to be allocated annually for as long as you remain invested in the product:

Example: $100,000 invested in the following platform	**CTC value**
Skandia and wealth-e-account	**500**
Perpetual WealthFocus and Wrap Essentials	400
Platform[2] (For amounts of $750,000 and above, applied to the first $5M investment per client)	375
CFS FirstChoice	350
Merrill Lynch BlackRock Customised Portfolio[1]	200

[1] Direct share portfolios only.

- *Retail Investments*

For retail investments, such as the recommended Macquarie CMT and CommInsure wealth protection insurance, CTCs are calculated on the

portion of upfront and ongoing commission retained by Count, as disclosed in the Disclosure of Fees and Commissions table:

Example: $10,000 invested in Macquarie CMT	**CTC value**
$0 upfront commission retained by Count	0
$5 ongoing commission retained by Count each year[2]	5

[2] CTCs on ongoing commission will continue to be allocated annually for as long as you retain the product.

What is the benefit of CTCs?

- *Count Options*

Franchisees who increase their CTC level by 12.5% each year may be allocated discretionary Count Financial Limited (COU) options.

CTCs are used to calculate how many options will be granted to each Franchisee by applying a profitability multiplier (net profit after tax divided by net revenue). This dollar amount is divided by the Option exercise price. The multiplier for the 2005/2006 financial year was 43.2%.

Example:	
The number of options @ 193.7 cents for 10,000 CTCs	= Number of CTCs x Multiplier / Exercise price = 10,000 x 43.2% / 1.937 = 2,230 Options

Subject to meeting a number of requirements, Franchisees may convert their COU options to shares at a 12.5% discount to the market price in the year they are issued.
Centenary Financial Pty Ltd may qualify for COU options and some of these may be passed on to your adviser.

- *Other benefits*

By reaching specified CTC levels, Franchisees may become eligible for fee waivers, cash rebates or higher commission splits paid by Count on some products.
Centenary Financial Pty Ltd will qualify for a waiver of Count's annual membership fees and a rebate in the current financial year.

Oral disclosures to Mrs Hunter

325 In addition to the documentary disclosures, it is also necessary to determine the extent of any oral disclosures by the Applicant's Representatives of the Commissions and Other Benefits.

326 Mrs Hunter gave evidence in her first affidavit that, to the best of her recollection, on every occasion when she received advice from the Applicant's Representatives:

> … I was not told about the payment of commissions to Centenary Financial and its financial advisers or that the commissions could have been dialled down, switched off and/or rebated. I would have expected this type of information to be brought to my attention at the time of receiving the advice and if I had been given the choice, I would have elected not to pay these commissions.

327 Mrs Hunter also gave evidence in her first affidavit, that to the best of her recollection, she was never advised:

> a) that the financial advice received by the Hunter Fund may have been influenced by the commissions and/or other benefits that the financial advisers at Centenary Financial were receiving;
>
> b) that the Hunter Fund could have stopped paying the commissions;
>
> c) that the commissions and/or other benefits could be dialled down, switched off or rebated or that Centenary Financial's fees could be reduced by the amount paid in commissions and/or other benefits;
>
> d) that there was a potential conflict arising from the payment of the commissions and/or other benefits to Centenary Financial and its financial advisers;
>
> e) that the Hunter Fund would not receive additional services or benefits in return for paying the commissions and/or other benefits; or
>
> f) the reasoning for the payment of the commissions and/or other benefits being in the Hunter Fund's best interests.

328 In her second affidavit Mrs Hunter gave evidence that none of Mr Duffield, Mr Williams and Mr Hohnen "ever discussed or advised me that Centenary or its financial advisers would receive any benefits or commissions" and in her third affidavit Mrs Hunter gave evidence that she was "not aware that: … the Applicant was paying commissions in addition to ongoing service fees".

329 Mrs Hunter accepted in cross examination that she had received documents from the Applicant's Representatives, in particular the May 2008 SOA, in which the payment of Commissions and Other Benefits had been disclosed. At times, she also accepted that had she read the disclosures she would have understood that Centenary was to receive Commissions and Other Benefits but on other occasion she claimed that they were merely facts and figures that as a lay person she could not understand.

330 Mrs Hunter stated that she was confident that she was never told that the Applicant's Representatives would be receiving "any sort of commissions, or anything" for suggesting the products that they were putting to the Applicant, because if she had been told she would have

questioned it. Mrs Hunter maintained throughout her cross examination that the Applicant's Representatives never drew her attention to any disclosures of Commissions and Other Benefits payable to Count or Centenary in the statements of advice and records of advice and she assumed the fee payable under the Total Financial Care Agreements was the total remuneration paid to the Applicant's Representatives, not least because $5,500 was a significant fee given the Hunter's combined income was only $117,000.

331 When pressed as to how she was able to deny that she had ever read the disclosure of Commissions and Other Benefits in the May 2008 SOA, Mrs Hunter responded:

> We were never told that anything was paid back to Count in ways of commissions. We were never verbally told it was in there but we were never verbally told and we were never pointed out, via the people that we trusted and entrusted to look after our funds and make sure that they were all done properly and received the best outcome that we could, we were never told by either of those people.

332 In his first affidavit, Mr Williams gave evidence that to the best of his recollection he did not have "ongoing conversations" with Mrs Hunter concerning the payment of Commissions on the Applicant's Products at each instance on which he provided advice but it was his usual practice to "comment on the relevant commissions to Roslyn or Neal when taking out any policy" for the Applicant.

333 Mr Williams gave evidence that he could not specifically recall drawing to the attention of Mr and Mrs Hunter the receipt of trail commissions by Count and Centenary, and that his usual practice, particularly for records of advice, was to "have gone through the information where those commissions were disclosed in the record of advice". Mr Williams also accepted that if the receipt of Commissions had been discussed in the usual course it would have been recorded in the record of advice.

334 I do not accept Mrs Hunter's denials that she was not aware during the Relevant Period of the payment of Commissions and Other Benefits to Count and Centenary. The denials are implausible given the extent of the disclosure of the receipt of Commissions and Other Benefits in the May 2008 SOA and the subsequent disclosure of Commissions in the much shorter October 2008 ROA and the April 2009 ROA and the evidence Mr Williams gave of his usual practice, which I consider is both non-partisan and consistent with the apparent logic of events, particularly the records of advice in which Commissions were recorded and the cross references to the disclosures in the May 2008 SOA in later records of advice.

335 Nor do I accept Mrs Hunter's evidence that she assumed that the only fee payable was the annual fee under the Total Financial Care Agreements. The fee payable under the Total Financial Care Agreements was a fee calculated by reference to the value of the Applicant's portfolio that was managed by the Applicant's Representatives, as clearly stated in the May 2008 SOA. It was a fee referrable to the value of the Applicant's portfolio, not a fee referrable to any advice provided with respect to the acquisition of the Applicant's Products.

336 Moreover, the denials could otherwise be given limited weight given the length of time that has elapsed since the relevant events and the inherently self-serving nature of the denials given the case that the Applicant is pursuing in this proceeding. The latter point emphasised by the movement from "to the best of my recollection" in Mrs Hunter's first affidavit to unqualified denials of knowledge of Commissions in her second and third affidavits.

Sufficiency of disclosure of Commissions and Rebates

337 For the reasons explained at [303] to [336], the receipt of Commissions and Rebates in relation to the Applicant's Products was sufficiently disclosed to the Applicant at the time each product was acquired by the Applicant to give rise to at least an implicit agreement by the Applicant to the receipt by Count and Centenary of the Commissions and Rebates. It was neither necessary nor practical for the Applicant's Representatives to disclose the receipt of Commissions and Rebates with the degree of specificity now contended for by the Applicant in order to establish that the Applicant had, at least by necessary implication, agreed to the receipt of Commissions and Rebates. The receipt of the Commissions and Rebates by Count and Centenary from the product providers therefore did not constitute any improper use of the Applicant's Representatives position as fiduciaries to gain a benefit for themselves. Nor could any decision by Count or Centenary to continue to receive Commissions and Rebates relevantly give rise to any breach of the no conflict or no profit rules.

338 The fact that the Commissions or Rebates were only paid indirectly by the Applicant to Count and the Applicant's Representatives, by the providers of the Applicant's Products does not relevantly alter the analysis. An equivalent issue arose in *Wingecarribee*. Relevantly for present purposes, Rares J concluded that the disclosure in the relevant agreements between the financial adviser and the councils attenuated the fiduciary obligations his Honour had otherwise found were owed by the financial adviser. His Honour stated at [774]-[776]:

> The issue is whether Grange's revelation in Sch 3 to the IMP agreements that it may be entitled to other fees paid by the issuer of a security in relation to its placement, and

> its obligation to disclose any such fee on request, was sufficient to relieve Grange of its fiduciary obligation owed to each council in respect of what it earnt from placing or selling new SCDO issues. This issue bears on two aspects of Grange's relationship with each council under the IMP agreements, first, whether what was stated in Sch 3 operated contractually to change the nature of Grange's relationship with each council from being or including that of a fiduciary and, secondly, if not, whether that statement was a sufficient disclosure of the nature and extent of any conflict of interest and duty Grange might have had in respect of each such transaction.
>
> The critical revelation in Sch 3 is that Grange may be paid a "fee" by an issuer for placement of a security. That put the councils on notice of the possibility that Grange would be paid a "fee" and that they had a contractual right to require Grange to give them information about that "fee" if they sought this. The councils had a contractual right under Sch 3 to request Grange to disclose the amount of any fee an issuer paid to it in relation to the placement of SCDOs.
>
> In those circumstances, the IMP agreement attenuated the fiduciary obligation that Grange would otherwise have owed to Swan and Wingecarribee. Grange was authorised to be paid placement fees by issuers for products it sold to the councils provided that, a council could request and require Grange to disclose any such fee. In consequence, the councils were not entitled to complain that Grange breached its fiduciary obligation merely by receiving payment, gain or profit, being payment of such a fee, from its sales to them of SCDO products.

Sufficiency of disclosure of Other Benefits

339 The Other Benefits alleged to have been obtained by Count and the Applicant's Representatives in breach of the no conflict and no profit rules were tied to and largely incidental to the payment of the Commissions and the Rebates. Further, as outlined at [324] above, the existence and essential terms of the principal element of the Other Benefits, the CTC Program, was disclosed to the Applicant in the May 2008 SOA.

340 Moreover, as explained at [145] to [147] above, the AMP Distribution Agreement did not include any provision of incentive rebates, promises by Count to promote AMP products or place them on the APL, lapse rate incentive or sales targets. The absence of such Other Benefits in the AMP Distribution Agreement is significant given that I have found that Centenary, Mr Williams and Mr Hohnen only owed fiduciary duties to the Applicant in relation to its acquisition of the AMP Policy.

I.5. Informed consent

I.5.1. Overview

341 The question of informed consent only arises if I had otherwise found that Centenary, Mr Willliams and Mr Hohnen had breached the fiduciary duties that they owed to the Applicant in relation to the acquisition by the Applicant of the AMP Policy.

342 On the assumption that I had otherwise found that Centenary, Mr Williams and Mr Hohnen had breached these fiduciary duties I now turn to consider whether the Applicant had provided informed consent to those breaches.

I.5.2. Relevant principles

343 The principles governing informed consent are well established. For present purposes the following distillation is sufficient.

344 *First*, a fiduciary cannot obtain or retain a profit or advantage for themselves or enter into a transaction in conflict with their fiduciary duty without the informed consent of the person to whom the fiduciary duty is owed: *Hospital Products* at 67-68 (Gibbs CJ).

345 *Second*, informed consent requires the full and candid disclosure of all material facts known to the fiduciary relating to the transaction that gave rise to the conflict of interest and that might influence the conduct of the client and it imposes a "heavy duty" on the fiduciary to show the righteousness of the impugned transactions: *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154 at 170 (Street CJ); *Coope v LCM Litigation Fund Pty Ltd* [2016] NSWCA 37; (2016) 333 ALR 524 at [111] and [217] (Payne JA, Gleeson and Leeming JJA agreeing). It is not sufficient to put the client on inquiry: *Oliana Foods Pty Ltd v Culinary Co Pty Ltd (In Liq)* [2020] VSC 693 at [498] (Connock J).

346 The task of establishing informed consent has been said to be an "onerous and exacting one": *Re McGrath & Anor (in their capacity as liquidators of HIH Insurance Ltd)* [2010] NSWSC 404; (2010) 266 ALR 642 at [37] (Barrett J). It has also been said that informed consent requires that the person to whom the fiduciary duty is owed must have "full knowledge" of the "precise nature" of the fiduciary's interest in the impugned transaction or the "existence and scope" of the fiduciary's conflict of interest: *Thomson v Golden Destiny Investments Pty Ltd* [2015] NSWSC 1176 at [86] (Sackar J) citing ***Woolworths Ltd** v Kelly* (1991) 22 NSWLR 189 at 212 (Samuels JA); see also *Clark Boyce v Mouat* [1994] 1 AC 428 at 435-6.

347 *Third*, the extent of the disclosure necessary to provide informed consent is inherently fact specific: *Aequitas* at [322] (Austin J); ***Blackmagic Design** Pty Ltd v Overliese* (2011) 191 FCR 1; [2011] FCAFC 24 at [110] (Besanko J, Finkelstein and Jacobson JJ agreeing).

348 In *Aequitas*, Austin J held that there had been a failure by the fiduciary to provide full disclosure in a private placement memorandum issued to investors in Aequitas of all the circumstances relevant to benefits that would flow to Australian European Finance Corporation (**AEFC**), a

bank and Corporate Advisory Services (Operations) Pty Ltd (**CASO**), a company. AEFC and CASO had entered into a joint venture agreement to conduct a corporate advisory services business called AEFC Advisory Services Pty Ltd (**AEFCAS**). Subsequently, AEFCAS was retained by the Rendell Group to assist with the restructuring of their finances. In reaching his conclusion, his Honour found at [322]:

> These conflicts of interest could have been overcome by full disclosure of all relevant circumstances in the private placement memorandum, so that by applying for shares on the faith of that memorandum, investors in Aequitas could be taken to have assented to the benefits which were to flow to AEFC and CASO. However, the private placement memorandum fell far short of the kind of disclosure which would suffice for this purpose. Apart from the misleadingly optimistic assessment of the position of the Rendell group, the memorandum failed to disclose the true attitude of AEFC to Aequitas. There was a stark contrast between the vagueness of Mr Gledhill's open letter of 10 March 1986 and the specific and self-interested strategy of AEFC which was disclosed in Mr Gledhill's board paper dated 2 September 1985. Nor did the memorandum disclose the fees which AEFCAS and CASO were to derive from the Rendell Industries transaction. It did not disclose that the vendor of the Rendell Industries shares, AEFC Leasing, had acquired them, less than two months before selling them to Aequitas No 1, for a consideration of only $250,000, a much lower consideration than Aequitas No 1 had undertaken to provide.

349 In *Blackmagic Design*, Besanko J at [110] stated that it appeared that the facts that would need to be disclosed in order to constitute a full and frank disclosure of all material facts to avoid the consequences of a conflict of interest, were the facts giving rise to the conflict, namely:

> … an intention to compete, the use of confidential information to cost products, consideration of alternative products including details of their stage of development and, possibly, some of the details of Simple Card and the involvement of another employee of the appellant…

350 *Fourth*, consent does not necessarily have to be provided expressly, it may be implied in all the circumstances: *Citigroup Global* at [293]-[296] (Jacobson J) citing *Woolworths Ltd* at 212 (Samuels JA) and at 234 (Mahoney JA); *Our Lady's Mount Pty Ltd (as trustee) v Magnificat Meal Movement International Inc* (1999) 33 ACSR 163 at [128] (Muir J).

351 *Fifth*, whether a disclosure is sufficient to provide informed consent may depend on the sophistication and intelligence of the person to whom disclosure is required to be made: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [107] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

352 *Sixth*, the defaulting fiduciary bears the onus of proving fully informed consent: *One.Tel Ltd (in liq) v Rich* (2003) 45 ACSR 466; [2003] NSWSC 522 at [30] (Einstein J), citing *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384 at 398 (Isaacs J).

353 The requirement for the disclosure to be transparent in order to establish informed consent was emphasised by Heerey J in *Henderson v Amadio (No 1)* [1995] 62 FCR 1 at 170:

> The only suggested disclosure in the Gray & Winter instruction letter arises from the words and figures "Accounting fees (1.5% of Purchase Price) 750,000". In the context of the letter, and especially the reference to items such as stamp duty and "Legals - Nevitts [sic], Solicitors 15,000", which are obviously part of the acquisition costs on behalf of the purchasers, this was quite misleading. It would convey the impression that some kind of accounting work, such as the preparation of financial documents, the establishment of book-keeping or computer services, or the giving of accounting, taxation or financial advice, was to be carried out for the purchasers as a necessary and incidental cost of the purchase. The camouflage is all the more effective because the Gray & Winter fee *is* disclosed; the reader is unlikely to suspect that the "Accounting fees" cover another payment of a similar kind.
>
> …
>
> The reality of what was happening would have been revealed if the letter said:
>
> > "I understand that in the event that I become an investor, my accountants Bird Cameron (or Huntley McArdle & Glass) are to receive $10,350 for introducing me to Gray & Winter."
>
> The letter does not say that, and I think designedly so. At best there is carefully crafted ambiguity.
>
> …
>
> The serious obligation on the accountants could only be discharged by direct, frank and candid disclosure of a kind which would enable the accountants to be honestly and reasonably satisfied that the clients understood the nature of the commission and what the accountants had to do to earn it.

I.5.3. Submissions

The Applicant

354 The Applicant contends that the Commissions were partially but inadequately disclosed to the Applicant in several documents prior to the Relevant Period and there was no disclosure during the Relevant Period of Commissions payable on the Macquarie Cash Management Account or either of the TCP Policies.

355 The Applicant submits that for consent to be fully informed there must be a "full disclosure of all relevant circumstances" or the "whole of the information". It submits that this requires disclosure of the "real nature of the conflict" and being put on enquiry is not sufficient.

356 In its written closing submissions, the Applicant submits that each of the following matters needed to be disclosed in order for it to understand the nature and extent of the conflict created by the Commissions:

10.1 that Count and / or the Representatives had a financial interest in the Group Members accepting the advice and recommendations of Count and / or the Representatives to acquire or invest in financial products on Count's Approved Product List;

10.2 that Count and / or the Representatives had a financial interest in maximising the Commissions, Rebates and other benefits earned by them [sic] reason of the Group Members accepting the advice and recommendations of Count and / or the Representatives to acquire or invest in financial products on Count's Approved Product List;

10.3 that there existed a real or substantial possibility of conflict between the interests of the Group Members on one hand, and the interests of the Representatives and / or Count on the other;

10.4 that Group Members ultimately paid, directly or indirectly, for the Commissions, Rebates and other benefits earned by Count and / or the Representatives by reason of the Group Members accepting the advice and recommendations of Count and / or the Representatives to acquire or invest in financial products on Count's Approved Product List;

10.5 Commissions could be fully rebated by the Representatives to their clients;

10.6 Count did not require the Representatives to provide any service in exchange for Commissions;

10.7 Commissions increased the costs to Group Members of the Relevant Products;

10.8 Count had a contractual entitlement to terminate from the Count authorised representative network Representatives who did not meet specified revenue targets;

10.9 Count did terminate Representatives who failed to meet specified revenue targets;

10.10 Count financially incentivised Representatives to sell products on its Approved Product List that:

(a) paid Commissions to Count and the Representatives; and

(b) paid Rebates to Count;

10.11 The CTC Program and the pre-July 2017 remuneration model provided a financial incentive for pre-July 2013 member firms to provide advice to clients which, if accepted, would earn those member firms CTC points, which may entitle them to monetary and non-monetary benefits from Count, including an increased share in advice and Commission revenue;

10.12 The post-July 2017 remuneration arrangements for all member firms provided a financial incentive for all representatives to increase their Gross Business Earnings by advising and recommending that clients acquire or invest in financial products on Count's Approved Product List;

10.13 Commissions were material to the financial performance of Representatives;

10.14 Commissions and Rebates were material to the financial performance of Count;

10.15 During the Relevant Period, Count was performing below the CBA's expectations and this increased pressure on Count to generate Commission and

Rebate revenue.

357 The Applicant submits that the only material facts that were disclosed by Count and the Applicant's Representatives were that the providers of the products acquired by the Applicant paid the Commissions to Count and the Count Representatives and "some details" of the CTC Program. It submits that there was no documentary disclosure of the Commissions during the Relevant Period and the Court should find that the Applicant was not verbally told that Commissions were payable.

358 The Applicant submits that it was never told how the payment of the Commissions was optional, in the sense that they could be rebated or dialled down to nil. Moreover, it submits, it was never told how much more expensive the Commissions made the Applicant's Products or that it was possible to obtain the same products without paying Commissions. In support of these submissions it points to (a) an AMP "adviser only" document that provided that the dial down facility for the AMP Policy could lead to a 20.37% reduction in the premium for the policy if the adviser chose to take no commission, (b) April 2017 and September 2018 "adviser guides" to the TCP Policies that acknowledged the possibility of premium discounts, and (c) the decision by Mr Williams to move the Applicant from the Commission paying Macquarie Cash Management Account to the non-commission paying CBA Cash Account.

359 The Applicant submits that the conflicts of interest would only be fully revealed if the commercial pressures on Centenary, including its obligations under the Distribution Agreements, were disclosed. It submits that this required disclosure of minimum revenue targets for advisers and Project Gecko and informing the Applicant that the pass through of Commissions and fees from Count to Centenary turned on the extent to which Centenary recommended products that Count wanted sold.

360 Further, the Applicant submits that the receipt of Commissions and recommending Commission paying products cannot be characterised as "normal business risks" known to the Applicant. Nor it submits, can it be contended that the commercial pressures and incentives would have been apparent to the Applicant given the "consistent messaging" from advisers, including Centenary, "trust us", "we are looking after you" and "we are in it together".

361 Count submits that the disclosures of the Commissions, Rebates and Other Benefits in the Financial Services Guide, the May 2008 SOA and the March 2018 SOA, and the various records of advice combined with the evidence of Mr William's usual practice in alerting Mr

and Mrs Hunter to Commissions was sufficient to find that the Applicant had provided its fully informed consent.

I.5.4. Consideration

362 The expressions "full disclosure of all relevant circumstances", the "whole of the information" and disclosure of the "real nature of the conflict" necessarily demand close attention to the specific facts of a particular case. Some guidance is provided by the qualifying adjectives "relevant" and "real". It is necessary to focus on the identification of matters that would be sufficient to disclose the nature of the conflict or benefit, rather than to impose some overriding obligation to disclose material of only subsidiary or peripheral relevance to an identification of the nature of the conflict or benefit.

363 It is convenient to address first the sufficiency for informed consent to the disclosure that Count and Centenary made of the receipt of Commissions from product providers of products, including the providers of the Applicant's Products, without disclosing the quantum of those Commissions.

364 In *Short v Crawley (No 30)* [2007] NSWSC 1322, White J stated at [690]-[692] that in order to establish fully informed consent a director taking a commission on a contract must "disclose not only the nature of the commission but its amount" and "the obligation of disclosure required disclosure of the amounts charged from time to time". His Honour cited the decisions of the House of Lords in ***Imperial Mercantile*** *Credit Association (Liquidators) v Coleman* (1873) LR 6 HL 189 at 200 and 202 and the Judicial Committee of the Privy Council in ***Gray*** *v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 14, in support of these propositions. The passages that his Honour cited in *Imperial Mercantile* and *Gray*, however, do not state and otherwise provide only limited support for any general statement of principle to the effect that in order to establish fully informed consent a fiduciary must disclose the quantum of any commission they have received or expect to receive in the future.

365 In *Imperial Mercantile*, the only disclosure made by the director fiduciary was that he had an interest in a transaction. Lord Chelmsford stated at 200 that a requirement on a director to "disclose *his* interest" imposed an obligation on the director to declare the "nature of that interest", in that case that he would receive "a commission of 3 ½ per cent. without any risk" whereas the other directors would take on the "whole risk" of placing the debentures on the association for a commission of 1.5%. Lord Chelmsford rejected a contention at 201-202 that because Mr Coleman and Mr Knight (the other respondent) were known to be stockbrokers, it

was sufficient for them to disclose that they had an interest in the transaction. His Lordship at 202 rejected the contention because commissions payable to brokers varied considerably depending on the character of each transaction and because Mr Coleman himself had given evidence in an affidavit that the placement of debentures in question:

> … amounting to £356,300, was a matter from its magnitude and character wholly beyond the ordinary business of stockbrokers, and for which there were and could be no ordinary or recognised terms of remuneration.

366 In *Gray*, after referring to Lord Chelmsford statement in *Imperial Mercantile* at 201 that a director must ensure his colleagues were "fully informed of the real state of things", Lord Radcliffe stated at 14:

> If it is material to their judgment that they should know not merely that he has an interest, but what it is and how far it goes, then he must see to it that they are informed…

367 In *FHR European Venturers Ltd LLP v Mankarious* [2011] EWHC 2308 (Ch), Simon J, after explaining that the sufficiency of disclosure is dependent on the facts of particular cases and noting that the defendant had referred to a line of cases concerning disclosure of commissions, then went on to state at [81]-[82]:

> ii) Where the principal knows the agent will receive a commission and could have discovered what the commission was, but did not take the trouble to enquire, a misapprehension as to the amount of the commission will not mean that there has been no informed consent, see for example *Great Western Insurance Co of New York v. Cunliffe* (1874) LR 9 Ch App 525 at 539 and *Baring v. Stanton* (1876) 3 Ch D 502 at 505.
>
> iii) The Court will not regard there being a lack of consent where the principal knows that commission will be paid, but wrongly assumes that it is an annual retainer rather than the 'standard and usual brokerage', see *Hindmarsh v. Brigham & Cowan Ltd* [1943] 76 Ll.LR 141 at 152r.
>
> The latter two categories illustrate a consistent approach: where the agent can show a customary usage or that the amount of the commission is standard and ascertainable on enquiry, the failure of the principal to make enquiries as to the amount of the commission is fatal to a contention that there has been insufficient disclosure. They do not assist where there is no customary usage of which the principal is deemed to have notice, or where the amount of the commission is not easily ascertainable from an available source which the principal has failed to take the trouble to discover.

368 I am satisfied that the disclosures of the Commissions in the May 2008 SOA, the Financial Services Guide and the subsequent disclosures in records of advice were sufficient to provide the Applicant with a full disclosure of all relevant circumstances and the real nature of the conflict. It was readily apparent from the receipt of the Commissions from the providers of the Applicant's Products that both Count and the Applicant's Representatives had a financial

interest in the Applicant accepting the advice and recommendations from Count to acquire or invest in the Applicant's Products and maximising the Commissions payable.

369 Further, it must follow that the disclosure of the Commissions paid by a product provider necessarily meant that the Applicant indirectly paid for the Commission. Objectively, it is implausible that any other inference could be conveyed by the disclosure of the payment of the Commissions by the providers of the Applicant's Products.

370 Moreover, there was nothing inherent in the quantum of the Commissions received for recommending the acquisition or investment in the Applicant's Products that required it to be disclosed to permit the Applicant to appreciate the extent of the conflict of interest or the nature of the benefit obtained by Count and the Applicant's Representatives. Nor more generally, was it necessary to disclose the overall quantum of Commissions received by the Applicant's Representatives to convey to the Applicant that the receipt of Commissions was "material" to their financial performance. Similarly, it was not necessary to disclose the overall quantum of Commissions and Rebates received by Count in order to convey to the Applicant that the receipt of Commissions and Rebates was "material" to its financial performance. Both propositions would be self-evident, not least because of the agreed fact the Commissions formed part of the remuneration that Count and the Applicant's Representatives received with respect to its acquisition and investment in the Applicant's Products.

371 I accept, at least as a matter of theory, that Commissions could have been fully rebated to the Applicant by the Applicant's Representatives. Such rebates, however, would make little commercial sense given the agreed basis of remuneration for acquiring or investing in the Applicant's Products was the receipt of Commissions from the product providers.

372 I do not accept that Count did not require the Applicant's Representatives to provide any service in exchange for the Commissions. The receipt of Commissions was necessarily tied to the recommendation to acquire or invest in the Applicant's Products and formed part of the remuneration that the Applicant had agreed, by reason of its acceptance of the advice to acquire or invest in the Applicant's Products. The service may have been limited to the period up to the acceptance of the advice but that does not carry with it any implication that the Applicant's Representatives did not have to provide any service in exchange for the Commissions.

373 The Applicant's reliance on Project Gecko is misplaced when the project is viewed in its proper context. Project Gecko was a project initiated by Count in or about early 2017 in which

financial data was analysed to identify Member Firms that had been with Count for five or more years and still did not meet commercial viability thresholds. Count proposed a number of options to address firms that had been identified as not being commercially viable including assisting the firm to "off board and transfer to another licensee, if appropriate". As at 31 July 2018, 25 member firms had been "off-boarded" with another two in progress for not meeting commercial viability thresholds and 60 "Accountant Authorised Representatives" had been or were in the process of being off-boarded having decided not to choose to upgrade to fully authorised representative status. By 4 December 2018, the "off-boarding" of the 27 firms had been completed.

374 In any event, I do not accept that the ability of Count to terminate Count Representatives, including the Applicant's Representatives, if they failed to meet specified revenue targets, in itself, was a matter that was required to be disclosed in order to achieve fully informed consent for receipt of the Commissions and Other Benefits. Had there been a failure or an imminent prospect of a failure by Centenary to meet its revenue targets at the time that the Applicant's Representatives recommended that the Applicant acquire or invest in the Applicant's Products, the position may have been very different but there was no such evidence of any failure or imminent prospect of failure.

375 Further, any specific connection between any failure of Count to perform to CBA's expectations and the integrity of the recommendations made by the Applicant's Representatives to the Applicant to acquire or invest in the Applicant's Products was not discernible or at best speculative.

376 I am otherwise satisfied, that the nature of the CTC Program and the financial incentives it offered to the Applicant's Representatives was disclosed in the May 2008 SOA. That disclosure relevantly included the following disclosure:

> by reaching specified CTC levels, franchisees become eligible for … higher commission splits paid by Count on some products.

377 The critical matter to be disclosed was the receipt of higher commission splits if specified thresholds were reached, not the specific amounts to be received.

I.5.5. Agreed factual and legal issues for determination

378 For the foregoing reasons with respect to breach and informed consent, I answer the parties' agreed factual and legal issues for determination with respect to those matters as follows:

21. No person who owed fiduciary obligations to the Applicant breached those obligations. If I had otherwise found that Centenary, Mr Williams and Mr Hohnen breached the fiduciary obligations that I have found each owed the Applicant with respect to its acquisition of the AMP Policy, the Applicant gave its fully informed consent to the conduct that is alleged to give rise to the breach(es) of duty.

22. Had I otherwise found that Centenary, Mr Williams and Mr Hohnen had breached the fiduciary obligations that I have found each owed to the Applicant with respect to its acquisition of the AMP Policy and the Applicant had not provided fully informed consent to those breaches, the relief to which the Applicant would have been entitled, is the amount agreed between the parties with respect to the AMP Policy of $1,529.57, comprising Commissions of $1,200.87 and pre-judgment interest of $328.70.

23. Had I otherwise found that Centenary, Mr Williams and Mr Hohnen had breached the fiduciary obligations that I have found each owed to the Applicant with respect to its acquisition of the AMP Policy and the Applicant had not provided fully informed consent to those breaches, Count would not have been liable to the Applicant for the breach of those fiduciary obligations.

J. FIDUCIARY DUTY REPRESENTATIVE CLAIMS

J.1. Overview

379 Given my conclusion that the categories of presumptive fiduciary relationships should not be extended to any relationship between a financial adviser and their clients, it is necessary to determine whether the question of whether the Count Representatives and the Group Members were in a fiduciary relationship can properly be the subject of common questions given the manner in which the Applicant has framed its case. Although the pleaded case was advanced as "some or all Group Members" the common questions proposed by the Applicant were framed as applying to "Group Members" not "some or all Group Members".

J.2. Legal principles

380 Section 33ZB of the FCA Act provides that a judgment given in a representative proceeding must describe or otherwise identify the Group Members affected by it and that it binds all such persons other than any person who has opted out of the proceedings pursuant to s 33J. The making of orders under s 33ZB gives rise to a form of "statutory estoppel": *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212; [2016] HCA 44 at [52] (French CJ, Kiefel, Keane and Nettle JJ).

381 It is important to ensure that orders made pursuant to s 33ZB provide for the making of factual findings and the resolution of legal questions which cannot be affected by different facts being found in the case of individual group members and to avoid either provisional statements of entitlement or disentitlement: ***Lloyd*** *v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; (2019) 142 ACSR 445 at [384] (Lee J) (overturned on appeal but not in relation to this issue).

382 The framing of common questions must be approached in a practical manner to ensure that as many questions of law and fact having a degree of commonality can be decided at the initial trial: *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27; (2003) ATR 81-692 at [42] (Gillard J); *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150; [2017] FCA 896 at [63] (Lee J); *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 5)* [2015] NSWSC 1771 at [15] (Beech-Jones J). A question can still be common even if the respondent can adduce different evidence in respect of each group member: *Bright v Femcare Ltd* [2002] FCAFC 243 at [28] (Lindgren J) and [126] (Kiefel J, with whom Lindgren J agreed). A question can be common even if it is not common to all Group Members and even if the question may lead to answers that are fact specific: *Moussa v Camden Council (No 5)* [2023] NSWSC 1135 at [55]-[57] and [60]-[65] (Garling J).

J.3. Existence of a fiduciary duty

J.3.1. Proposed common questions

383 The Applicant and Count advanced competing proposed common questions directed at the existence of fiduciary duties that the Applicant alleged were owed by Count and the Count Representatives to Group Members.

384 The Applicant proposes the following common question directed at the existence of a fiduciary duty:

> 1. Did Count and / or the Representatives, by reason of the distribution or provision of the Financial Services Guide (as updated from time to time) to the Group Members, owe fiduciary obligations in relation to the provision of financial advice services to those persons? (2FASOC [43], [95.2] and [95.3])

385 Count proposes the following common questions directed at the existence of a fiduciary duty:

> 1. During the Relevant Period, was a Financial Services Guide (as updated from time to time) distributed or provided to each Group Member by a Representative?
>
> 2. If the answer to question 1 is 'yes', then, did the Representative who distributed or provided a Financial Services Guide to the Group Member, by reason of so doing:

2.1 "undert[ake] to provide advice to [that] Group Member" (FASOC [43.2], and see [95.1]);

2.2 "h[o]ld themselves out [to that Group Member] as [an] expert financial advisor" (FASOC [43.3], and see [95.2)]?

3. Was each Group Member provided with financial advice during the Relevant Period by:

3.1 a Representative; or

3.2 Count?

4. If the answer to questions 2 and 3 is 'yes', then, by reason solely of the distribution or provision of the Financial Services Guide (as updated from time to time) to the Group Members during the Relevant Period, and without enquiry into any other circumstances, was each Group Member owed fiduciary obligations (in relation to the provision of financial advice to the Group Member) by (2FASOC [43], [95.2] and [95.3]):

4.1 a Representative; or

4.2 Count?

386 The critical issue raised by both formulations of the common questions is whether the receipt of the Financial Services Guide in the context of the provision of financial advice is sufficient to give rise to a fiduciary relationship between on the one hand, Count and the Count Representatives and on the other hand, all Group Members.

J.4. Submissions

J.4.1. The Applicant

387 The Applicant submits that the statements of principle referred to at [380] to [382] above were recently affirmed by the Court of Appeal of the New South Wales Supreme Court in *Nguyen v Rickhuss* [2023] NSWCA 249 at [27] (Ward P, Leeming JA and Baston AJA).

388 The Applicant also submits that a respondent in a representative proceeding bears an onus to adduce evidence that is beyond mere speculation if it seeks to demonstrate any lack of commonality and that an alleged issue is not common to all group members, citing the decision of the Full Court in ***Toyota Motor Corporation*** *Australia Limited v Williams* [2023] 296 FCR 514; [2023] FCAFC 50 at [50] (Moshinsky, Colvin and Stewart JJ).

389 Consistently with these principles, the Applicant contends that the Court can determine whether a fiduciary relationship can be determined on a common basis. It submits that in *Wingecarribee* at [1219], [1235]-[1241], Rares J found in very similar circumstances to the position in this proceeding that the questions of both whether a fiduciary duty was owed and whether fully informed consent had been provided were common issues. It submits that the Supreme Court

of New South Wales adopted a similar approach in *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2021] NSWSC 383 at [40] and [59] (Hammerschlag J).

390 It accepts that the answer to a common question should not provide a mere advisory opinion but submits that this does not prevent a common question from being drafted in general terms.

391 Moreover, the Applicant submits that the Court should reject Count's attempts to avoid the substantive common questions in this proceeding unless facts are proved for each Group Member. It submits that the "whole point" of the Pt IVA regime is to avoid the need for Group Members to have to litigate and establish the same claims as the representative applicant.

392 The Applicant submits that the Group Member definition is based on the Financial Services Guide that was a standard form document provided to all clients and it was not necessary for the Applicant to plead anything more than it has done, such as the nature of the personal advice or reliance on the personal advice. It submits that subjective criterion and causative elements should not be included, citing the statements made by Lee J in *Perera v GetSwift Ltd* (2018) 263 FCR 1; [2018] FCA 732 at [76]-[82].

393 Further, the Applicant submits that (a) actual trust and confidence is neither necessary nor determinative of the existence of whether a fiduciary duty is owed, (b) a fiduciary relationship may arise even if a Group Member did not accept the Count Representatives' recommendations on every occasion, and (c) nothing in the template contractual document for the Total Financial Care Agreement displaces the fiduciary obligations that had otherwise arisen, and (d) any limitation in the scope of a fiduciary relationship must be supported by clear evidence that the limitation was understood and accepted by the beneficiary.

394 The Applicant contends that the Court can determine whether Count and the Count Representatives owed a fiduciary duty to Group Members. It advances the following principal submissions in support of that contention.

395 *First*, the Applicant submits that the Court should have regard to the three factors identified by Delany J in *Porter* at [494]. It submits that the facts it relies upon to establish those three factors are common and identical for all Group Members, namely (a) the receipt of a copy of the Financial Services Guide containing an undertaking to act in their best interests, (b) the Count Representatives held themselves out to all Group Members as experienced financial advisers as reflected in statements made in the Financial Services Guide, and (c) the Count Representatives provided strategic advice which involved the use of financial acumen,

judgment and expertise to further the interests of Group Members. It submits that Count has not led any evidence to contradict any of these propositions.

396 *Second,* the Applicant submits that it is well established that the question of whether a duty of care can be determined on a common basis and whether a person owes another a fiduciary duty is an analogous question, citing in support the decision of McDonald J in ***Kamasaee*** *v Commonwealth of Australia & Ors (No 10) (Issues for trial ruling)* [2017] VSC 272 at [60].

397 *Third,* the Applicant submits that earlier authorities, including in particular *Wingecarribee,* have determined the question of a fiduciary relationship on a common basis. It submits that the proposition that fiduciary relationships involve a consideration of all relevant facts is not the same as, or necessarily leads to, the proposition that fiduciary duties can never be determined on a common basis. It submits that the distinction between the two propositions is more pronounced in this case because the factual matrix on which it relies is common for all Group Members. It submits that Count's contention that the Court would need to examine the advice received by each and every Group Member in order to determine whether they were owed fiduciary duties is "nonsensical and contrary to well-established law".

398 *Fourth,* the Applicant accepts that a fiduciary relationship must accommodate the terms of any contract but submits in this case that Count provided the Count Representatives with template documents, being Total Financial Care Agreements, to provide to clients in the period prior to March 2018 and thereafter known as Ongoing Service Agreements, with limited ability to alter the terms of the documents, other than to remove certain services. It submits that in the absence of any evidence adduced by Count of any material deviation in the terms of these template documents the Court can disregard Count's speculation about possible variations in these documents that might make it not possible to determine the existence of a fiduciary relationship on a common basis. It submits that this must necessarily follow given the ability to make good that speculation was peculiarly within Count's ability.

399 *Fifth,* the Applicant submits that Count's reformulation of the proposed common issue as to the existence of a fiduciary relationship appears designed to turn a useful question that could be answered by the Court into "a series of cascading points of failure". It submits that requiring affirmative answers to proof of something happening to "each Group Member" at the end of the trial is an "absurd and impractical approach".

J.4.2. Count

400 Count submits that the representative claims brought on behalf of Group Members for breaches of fiduciary duty are not capable of being determined on a common basis.

401 Count submits that the framing of common questions in this proceeding gives rise to serious difficulties for two principal reasons.

402 *First,* Count submits that most of the claims, including the fiduciary duty claims, advanced by the Applicant require close attention to the individual circumstances of Group Members and are therefore not well suited to representative proceedings. It submits that decisions in other cases as to whether particular factual and legal issues are appropriate for common questions are of limited assistance because regard must be had to the particular facts and circumstances of each case.

403 *Second,* Count submits that the exercise of framing and answering questions on a common basis in this proceeding gives rise to particular difficulties because of the "extremely broad" and "defective" definition of Group Members adopted by the Applicant. It submits that there is an "unusually high degree of diversity" within the class and a "*de minimis* degree" of commonality.

J.4.3. Consideration

404 The formulation of the proposed common questions by Count more accurately captures the existence of fiduciary duty common question sought to be raised by the Applicant in this proceeding. The Applicant seeks to propound a case that the representations made in the Financial Services Guide were sufficient to give rise to the existence of a fiduciary relationship with each Group Member, being persons to whom a copy of the Financial Services Guide had been provided and who had received financial advice from Count or a Count Representative.

405 For the following reasons I have concluded that it is not possible to determine on a common basis whether the provision of the Financial Services Guide to Group Members in the context of the provision of personal financial advice gave rise to a fiduciary duty owed by Count and the Count Representatives to all Group Members.

406 I do not accept that the determination on a common basis of the existence of a fiduciary duty can relevantly be said to be analogous to the determination on a common basis of the existence of a duty of care. The two duties are fundamentally distinct and give rise to distinct enquiries. The Applicant could not point to any authority in which the proposition that the duties are

analogous, in the context of the determination of common questions or indeed for any other purpose, has been accepted. The statements made by McDonald J in *Kamasaee* at [60] were confined to the issue of whether the breach of a duty of care could give rise to any common question of law and fact.

407 The existence and content of a fiduciary duty requires a consideration of all the relevant circumstances.

408 In *Stack*, it was alleged that a fiduciary duty was owed by AMP licensees and/or each of AMP's authorised representatives to each of the Applicants and Group Members. His Honour, Beach J, stated at [73]:

> But the respondents say that the question of whether a fiduciary duty exists in any given adviser-client relationship will depend upon the individual circumstances of that relationship. I agree. So much is clear, and indeed not disputed by the applicants. Questions going to the existence of a fiduciary duty are individual ones.

409 His Honour made the following further observations at [164]-[170] concerning the identification and the scope of fiduciary duties in a representative proceeding:

> Now there are fiduciary duties allegedly owed by the AMP licensees and separately owed by the AMP authorised representatives, for whom the AMP licensees are responsible.
>
> It may be accepted that the existence of a fiduciary relationship between an AMP licensee or AMP authorised representative and an applicant and/or group member must be informed by the nature of the relationship with the applicant or group member. Moreover, in any one year there were numerous AMP authorised representatives across the AMP licensees as I have already indicated.
>
> Further, to a large extent the determination of the existence of a fiduciary duty, the scope of that duty, as well as whether there was a breach of that duty necessitates an investigation into the circumstances of each of the group members.
>
> Further, even if a fiduciary duty is found to exist, the determination of that duty's scope will also depend on an examination of all of the facts and circumstances on a case by case basis. This would require an examination of the relationship between each of the group members and their particular AMP authorised representatives.
>
> These claims, of course, raise many individual questions. But selecting a sufficient number of sample group member claims for adjudication may be an efficient way to proceed in the first instance.
>
> As for the knowing receipt claim against AMP Life, the allegations are a derivative of the breach of fiduciary duties claims. Being such derivative claims, they also require a consideration of the circumstances of each group member with respect to the fiduciary duty allegations.
>
> Now that may be true. But that does not entail that there are not broader questions and systems that will need to be addressed.

410 For present purposes, the common question sought to be advanced by the Applicant is formulated in terms that do not seek to identify "individual questions" that could be determined on a common basis as contemplated by Beach J as a series of "sample group member claims".

411 In the present context those individual questions would likely require at least (a) an identification of the specific financial advice alleged to have been provided to a Group Member, (b) the extent to which the Group Member relied on that advice, (c) the nature and extent of the relationship between the advisers and the Group Member and (d) the particular financial acumen and experience of the Group Member.

412 The Applicant's proposed existence of fiduciary duties common question does not encompass or otherwise address any of these specific issues. Moreover, Count only accepted in the statement of agreed facts that from time to time, its Count Representatives gave personal advice to *some* Group Members in relation to *some* Relevant Products.

413 I accept, as submitted by the Applicant, that the Court should be astute to ensure that to the extent possible all common questions of law and fact should be determined in a representative proceeding and the Court should approach that task in a practical and common sense fashion.

414 The fiduciary case advanced on behalf of Group Members, unlike the case advanced by the Applicant on its own behalf, is essentially confined to the provision of the Financial Services Guide to clients. I accept that the representations made in that document included commitments to act in the best interests of clients and where a conflict of interest was identified, to act in the client's best interests. Representations in these terms are consistent with the existence of a fiduciary relationship but not determinative.

415 The submission made by the Applicant that the respondent in a representative proceeding must establish through evidence, rather than mere speculation, that there was a sound basis for the Court not to determine an issue on a common basis materially over states the conclusion reached by the Full Court in *Toyota Motor Corporation* at [50]. That proceeding was a representative proceeding directed at the supply of defective motor vehicles. It could readily be inferred that a common defect in a vehicle would be unlikely to give rise to any material bespoke issues for individual purchasers of the vehicle.

416 The claims made by the applicant on its behalf and on behalf of group members before the primary judge in *Williams v Toyota Motor Corp Australia Ltd (Initial Trial)* [2022] FCA 344 included a claim that the vehicles that had been supplied were not of "acceptable quality" and

therefore Toyota Motor Corporation had failed to comply with the consumer guarantee in s 54 of the ACL: *Toyota Motor Corporation* at [5]. Section 54 of the ACL provides for an objective test to determine whether goods are of acceptable quality by reference to whether a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard the goods to be of acceptable quality having regard to (a) the nature of the goods, (b) if relevant the price of the goods, (c) statements made about the goods or any packaging or label on the goods, (d) any representation made about the goods by the supplier or manufacturer of the goods and (e) any other relevant circumstances relating to the supply of the goods. Toyota contended before the Full Court that the primary judge had erred in finding that he could determine whether s 54 had been breached with respect to each and every group member on a common basis. Toyota submitted that the primary judge should have found that whether s 54 had been contravened in the context of the supply of a vehicle is not capable of being determined as a common question because it depended on the circumstances of supply specific to each group member: *Toyota Motor Corporation* at [32].

417 Given that the relevant inquiry for the purposes of s 54(2) is undertaken from the perspective of the hypothetical reasonable consumer, the Full Court considered that any idiosyncratic subjective understanding of the state and condition of the goods in issue or any idiosyncratic attitude to what may not be thought acceptable, is irrelevant: *Toyota Motor Corporation* at [43].

418 The Full Court then turned to consider the submission by Toyota that the primary judge was wrong to have held that it bore an onus to adduce evidence of any relevant circumstances peculiar to particular group members in order to establish a foundation for its contention that the question of acceptable quality could not be determined on a common basis: *Toyota Motor Corporation* at [49].

419 In that context, the Full Court concluded at [50]:

> As submitted on behalf of the respondents, if Toyota wished to demonstrate through evidence, as opposed to mere speculation, that there was a sound basis in fact for the Court to refrain from determining the issue on a common basis, it could and should have led relevant evidence. As identified by the primary judge (J[193]), that need not have been of the circumstances of every one of the quarter of a million supplies; evidence of materially different relevant circumstances of even one supply may have been sufficient, but not even that was done. In the absence of that, and in light of the compelling generalised evidence in support of a finding that the vehicles were not of acceptable quality (canvassed at J[15], [32]–[86], [173]–[198]), there was no error in the primary judge's approach to, and conclusion on, the question of commonality.

420 The conclusion reached by the Full Court at [50] does not stand for any general proposition that a respondent in a representative proceeding, seeking to persuade a Court to refrain from determining an issue on a common basis must adduce relevant evidence that there was a sound basis for the Court to refrain from determining that issue on a common basis. Rather given the objective nature of the inquiry in s 54(3) and what the Full Court described as "compelling generalised evidence in support of a finding that the vehicles were not of acceptable quality" the Full Court found that the primary judge had not erred in finding that liability could be determined in that proceeding on a common basis.

421 Ultimately the question will inevitably depend on the nature of the issue sought to be determined on a common basis.

422 The Applicant seeks to rely on the following statements by Rares J in *Wingecarribee* at [1240]:

> Once again, the particular circumstances of a claimant may need to be examined on the contractual or fiduciary issues. But I think that there is also utility, given Grange's apparent mode of conducting its business relations with its clients, in making determinations of law and fact based on my findings of Grange's breaches of its fiduciary obligations in ss 6.3.1 and 6.3.2. It is unlikely that Grange would have obtained fully informed consent from any claimant, since it seemed unaware of the need to do so.

423 The observations of Rares J in *Wingecarribee*, however, must be understood in their context. The relevant business relations that Grange conducted were with a limited number of clients, Shire and Municipal Councils with a common financial product, known as a synthetic collateralised debt obligation, that was promoted by Grange. Each Council had surplus funds to invest and was looking for a secure investment with a reasonable return and prior to dealing with Grange, each Council had invested surplus funds in floating rate notes with approved deposit taking institutions: *Wingecarribee* at [2]-[4]. They cannot be relied upon as establishing a general principle that common questions can and should be formulated to address alleged breaches of fiduciary duty.

424 An immediate hurdle confronting the Applicant is that the proposed common question directed at the existence of a fiduciary duty proceeds on an assumed factual premise that all Group Members received a copy of the Financial Services Guide and received personal advice from a Count Representative.

425 The Group Members, as defined, include any person who has acquired, renewed or continued to hold Relevant Products in respect of which Commissions were paid during the Relevant Period and who had received personal advice from Count Representatives at any time. Given

that (a) Count has operated its advice business since approximately 1980, (b) s 941B requiring an authorised representative to give a financial services guide to a person if it provided a financial service to that person's retail client was only inserted in the Corporations Act in 2001, shortly after its enactment and (c) the class of Group Members includes persons who received personal advice from Count at any time, it is not readily apparent that any conclusion could be reached that all Group Members were provided with a copy of the Financial Services Guide. Given these matters, it would appear likely that although most Group Members may have been provided with a copy of the Financial Services Guide, a not insignificant subset of Group Members would have received personal advice prior to 2001 to acquire a Relevant Product in respect of which Commissions continue to be paid from 21 August 2014, without receiving a Financial Services Guide.

J.5. Scope of fiduciary duty

J.5.1. Proposed common questions

426 The Applicant proposes the following common question directed at the scope of a fiduciary duty:

> 2. If the answer to question 1 is "yes", did those fiduciary obligations require Count and / or the Representatives to:
>
> (a) avoid the real or substantial possibility of conflict between the interests of the Group Members on one hand, and the interests of the Representatives and / or Count on the other; and
>
> (b) not to profit by reason of their position as a fiduciary?

427 Count proposes the following common questions directed at the scope of the fiduciary duty:

> 5. Can question 6 be answered on a common basis, without regard to individual circumstances?
>
> 6. If the answer to question 4 is "yes", did those fiduciary obligations require Count and / or the Representatives to:
>
> (a) avoid the real or substantial possibility of conflict between the interests of the Group Members on one hand, and the interests of the Representatives and / or Count on the other; and
>
> (b) not to profit by reason of their position as a fiduciary?

J.5.2. Consideration

428 ACQ 2 and RCQ 6 in effect raise the same question for determination in that the cross referenced questions, ACQ 1 and RCQ 4 are equivalent.

429 RCQ 5 is not of any real utility, given RCQ 6 only arises if I was satisfied that RCQ 4 could be answered "yes". RCQ 4 could only be answered "yes" if I was satisfied that solely by reason of the distribution of the Financial Services Guide, as updated from time to time, to Group Members during the Relevant Period and "without enquiry into any other circumstances", each Group Member was owed fiduciary obligations in relation to the provision of financial advice by Count Representatives or Count. If that was the case, it must follow, given the entirely conventional and well established manner in which the fiduciary obligations are expressed in RCQ 6 that the answer to RCQ 5 must self-evidently be "yes".

430 Moreover, as a matter of principle, Count accepted, as submitted by the Applicant that to the extent that the Court might find that Count and the Count Representatives owed fiduciary duties to Group Members, those duties comprised duties to avoid the real or substantial possibility of conflict between the interests of the Group Members on one hand, and the interests of the Count Representatives and/or Count on the other, and not to profit by reason of their position as a fiduciary.

J.6. Breach of fiduciary duty

J.6.1. Proposed common questions

431 The Applicant proposes the following common questions directed at the breach of fiduciary duty:

> 3. Did Count and / or the Representatives have a financial interest in the Group Members accepting the advice and recommendations of Count and / or the Representatives to acquire, invest in or remain in financial products on Count's Approval Product List?
>
> 4. Did Count and / or the Representatives have a financial interest in maximising the Commissions, Rebates and other benefits earned by them reason of the Group Members accepting the advice and recommendations of Count and / or the Representatives to acquire, invest in or remain in financial products on Count's Approved Product List?
>
> 5. Was it in the interests of Group Members to minimise the costs to acquire, invest in or remain in financial products?
>
> 6. Did there exist a real or substantial possibility of conflict between the interests of the Group Members on one hand, and the interests of the Representatives and / or Count on the other?
>
> 7. Did Count and / or the Representatives earn revenue and / or profits by reason of the acceptance by the Group Members of the advice and recommendations of Count and / or the Representatives to acquire, invest in or remain in financial products on Count's Approval [sic] Product List?

432 Count proposes the following common questions directed at the breach of fiduciary duty:

7. Can questions 8 to 16 be answered on a common basis, without regard to individual circumstances?

8. During the Relevant Period, was each Group Member advised to acquire, invest in, or remain in a financial product on Count's Approved Product List:

    8.1 by a Representative; or

    8.2 by Count?

9. During the Relevant Period, did each Group Member acquire, invest in, or remain in a financial product on Count's Approved Product List?

10. During the Relevant Period, did the acquisition by a Group Member of, or investment by a Group Member in, a financial product on Count's Approved Product List necessarily result in:

    10.1 the receipt of Commissions or Benefits by a Representative; or

    10.2 the receipt of Rebates, Commissions or other benefits by Count?

11. During the Relevant Period, did the decision by a Group Member to remain in a financial product on Count's Approved Product List necessarily result in:

    11.1 the receipt of Commissions or Benefits by a Representative; or

    11.2 the receipt of Rebates, Commissions or other benefits by Count?

13. Was it in the interests of Group Members to minimise the costs to acquire, invest in or remain in financial products?

14. If the answer to question 9 is 'yes', then, in respect of each Group Member:

    14.1 did the payment of any Rebates to Count by the product issuer of the financial product that the Group Member acquired, invested in or remain in increase the costs to the Group Member to acquire, invest in or remain in the financial product;

    14.2 could Commissions payable in respect of the financial product be 'dialled down', 'switched off', or rebated;

    14.3 if so, would dialling down, switching or rebating the Commissions have reduced the overall cost to the Group Member (including the cost of advice) to acquire, invest in or remain in the financial product?

15. Did there exist "an actual conflict" (FASOC [97]) between the interests of each Group Member on one hand, and:

    15.1 the interests of the Representative, of the kind pleaded in FASOC [97]; or

    15.2 the interests of Count, of the kind pleaded in FASOC [97]?

16. Having regard to the answers to questions 9 and 11 above:

    16.1 did each Group Member accept the advice referred to in question 8; and

    16.2 if so, did Count and / or the Representatives earn revenue and / or profits by reason of the acceptance by the Group Members of that advice?

J.6.2. Submissions

433 The Applicant submits that the basis on which it contends that Count and the Applicant's Representatives breached the no conflict and no profit rules applies equally to all Group Members. It submits that a Group Member's interest in acquiring cheaper financial products could not depend on their individual circumstances and nor could the interests of Count and the Count Representatives recommending commission-paying products depend on the particular circumstances of Group Members.

434 The Applicant further submits that given the relevant question is the existence of a real or substantial possibility of conflict it is unnecessary to enquire into the individual circumstances of Group Members and equally there is no need to enquire into whether each Group Member accepted the advice it received, being a question that could not obviously be answered on the evidence.

435 Count submits that (a) ACQ 3, ACQ 4 and ACQ 7 cannot be answered on a common basis once the assumptions on which those questions proceed as demonstrated by RCQ 7 to 16, (b) ACQ 5 could probably be answered on a common basis but is unlikely to be of any real utility because it concerns a matter of basic common sense and rational commercial behaviour, and (c) ACQ 6 impermissibly departs from the pleaded case in the 2FASOC at [97] that there was an "actual conflict".

J.6.3. Consideration

436 Each of ACQ 3, ACQ 4 and ACQ 7 relies on factual premises that necessarily depend on the individual circumstances of Group Members and therefore cannot be answered on a common basis.

437 As to ACQ 3, it proceeds on the assumption, as exposed by RCQ 8, that each Group Member received "advice and recommendations [from Count or a Count Representative] to acquire, invest in or remain in financial products on Count's Approved Product List". The answer to RCQ 8, and therefore in turn ACQ 3, necessarily turns on the circumstances of each Group Member, including whether a Group Member received advice that included a recommendation to acquire, invest in or remain in a financial product on the APL. As explained at [158] to [159] above, it was not uncommon for Count Representatives to recommend products that were not on the APL. Further ACQ 3 proceeds on the assumption that Group Members both received *and* accepted the advice, as exposed by RCQ 9.

438 As to ACQ 4, it proceeds on the assumption, as exposed by RCQ 10 and RCQ 11, that the decision by Group Members to "acquire, invest in or remain in financial products on Count's Approved Product List" resulted in Count or Count Representatives receiving "Commissions, Rebates and other benefits". This necessarily would depend on the individual circumstances for each Group Member including whether at the time the decision was made to "acquire, invest or remain" in the product, were Count Representatives permitted by reason of the FoFA reforms to receive Commissions because they were grandfathered or with respect to life insurance products.

439 As to ACQ 7, it proceeds on the assumption, as exposed by RCQ 9, of an "acceptance by the Group Member" of "advice and recommendations … to acquire, invest in or remain in financial products on Count's Approved Product List". This again would necessarily depend on the individual circumstances of the Group Member, including whether the Group Member was acquiring or simply remaining in a product, the state of the law at the time of the acceptance of the advice and the specific remuneration arrangements between the individual Count Representative and their Member Firm.

440 Next, I accept Count's submission that ACQ 5 is of limited utility given the generality and almost self-evident answer to a question asking whether it was in the interests of Group Members to minimise the costs to acquire, invest in or remain in financial products.

441 Finally, in my view RCQ 15, more accurately than ACQ 6, reflects the Applicant's pleaded case in the 2FASOC at [97] by its use of the language "actual conflict".

J.7. Fully informed consent

J.7.1. Proposed common questions

442 The Applicant proposes the following common question directed at fully informed consent:

> 8. If the answers to Questions 1, 2, 6 and 7 is yes, were the Representatives and / or Count required to obtain the fully informed consent of the Group Members to Count and / or the Representatives:
>
> 8.1 being in a position of conflict, as identified in answer to Question 6;
>
> 8.2 earning revenue and / or profits, in the circumstances identified in answer to Question 7.
>
> 9. Does Count have the burden of proving that fully informed consent was obtained?
>
> 10. In order to provide fully informed consent, would the Group Members needed to have known some or all of the following facts (if established on the

evidence):

10.1 that Count and / or the Representatives had a financial interest in the Group Members accepting the advice and recommendations of Count and / or the Representatives to acquire or invest in financial products on Count's Approved Product List;

10.2 that Count and / or the Representatives had a financial interest in maximising the Commissions, Rebates and other benefits earned by them reason of the Group Members accepting the advice and recommendations of Count and / or the Representatives to acquire or invest in financial products on Count's Approved Product List;

10.3 that there existed a real or substantial possibility of conflict between the interests of the Group Members on one hand, and the interests of the Representatives and / or Count on the other;

10.4 that Group Members ultimately paid, directly or indirectly, for the Commissions, Rebates and other benefits earned by Count and / or the Representatives by reason of the Group Members accepting the advice and recommendations of Count and / or the Representatives to acquire or invest in financial products on Count's Approved Product List;

10.5 Commissions could be fully rebated by the Representatives to their clients;

10.6 Count did not require the Representatives to provide any service in exchange for Commissions;

10.7 Commissions increased the costs to Group Members of the Relevant Products;

10.8 Count had a contractual entitlement to terminate from the Count authorised representative network Representatives who did not meet specified revenue targets;

10.9 Count did terminate Representatives who failed to meet specified revenue targets;

10.10 Count financially incentivised Representatives to sell products on its Approved Product List that:

(a) paid Commissions to Count and the Representatives; and

(b) paid Rebates to Count;

10.11 The CTC Program and the pre-July 2017 remuneration model provided a financial incentive for pre-July 2013 member firms to provide advice to clients which, if accepted, would earn those member firms CTC points, which may entitle them to monetary and non-monetary benefits from Count, including an increased share in advice and Commission revenue;

10.12 The post-July 2017 remuneration arrangements for all member firms provided a financial incentive for all representatives to increase their Gross Business Earnings by advising and recommending that clients acquire or invest in financial products on Count's Approved Product List;

10.13 Commissions were material to the financial performance of Representatives;

10.14 Commissions and Rebates were material to the financial performance of Count;

10.15 During the Relevant Period, Count was performing below the CBA's expectations and this increased pressure on Count to generate Commission and Rebate revenue.

11. Are the matters in question 10 established on the evidence?

12. If one or more the facts identified in answer to question 10 above were not disclosed or known to the Group Members, did Count and / or the Representatives fail to obtain the fully informed consent of the Group Members to Count and / or the Representatives:

12.1 being in a position of conflict, as identified in answer to Question 6;

12.2 earning revenue and / or profits, in the circumstances identified in answer to Question 7.

443 Count has deleted each of the common questions addressing informed consent in its draft common questions and has not proposed any alternative questions.

J.7.2. Submissions

The Applicant

444 The Applicant submits it's proposed common questions addressing informed consent are entirely consistent with the Court's orthodox approach, address matters that can be determined on a group-wide basis, and should be accepted by the Court in the absence of any alternative questions.

445 The Applicant advances the following principal submissions in support of those contentions.

446 *First*, the Applicant submits that Count bears the onus of proving fully informed consent and it is sufficient for it to plead the fiduciary relationship and the fact that Count and the Count Representatives gained a benefit in the course of that relationship without alleging the content of the defence.

447 *Second*, the Applicant submits that given Count has not pleaded any defence of informed consent in answer to the claims made on behalf of Group Members nor adduced any evidence of any informed consent by any Group Member, Count cannot now contend that the Group Members consented to or waived any breach of fiduciary duty by Count and/or the Count Representatives.

448 *Third*, the Applicant submits that ACQ 10 does not pose a hypothetical question or seek an advisory opinion. It submits that (a) in the absence of Count leading any evidence to the contrary, the Applicant's circumstances can be taken to be the same as Group Members, (b) there is no reason to conclude that fully informed consent for Group Members would require disclosure of anything less than what was necessary for the Applicant and (c) it is open to Count at individual hearings for Group Members after the initial trial to lead evidence demonstrating that facts were in fact known by Group Members, but that future possibility cannot prevent the formulation now of a common question that adopts a practical approach that seeks to determine as many questions as possible that are of utility to the resolution of the Group Members' claims.

449 *Fourth*, the Applicant submits that the following matters were common to all Group Members, needed to be known by all Group Members and the Court can infer were not in fact disclosed to any Group Member:

(a) the real or substantial possibility of conflict between the interests of the Group Members on the one hand and the interests of Count and the Count Representatives on the other hand;

(b) the "true nature" of the Commissions, in particular that Group Members will ultimately pay for the Commissions, Rebates or Other Benefits, Commissions could have been fully rebated, Commissions increased the cost of the relevant products and Count did not require Count Representatives to provide any service in exchange for Commissions;

(c) the existence of commercial imperatives and commercial pressures, including that Count could and did terminate advisers who failed to meet specified revenue targets and that Commissions were material to the financial performance of Count and the Count Representatives; and

(d) the existence of commercial incentives including that Count financially incentivised Count Representatives to sell products on its APL that paid Commissions and Rebates and Count's remuneration model and the CTC Program provided a financial incentive to recommend that clients acquire products on the APL.

450 The Applicant submits that the Court can infer that there was no disclosure of these matters to Group Members because (a) Count only pleads that it disclosed the Commissions, (b) Count denies knowing that financial advisers receiving Commissions created a conflict of interest, customers would benefit from a decision to cease retaining Commissions, and turning Commissions off would make it simpler for conflicts of interest to be managed, and (c) there

was no evidence that Count ever instructed the Count Representatives to disclose the above matters or that it ever turned its mind as to whether those matters should be disclosed.

Count

451 Count submits that the informed consent questions proposed by the Applicant cannot be answered on a common basis. It submits that there is no precise formula to determine whether fully informed consent has been given and it is a question of fact in all the circumstances, including the degree of sophistication and intelligence to whom the disclosure is required to be made.

452 Further, Count submits that the questions advanced by the Applicant are self-evidently and impermissibly hypothetical, inviting the Court to provide an advisory opinion and it would be both premature and inappropriate to make findings and determine the issue in the advance of any evidence and because the defence of informed consent by Group Members was never an issue that Count, or the Applicant (at least prior to trial) had sought to agitate at the initial trial.

453 More specifically, Count submits that (a) ACQ 8 proceeds only if, contrary to its submissions, the Court were to answer ACQ 1, 2, 6 and 7 affirmatively, (b) ACQ 9 is trite and of no utility, and that the party asserting informed consent bears the burden of establishing it has never been disputed, and (c) ACQ 10 to 12 cannot be answered on a common basis as it would turn on the particular circumstances of each Group Member, including, whether they received advice, and if so, when they received the advice, the subject matter of the advice, if the advice included a recommendation to acquire the product, whether the acquisition or investment in the product would result in the payment of a Commission or Rebate to Count or the Count Representatives, and the nature of any such Commission or Rebate.

J.7.3. Consideration

454 Assuming that I had otherwise concluded that the Group Members were owed fiduciary duties by the Count Representatives and that those fiduciary duties had been breached, the manner in which the Applicant has framed both its fiduciary claims on behalf of Group Members and the common questions that it proposes, would have precluded any determination in this proceeding of whether Group Members had provided informed consent.

455 *First*, the question of whether a Group Member, may have provided informed consent to a breach of fiduciary duty necessarily depends on the level of financial sophistication and intelligence of the client. Moreover, it would also necessarily be informed by the nature of the

relationship that the client might have had with their Count Representative and the nature and extent of any Commissions, Rebates or Other Benefits that Count or their Count Representative may have received from any financial product that the Group Member might have invested in or acquired pursuant to the advice that they had received from the Count Representative.

456 *Second*, the issue of whether Group Members had provided informed consent was not the subject of any pleading or evidence. In those circumstances it would be procedurally unfair, given the manner in which the issues had been framed for determination at the initial trial, for the Court now to seek to answer common questions first provided to the Court on 1 March 2024, on the eve of the initial trial, and subsequently revised on 19 March 2024, directed at the issue of informed consent from Group Members. Unlike many representative proceedings this was not a proceeding in which the parties had agreed common issues in advance of the initial trial. The generality of the definition of Group Member employed by the Applicant, which on one estimate may capture as many as 70,000 clients, plainly made the determination of informed consent impractical at the initial trial. Moreover, I also accept Count's submission that it would be procedurally unfair in these circumstances to deny to Count, as submitted by the Applicant, the opportunity to raise informed consent of Group Members when issues specific to Group Members might subsequently be determined.

457 *Third*, and in any event, many of the matters for disclosure included in ACQ 10 are expressed at such a degree of generality that they could be expected to be largely self-evident to many if not most Group Members. For example, given the disclosure in the Financial Services Guide that the Count Representatives would receive Commissions from the providers of the Relevant Products acquired or invested in by Group Members, the Count Representatives plainly had an interest in Group Members acquiring the Relevant Products (ACQ 10.1), equally plainly had a financial interest in maximising Commissions and any Other Benefits referrable to the acquisition of the Relevant Products (ACQ 10.2) and Group Members plainly ultimately "paid for" the Commissions, Rebates and Other Benefits, in an economic sense, because the providers of the Relevant Products were paying commissions to the Count Representatives (ACQ 10.4) and thereby the cost of the Relevant Products was increased (ACQ 10.7), the Commissions were material to the financial performance of the Count Representatives (ACQ 10.13) and Commissions were material to the financial performance of Count (ACQ 10.14).

458 Equally likely to be self-evident or at least unsurprising and not material to many Group Members, unless their Count Representative was at risk of not meeting specified revenue

targets, was any contractual entitlement that Count may have possessed to terminate Count Representatives who had failed to meet specified revenue targets (ACQ 10.8) or that Count had terminated Count Representatives that failed to meet specified revenue targets (ACQ 10.9). The ability of a financial services licensee to terminate arrangements with authorised representatives who failed to meet minimum specified revenue targets is hardly exceptional.

459 Moreover, the use of financial incentives to sell products on the APL (ACQ 10.10), the monetary and non-monetary benefits provided by Count in the CTC Program and pre-July 2017 remuneration model (ACQ 10.11), and the focus of the post-July 2017 remuneration arrangements on GBE, are equally likely to be seen as unexceptional or at least unsurprising commercial incentives and not of any material relevance to Group Members in determining whether to accept the advice given by Count Representatives in relation to Relevant Products (ACQ 10.12).

460 The critical issue to be disclosed is the receipt of financial benefits from the provider of the Relevant Products rather than internal incentive arrangements between Count and the Count Representatives designed to grow the businesses of the Count Representatives and in turn generate increased revenue for Count.

461 I address the issues arising with respect to the disclosure of the "real or substantial possibility of conflict" (ACQ 10.3) at [436] to [441] above, and the rebating of Commissions (ACQ 10.5) at [167] and [174] above.

J.8. Relief

462 Given my conclusions that neither the Applicant's Representatives nor Count breached any fiduciary duties that they owed to the Applicant, the question of relief does not arise. In the absence of specific findings that any benefit or gain received by Count or the Applicant's Representatives had been obtained by reason of their fiduciary position, it would be inherently problematic to make any determination of whether (a) the "requisite causal connection", as explained in *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* (2018) 265 CLR 1; [2018] HCA 43 at [85] (Gageler J) existed, or (b) whether the Applicant has led sufficient evidence to "discharge the evidentiary burden of causation", as explained in *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers* [2005] VSCA 113 at [71] (Warren CJ).

463 Moreover, any final determination of relief would have been premature given the Applicant submits, and I accept, that it would have had the right after the trial, had it otherwise been successful in its fiduciary claims, to elect between an account and equitable compensation.

464 I note, however, that the parties agreed that if the Applicant had succeeded on its fiduciary claims, the quantum of the relief to which it would have been entitled, by way of an account or equitable compensation, were the figures advanced by Mr Cairns in his Scenario 1 calculation with respect to each of the Applicant's Products.

K. SECTIONS 961B AND 961J CLAIMS

K.1. Overview

465 The Applicant's pleaded case is that the Applicant's Representatives contravened s 961B and s 961J of the Corporations Act:

(a) as to the advice received prior to the Relevant Period, by, primarily, Centenary continuing to receive grandfathered Commissions with respect to the Macquarie Cash Management Account (until it was closed on or about 31 July 2015) and at all times during the Relevant Period with respect to the TCP Policies; and

(b) as to the advice received during the Relevant Period, by primarily failing to disclose that Centenary was receiving, and would continue to receive, grandfathered or exempt Commissions on the Applicant's Products, and it was open to Centenary to "rebate" those Commissions to the Applicant.

466 There was always a close correlation between the Applicant's fiduciary claims and statutory claims under s 961B and s 961J. The Applicant contended in the 2FASOC at [115.6] that if the Count Representatives had complied with their statutory duties under s 961B and s 961J they would have:

> 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; …

467 As the trial progressed it became increasingly apparent that the Applicant's fiduciary claims and statutory claims under s 961B and s 961J increasingly converged.

468 The Applicant accepted in closing submissions that s 961B and s 961J permit the receipt and retention of commissions but contended for the first time, or at least clarified their contention, that the sections placed an affirmative obligation on a provider of advice to obtain the fully informed consent of the client to the receipt of those commissions.

469 In order to address these contentions it is necessary to explain the context in which s 961B and s 961J were introduced and the statutory scheme within which they are located.

470 The Applicant also contends that by reason of s 917B and s 917E of the Corporations Act, Count was directly responsible during the Relevant Period for any conduct of the Applicant's Representatives and therefore, independently of any contravention of s 961L, the Applicant's Representatives contraventions of s 961B and s 961J constituted conduct for which Count was responsible. For the reasons I explain above at [262] to [276], this claim is untenable. Both s 961B and s 961J fall within Pt 7.7A of the Corporations Act. Section 769B(7) expressly provides that nothing in s 769B, or any other law, including the common law, has the effect for the purpose of a provision of Pt 7.7 or Pt 7.7A, of making conduct of an authorised representative of a financial services licensee to be conduct of a financial services licensee. Further, such a proposition would be antithetical to the careful delineation of liability in Pt 7.7A for an authorised representative of a financial services licensee, including in s 961B and s 961J, and for the financial services licensee itself in s 961L.

471 I turn now to consider the statutory scheme within which s 961B and s 961J are located.

K.2. Statutory Scheme

472 The FoFA reforms were implemented by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) (**First FoFA Act**) and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) (**Second FoFA Act**) in response to the 2009 Inquiry into Financial Products and Services in Australia by the Parliamentary Joint Committee on Corporations and Financial Services.

473 The First FoFA Act introduced a requirement for providers of financial advice to obtain client agreement to ongoing advice fees, enhanced disclosure of fees and services associated with ongoing fees, and increased regulatory powers in relation to ASIC's oversight of the financial services industry.

474 The Second FoFA Act introduced, relevantly, the best interests duty (s 961 to s 961F), the conflict priority rule (s 961J), an obligation on licensees to take reasonable steps to ensure their representatives comply with ss 961B and s 961J (s 961L), and a partial, qualified ban on conflicted remuneration (s 963 to s 963P).

475 The underlying objective of the FoFA reforms, as noted in the revised explanatory memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth) (**Revised Explanatory Memorandum**), was to:

> … improve the quality of financial advice while building trust and confidence in the financial advice industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest.

476 Prior to the introduction of the FoFA reforms, individuals involved in the provision of personal advice to retail clients could receive remuneration from parties other than the client, most commonly by way of commission paid by a product provider. It is an agreed fact in this proceeding that Commissions formed part of the way in which financial advisers, including Count Representatives, were remunerated for the provision of personal advice.

477 Relevantly, the Second FoFA Act introduced a partial ban on certain commissions and benefits: Div 4, s 963 to s 963P. This was subject to s 1528 of the Corporations Act, which provided at the relevant time:

> **1528 Application of ban on conflicted remuneration**
>
> (1) Subject to subsections (2) and (3), Division 4 of Part 7.7A, as inserted by item 24 of Schedule 1 to the amending Act, does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee, if:
>
> (a) the benefit is given under an arrangement entered into before the application day; and
>
> (b) the benefit is not given by a platform operator.
>
> (2) The regulations may prescribe circumstances in which that Division applies, or does not apply, to a benefit given to a financial services licensee or a representative of a financial services licensee.
>
> …
>
> (4) In this section: application day:
>
> (a) in relation to a financial services licensee or a person acting as a representative of a financial services licensee, means:
>
> (i) if the financial services licensee has lodged notice with ASIC in accordance with subsection 967(1) that the obligations and prohibitions imposed under Part 7.7A are to apply to the licensee and persons acting as representatives of the licensee on and from a day specified in the notice—the day specified in the notice; or
>
> (ii) in any other case—1 July 2013; and
>
> (b) in relation to any other person who would be subject to an obligation or prohibition under Division 4 of Part 7.7A if it applied, means:

(i) if a notice has been lodged with ASIC in accordance with subsection 967(3) that the obligations and prohibitions imposed under Part 7.7A are to apply to the person on and from a day specified in the notice—the day specified in the notice; or

(ii) in any other case—1 July 2013.

478 As a result, the partial ban does not apply to commissions and benefits given to financial advisers pursuant to an arrangement entered into before 1 July 2013, such commissions and benefits being "grandfathered conflicted remuneration". It also did not apply to certain life risk insurance products, with certain exceptions.

479 The Second FoFA Act also introduced, relevantly:

(a) a 'best interests duty' pursuant to s 961B of the Corporations Act, which, for the first time, imposed a statutory duty directly on the provider of advice, requiring financial advisers providing personal advice to retail clients to act in the best interests of the client in relation to the advice;

(b) a 'conflicts priority rule' pursuant to s 961J of the Corporations Act, which required financial advisers providing personal advice to retail clients to give priority to the client's interests when giving the advice, where the financial adviser knows, or reasonably ought to know, that there is a conflict of interest; and

(c) an obligation pursuant to s 961L on financial services licensees to take reasonable steps to ensure that representatives of the licensees comply with, relevantly, s 961B and s 961J.

480 Section 961B(1) and (2) of the Corporations Act relevantly provides:

(1) The provider must act in the best interests of the client in relation to the advice.

(2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:

(a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

(b) identified:

(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and

(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the ***client's relevant circumstances***);

(c) where it was reasonably apparent that information relating to the

client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;

(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;

(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and

(ii) assessed the information gathered in the investigation;

(f) based all judgements in advising the client on the client's relevant circumstances;

(g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

481 The expressions "reasonably apparent" and "reasonable investigation" are defined in s 961C and s 961D respectively and the expression "what would reasonably be regarded as in the best interests of the client" is defined in s 961E.

482 Section 961E provides:

> It would reasonably be regarded as in the best interests of the client to take a step, if a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, exercising care and objectively assessing the client's relevant circumstances, would regard it as in the best interests of the client, given the client's relevant circumstances, to take that step.

483 In *Australian Securities and Investments Commission v NSG Services Pty Ltd* (2017) 122 ACSR 47; [2017] FCA 345, Moshinsky J provides at [14]-[31] a useful summary of the FoFA reforms, the introduction of Part 7.7A and in particular s 961B, which summary I respectfully adopt. In particular, his Honour noted at [19]:

> In summary form, for a provider to obtain the benefit of [s 961B(2)], it must prove that it has done each of the following:
>
> (a) identified the objectives, financial situation and needs of the client, as

disclosed to the adviser through the client's instructions;

(b) identified the reason for the client seeking financial advice, and the client's relevant circumstances;

(c) made reasonable inquiries to obtain complete and accurate information where it was "reasonably apparent" that information about the client's relevant circumstances was incomplete or inaccurate (see s 961C, which defines what is "reasonably apparent");

(d) declined to provide advice in the event that the adviser did not have the relevant expertise;

(e) conducted a "reasonable investigation" into the financial products that might meet the needs and objectives of the client, and assessed the information gathered in the investigation (see s 961D, which describes what is a "reasonable investigation");

(f) based all judgments in advising the client on the client's relevant circumstances; and

(g) taken any other steps that would "reasonably be regarded as being in the best interests of the client" given their circumstances. Section 961E amplifies the nature of that inquiry by stating that a matter would reasonably be regarded as in the best interests of the client if a person with a reasonable level of expertise in the subject matter of the advice sought, exercising care and objectively assessing the client's circumstances, would have regarded the step as such.

484 Section 961J(1) stipulates that a provider of financial advice must give priority to the client's interests. It relevantly provides:

(1) If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:

(a) the provider; or

(b) an associate of the provider; or

(c) a financial services licensee of whom the provider is a representative; or

(d) an associate of a financial services licensee of whom the provider is a representative; or

(e) an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee; or

(f) an associate of an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee;

the provider must give priority to the client's interests when giving the advice.

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a

banning order (see section 920A).

K.3. Submissions

K.3.1. The Applicant

485 The Applicant submits that it is in a client's best interests that it be fully informed about any conflicts of interest that an adviser might have and is in a position to give informed consent to any profit, in particular a conflicted profit and an adviser is not acting in a client's best interests if takes a conflicted profit without informed consent. The Applicant advances the following principal submissions in support of those propositions.

Section 961B

486 *First*, the Applicant submits that nothing in the text of s 961B suggests that the section is affected by the "grandfathering" provision in s 1528 of the Corporations Act. Further, it submits the text of s 1528 provides only that Div 4 of Pt 7.7A does not apply to benefits given under an arrangement entered into before 1 July 2013 and therefore s 1528 cannot have any application to s 961B and s 961J as both are within Div 2 rather than Div 4 of Pt 7.7A.

487 *Second*, the Applicant submits in answer to Count's pleading complaint with respect to informed consent that the 2FASOC makes clear, in particular at [115.6], that the requirement for fully informed consent to the receipt of any commission in order to comply with the best interests duty in s 961B was always part of the Applicant's case.

488 *Third*, the Applicant submits that s 961B prescribes "acts" in the best interests of a client, not "advice" in the best interest of a client. As such, the time for an obligation to apply is therefore the time of the "act", not the time the advice is provided. It submits that acts include both circumstances where advice was actually provided, including on a rollover, and where advice was contractually promised to be provided such as under the Total Financial Care Agreements.

489 *Fourth*, the Applicant submits that the Court must determine what it means to act in the best interests of the client, pursuant to s 961B. They submit that the language of the section "act in the best interests of the client in relation to the advice" requires the identification of the client's interests. Two such interests, as submitted by the Applicant, are an interest in receiving conflict free advice and an interest in being informed of any conflicts that might affect the advice. The Applicant submits that an adviser fails to act in the best interests of a client where they fail to give priority to those interests, namely an adviser who fails to disclose any potential conflict

of interest to a client has contravened s 961B. The Applicant also submits it is in the client's best interests that an adviser follow the guidance developed by a licensee.

490 *Fifth*, the Applicant submits that compliance with s 961B(2) requires an adviser to demonstrate that they have based all judgments in advising the client on the client's relevant circumstances, and taken any other step that would reasonably be regarded as being in the client's best interests. They submit that obtaining fully informed consent and complying with licensee guidance are such steps. The Applicant submits that such steps would also include complying with contractual obligations that an adviser owed to clients, in particular, the contractual obligations Centenary accepted in the Total Financial Care Agreements with the Applicant.

491 *Sixth*, the Applicant submits that the best interests duty acts as an extension of the fiduciary obligation of the provider to "act" in equitable faithfulness in the process of giving advice.

492 *Seventh*, the Applicant submits that process failures, including in relation to seeking commissions, formed the basis of findings of breach of s 961B(1) in both *Australian Securities and Investments Commission v* ***Wealth & Risk Management*** *Pty Ltd (No 2)* [2018] FCA 59; (2018) 124 ACSR 351 (Moshinsky J) and *Australian Securities and Investments Commission v* ***Financial Circle*** *Pty Ltd (No 2)* [2018] FCA 1644; (2018) 131 ACSR 484 at [45]-[46] and [131] (O'Callaghan J).

Section 961J

493 The Applicant submits that there was an actual conflict of interest between the interests of the Applicant and the interests of Mr Williams and Count for the reasons that it had advanced in support of its fiduciary claims.

494 The Applicant submits that the knowledge requirement in s 961J encompasses both an objective and subjective standard by reason of the phrase "ought reasonably to know": *R v Rivkin* (2004) 59 NSWLR 284; [2004] NSWCCA 7 at [94] (Mason P, Wood CJ at CL and Sully J). It submits that a reasonable person would see a conflict in the taking of Commissions, particularly when combined with "Count's other conflicted practices".

495 The Applicant submits that the obligations imposed by s 961J may overlap with the duties imposed by s 961B but each obligation prescribes a distinct statutory norm of conduct designed to protect clients.

496 The Applicant submits that on and from 1 January 2020, the FASEA Code of Ethics became mandatory by operation of s 921E of the Corporations Act. The FASEA Code of Ethics establishes 12 ethical standards for financial advisers to meet, including Standard 7 which required advisers to obtain informed consent to any benefits received. It submits that Standard 7's obligation to obtain informed consent was merely a reflection of the existing duties an adviser owes.

K.3.2. Count

497 Count submits that the case advanced by the Applicant in closing submissions is a substantial departure from its pleaded case. Count submits that the Applicant now advances a case "primarily, that s 961B permits the receipt and retention of commissions, but places an affirmative obligation upon a provider of advice to obtain fully informed consent of the client to the receipt of such commissions" and that it has abandoned its previous contentions that the receipt of grandfathered commissions or the giving of advice that will result in continued receipt of such commissions is *per se* prohibited by s 961B and s 961J.

498 Count submits that the s 961B and s 961J case directed at advice provided prior to the Relevant Period must fail because properly construed those provisions (a) do not apply to advice given prior to the introduction of the FoFA reforms, (b) apply only to the process of providing or giving advice, not the act of receiving and retaining commissions following the provision or giving of advice, and (c) in any event, do not *necessarily* prohibit the receipt of "grandfathered" or "exempt" commissions. Moreover, Count submits that any claims arising out of advice given prior to the Relevant Period are time-barred.

499 Count submits that the s 961B and s 961J cases directed at advice given during the Relevant Period must fail for the following reasons.

500 *First*, the Relevant Period Advice is impugned only on the basis of alleged inadequacies in the *content* of the advice, primarily inadequate disclosures, but neither s 961B nor s 961J is concerned with the adequacy of disclosures made in connection with advice given to the client. Count submits that s 961B is concerned with the *process* of providing advice and therefore has no relevant application once the advice has been provided. Moreover, Count submits that it can comfortably be concluded given the counterfactual advanced by the Applicant that it would have acquired the same products, that the advice *process* did not miscarry.

501 Count submits that s 961J is concerned with prioritising the client's interests when giving advice, where a conflict might arise. It submits that an adviser who prioritises a client's interest where a conflict arises complies with s 961J, irrespectively of whether they disclose the existence of the conflict to the client.

502 *Second*, Count submits that the Applicant has failed to establish that any advice was given during the Relevant Period to "renew" or "hold" the Applicant's Products acquired by the Applicant prior to the Relevant Period or to "continue to pay commissions" in respect of those products. The advice provided to acquire the Macquarie Cash Management Account, Roslyn TCP Policy and the Neal TCP Policy was given not only prior to the Relevant Period, but also prior to the introduction of the FoFA reforms, including s 961B and s 961J.

503 *Third*, Count submits that the advice process followed by Centenary for the AMP Policy as reflected in the March 2018 SOA and surrounding documentation was unimpeached. It submits that the March 2018 SOA and surrounding documentation made plain that the Applicant was advised of (a) the fact that Commissions would be received by Centenary and Count in relation to the AMP Policy, (b) the amount of those commissions, (c) the existence of the CTC Program and the CTC Benefits that Centenary received from the program, (d) the fact an adviser could "rebate" commissions to the Applicant, and (e) the fact that Count received volume-based rebates from some product providers.

K.4. Consideration

K.4.1. Grandfathering provisions

504 The Revised Explanatory Memorandum made clear at [3.79] that it was not the intention of the amendments to prohibit advisers from receiving trail commissions on contracts entered into prior to the introduction of the FoFA reforms, in the following terms:

> The option is likely to drive structural reform in the industry. It has implications for the way in which products are distributed and businesses are structured. It is a new model for the industry where fees paid for a product must be transparently distinct from the fees paid for advice. This will alter the financial services industry over the long term. However, the grandfathering of existing contracts means that changes to the industry will be more gradual and will occur over time. The grandfathering of existing contracts means that existing fee arrangements (prior to the commencement of the ban) can continue. For example, this means where a person is already invested in a product (prior to the ban) and the adviser is remunerated by commissions; the product provider can continue to pay the adviser the ongoing trail commission and the adviser can continue to receive it.

505 I accept that textually the grandfathering provisions in s 1528 do not expressly apply to s 961B and s 961J, as both sections are in Div 2, not Div 4, of Pt 7.7A. The sections must, however, be construed in their statutory context and the very clear intention of the legislature expressed in the Revised Explanatory Memorandum at [3.79]. The prohibition on conflicted remuneration was introduced into the Corporations Act in Div 4 of Pt 7.7A. It was therefore necessary, given that legislative intention, to preserve the receipt of conflicted remuneration by financial service licensees and their authorised representatives given under arrangements entered into prior to the application day (that is, 1 July 2013), by including a provision in s 1528 that Div 4 only applies to conflicted remuneration received on or after the application day. Given Div 2 of Pt 7.7A was introduced as part of the same legislative reforms that included Div 4 of Pt 7.7A, it would not be consistent with harmonious principles of statutory construction to construe s 961B or s 961J as including any implied or express prohibition on grandfathered conflicted remuneration. That is, having regard to the text, context and purpose of s 961B it would make no sense to construe the phrase "the best interests of the client" as extending to a prohibition on a provider receiving grandfathered conflicted remuneration. Equally, it would make no sense, having regard to the text, context and purpose of s 961J to construe the language of a conflict between the interests of a client and the interests of a provider or financial services licensee as encompassing the receipt by the provider or the financial services licensee receiving grandfathered conflicted remuneration.

K.4.2. Informed consent pleading issue

506 The necessity for informed consent to satisfy the best interest obligations in s 961B and s 961J if commissions were received by a financial adviser was not pleaded in the 2FASOC.

507 The Applicant variously alleged in the 2FASOC that the Count Representatives contravened s 961B and s 961J, *inter alia*, because (a) a reasonably competent adviser would have complied with licensee standards issued by the relevant licensee in relation to the payment of commissions and other benefits and the Count Representative failed to comply with the Count Licensee Standards (at [89.5] and [101.6]), and (b) a reasonably competent financial adviser would have complied with all legislative and professional obligations, including the FPA Code of Professional Practice and the FASEA Code of Ethics (at [89.3]). I accept that each of the Count Licensee Standards, the FPA Code of Professional Practice and the FASEA Code of Ethics included informed consent obligations but there was no explicit reference to that requirement in the 2FASOC.

508 More significantly the Applicant's contentions advanced in the 2FASOC at [115.3] and [115.6] are inconsistent with any obligation to obtain informed consent. In those paragraphs, the Applicant contends that in order to comply with their statutory duties under s 961B and s 961J, the Applicant's Representatives were required to disclose to the Applicant that there was a conflict by reason of the payment of Commissions, that their advice was or could be expected to be influenced by that payment and to identify and act in accordance their general law fiduciary duty by not accepting Commissions in circumstances of a conflict of interest. The Applicant was alleging the receipt of Commissions gave rise to an irreconcilable conflict that precluded their receipt and would contravene s 961B and s 961J, not that the receipt could be cured by informed consent.

509 I am satisfied, however, that the informed consent qualification advanced by the Applicant in closing submissions does not give rise to any material prejudice to Count and could reasonably be characterised as incidental to the Applicant's attempt to inject obligations with a fiduciary character into s 961B and s 961J. Moreover, Count had always contended the issue of informed consent in response to the Applicant's fiduciary claims.

510 Further, the contention that informed consent requirements are imposed by s 961B and s 961J only serves to highlight the extent to which the Applicant has sought to treat equitable and statutory obligations as synonymous. I do not accept that equitable fiduciary obligations not to profit by reason of being a fiduciary, without informed consent, and to avoid conflicts, can be regarded as equivalent to statutory duties to act in a client's best interests when providing advice and to give priority to a client's interests when giving advice. General statements in the explanatory material that the statutory best interests and priority obligations are "fiduciary like" are not sufficient to collapse the fundamentally different nature of the obligations.

K.4.3. Section 961B

511 The obligation imposed on an adviser pursuant to s 961B(1) must be construed textually, consistently with its relevant context and informed by the legislative purpose for its introduction. Section 961E is of limited assistance in determining what is in the "best interests" of the client, other than to make plain it is an objective test applied to a client's relevant circumstances.

512 Textually, the obligation to "act in the best interests" of a client is qualified by the words "in relation to the advice". The breadth to be given to the words "in relation" is necessarily governed by the statutory context and legislative purpose. The advice, contextually, is a

reference to a recommendation made by an adviser to a client generally leading to the acquisition, retention or disposal of a financial product.

513 Section 961B might be expressed in broad terms but it must be construed in its statutory context. That statutory context includes specific provisions imposing disclosure obligations on an adviser. These provisions include requirements for authorised representatives to provide (a) a statement of advice (s 946A and s 947C), (b) a warning to a client in the statement of advice if the resulting advice is based on incomplete or inaccurate information relating to the client's relevant personal circumstances (s 961H), and (c) specific enumerated information that must be disclosed prior to obtaining a client's written consent to ongoing fee arrangements (s 962G).

514 As such, I accept that the focus of s 961B is on the process of giving advice, rather than the receipt of conflicted remuneration. This focus is emphasised in the Revised Explanatory Memorandum. The following statements in the memorandum are instructive.

515 The principle underlying the best interests obligation in s 961B is described in the following terms:

> The principle guiding the application of the best interests obligation is that meeting the objectives, financial situation, and needs of the client must be the paramount consideration when going through the process of providing advice.
>
> …
>
> These steps recognise that the requirement to act in a client's best interest is intended to be about the process of providing advice reflecting the notion that good processes will improve the quality of the advice that is provided.

516 Next, the Revised Explanatory Memorandum at [1.24] stated that issues arising when advisers were faced with a conflict of interest "are dealt with under the obligation to give priority in section 961J".

517 Then the Revised Explanatory Memorandum provided the following explanation of the intersection between an adviser's remuneration, including the receipt of commissions, and the best interests duties at [1.46] and [1.47]:

> It is important to note there is nothing in the best interest duty that should be interpreted as prohibiting a provider from charging the client for the services that have been performed by the provider nor should the best interest duty be interpreted as mandating or prescribing how much the provider can charge the client. The cost of financial advice services is ultimately determined by competitive market forces.
>
> Further, there is nothing in the best interest obligation that necessarily prohibits a provider from receiving remuneration other than from the client (for example, a commission from an insurance provider). However, a provider in receipt of this

> remuneration must be able to demonstrate that it is complying with the steps above and is giving paramount consideration to the objectives, financial situation and needs of the client. This Bill also imposes some restrictions on remuneration received by a provider under the new Division 4 of Part 7.7A (see Chapter 2).

518 Finally, the distinction between the process of giving advice in s 961B and the appropriateness of the advice in s 961G was explained in the Revised Explanatory Memorandum at [1.56]-[1.57]:

> The Bill repeals existing section 945A of the Corporations Act *[Schedule 1, item 6]* and introduces provisions dealing with appropriate advice that take account of the best interest obligations. *[Schedule 1,item 23,Division 2, section 961G]*
>
> In contrast with existing section 945A, the provision does not contain the process-related elements in paragraphs 945A(1)(a) and (b) that have now been incorporated into the steps of the best interest obligation. This has been done to avoid overlap between the provider's best interest obligations and the obligation to give appropriate advice. Incorporating these process elements into the best interest obligation is not intended to lessen the standard of conduct expected of providers. Providers are still expected to follow a 'know your client' and 'know your product' process in providing advice as is currently required by paragraphs 945A(1)(a) and (b). The steps required by the best interests obligations are more expansive than previously required by existing paragraphs 945A(1)(a) and (b) and would be expected to raise the standard of conduct of advisers.

519 The proposition that the obligations imposed on a provider of financial advice pursuant to s 961B are directed at the *process* of providing the advice is supported by observations made by Jagot J in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170; [2019] FCAFC 187 at [295]-[301]:

> [295] As ASIC pointed out, the Replacement Explanatory Memorandum *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth) states in [1.23] that:
>
> > There are steps that providers may prove they have taken to demonstrate that they have acted in the best interests of the client. These steps recognise that the requirement to act in a client's best interests is intended to be about the process of providing advice, reflecting the notion that good processes will improve the quality of the advice provided. The provision is not about justifying the quality of the advice by retrospective testing against financial outcomes.
>
> …
>
> [300] In these circumstances, ASIC said that there has been no reversal of the onus of proof. ASIC has established to the requisite standard the factual matters which establish the contraventions of s 961B(1) of the Corporations Act. Westpac's submissions, ASIC said, are directed to the separate question of the loss which the customers may have suffered by reason of the contraventions.
>
> [301] I accept ASIC's submissions. To discharge the duty in s 961B(1) the provider must have as its purpose or object acting in the best interests of the client. The provider can effectively prove that their purpose or object was to act in the best

> interests of the client by doing each of the matters in s 961B(2), each of which is essentially procedural. As the Explanatory Memorandum explains the fact of harm is not the criterion against which performance of this duty is measured. Given the unchallenged facts as found by the primary judge, it is apparent that Westpac was not acting in the best interests of the customers. It was acting in its own interests in circumstances where it would be merely fortuitous if the rollover would also be in the customer's best interests. This is sufficient to establish a contravention of s 961(B)(1) of the Corporations Act.

520 Further, contrary to the Applicant's submissions, no findings were made in *Financial Circle* at [45]-[46] or [131] that the process failures forming the basis of findings of a breach of s 961B(1) included seeking commissions. Nor did any underlying findings with respect to the payment of commissions in *Wealth & Risk Management* provide any substantive support for the s 961B case advanced by the Applicant. In that case, the relevant underlying process failures as explained at [47]-[48] included a failure to disclose on a website and in online advertising material that a cash offer to clients was in truth an offer to rebate to the client part of commissions paid to a financial services licensee by a product provider on insurance purchased by the client.

521 Further, I do not accept that s 961B has any relevant operation after advice has been given, for example, to acquire a particular financial product. It is necessary to construe the apparent breadth of the phrase "in relation to the advice" in s 961B(1) and the "safe harbour" provisions in s 961B(2) together.

522 The safe harbour provisions in s 961B(2) are directed at the time period leading up to the provision of the advice. Subparagraphs (a) and (b) of s 961B(2) require the adviser to have identified the objectives, financial situation and needs of a client and the subject matter of the advice sought by the client. Next, subparagraph (c) requires an adviser to have obtained further information if the information as to the client's circumstances was incomplete or inaccurate and subparagraph (d) directs the adviser not to have provided the advice if the adviser had not been satisfied they had the requisite expertise to provide the advice that was sought. Then, subparagraph (e) stipulates what an adviser must have been satisfied of before recommending the acquisition of a financial product and subparagraph (f) requires the adviser to have based all judgments on the client's relevant circumstances. Finally, and significantly, subparagraph (g) requires the adviser to have taken any other step "at the time that the advice is provided" that would be reasonably regarded as in the best interests of the client.

523 Contrary to the submission advanced by the Applicant, subparagraph (g) of s 961B cannot be construed as providing that if a step is taken after the provision of advice, that the

reasonableness of that advice is assessed by reference to what were the best interests of the client at the time that the advice was provided. Subparagraph (g) is in the following terms:

> taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

524 Textually, the words "would reasonably be regarded" anchors the relevant inquiry to the time that the advice is provided. The construction propounded by the Applicant, in effect, rewrites the provision to read "at the time the advice *was provided*, would reasonably *have been* regarded as being in the best interests of the client".

525 It necessarily follows that the Applicant's submission that s 961B imposes an obligation on an adviser to comply with its contractual obligations is misconceived. The section is directed at steps taken in the process of the provision of the advice, not at complying with any contractual obligations after the advice has been provided and acted upon to acquire, retain or dispose of a financial product.

526 Moreover, I do not accept the contention advanced by the Applicant that the relevant "acts" for the purposes of s 961B relevantly extend to failures to comply with contractual obligations to provide advice, such as obligations assumed by the Applicant's Representatives under the Total Financial Care Agreements to provide ongoing advice to the Applicant during the Relevant Period. Failures to comply with those obligations may well have given rise to claims for breach of contract but that does not carry with it in any necessary implication that such contractual contraventions would also give rise to contraventions of s 961B.

527 As I have concluded at [362] to [377] above, that the Applicant relevantly provided its informed consent to the alleged breaches of fiduciary duty in connection with the receipt of the Commissions and Other Benefits, it is not strictly necessary to determine whether s 961B imposes any obligation on an adviser to obtain the fully informed consent of a client to a conflict of interest. The informed consent obligation sought to be deployed by the Applicant for its s 961B case was not materially different to the requirement for informed consent with respect to its fiduciary claims.

528 Nevertheless, in the event that I am mistaken in either of these conclusions, I confirm that I do not accept that s 961B imposes any obligation on an adviser to obtain the fully informed consent of a client to a conflict of interest. The contention advanced by the Applicant that such an obligation is imposed on an adviser impermissibly elides the obligation imposed under the

general law on a fiduciary to obtain the informed consent of a beneficiary to the receipt of a benefit and the statutory obligations imposed on an adviser to act in the best interests of a client in relation to the process of giving advice.

529 Nor do I accept the Applicant's contention that s 961B imposes a positive obligation on a provider of financial services or advice to disclose any potential conflict of interest. Disclosures of conflicts or potential conflicts of interest are matters relevant to fiduciary obligations, specifically the question of whether the beneficiary has provided informed consent to the receipt of the profit or benefit. An act that would otherwise give rise to a contravention of s 961B cannot be remedied by the provision of informed consent. A client cannot relevantly give informed consent to a failure by a provider to act in the client's best interests in relation to the provision of advice. It is a contravention of a statutory obligation not an equitable obligation owed by a fiduciary to a beneficiary.

530 For the foregoing reasons, I do not accept that the Applicant's Representatives contravened s 961B, on its proper construction, by not disclosing any potential conflict between their interests and the interests of the Applicant, failing to rebate Commissions referable to the Applicant's Products or agreeing to a provider of the Applicant's Products dialling down the Commissions.

K.4.3. Section 961J

531 Textually the statutory mandate imposed by s 961J on a provider of financial advice is to give priority to the interests of the client in circumstances where the provider knows, or reasonably ought to know, of a conflict of interest falling within those enumerated in s 961J(1)(a) to (f). It does not impose any prohibition on an adviser providing advice where there is such a conflict of interest.

532 I do not accept that Mr Williams knew or ought reasonably to have known that the receipt of Commissions from the providers of the Applicant's Products gave rise to a conflict of interest. As explained at [303] to [336] above, the receipt of Commissions was disclosed to the Applicant prior to the provision of advice leading to the acquisition of each of the Applicant's Products and was thereby at least impliedly agreed to by the Applicant. Moreover, it was an agreed fact that the receipt of Commissions from product providers formed part of the way in which financial advisers, including Count Representatives were remunerated for the provision of personal advice. Further, as Mr Williams explained in cross examination, had Centenary decided to rebate Commissions it would have made a commensurate increase in the fees that it

charged to clients as its business model was based on an aggregate recovery from both Commissions and fees for service.

533 As ultimately acknowledged by the Applicant in its oral closing submissions, s 961J is directed at the time at which the advice is provided to the client. The requirement to give the client's interests priority is stated to be "when giving the advice".

534 More fundamentally, the stipulation in s 961J is that if the adviser is aware or reasonably ought be aware of a conflict of interest between their interests and the interests of their client, they must give priority to their client's interests. Textually, there is no room for or contemplation of any concept of informed consent. The mandate is simple. The advice must give priority to the client's interests. The point can be illustrated with the following two examples.

535 *First,* assume there are two insurance products, X and Y, that provide equivalent benefits to the client. Product X has an annual premium of $500 payable by the client, of which the provider of product X pays a commission of $100 to the adviser. Product Y has an annual premium of $600 but no commission is payable to the adviser by the provider of Product Y. It could not be sensibly said that the adviser could contravene s 961J if in that example it recommended to the client that they acquire Product X. Recommending an equivalent product with a lower annual premium does give priority to the client's interests, notwithstanding the commission payable to the adviser by the provider of Product X.

536 *Second,* assume there are two insurance products, A and B, that provide equivalent benefits to the client. Product A has an annual premium of $500 payable by the client, of which the provider of Product A pays a commission of $100 to the adviser. Product B has an annual premium of $500 but no commission is payable to the adviser by the provider of Product B. Again, although perhaps more finely balanced, it could not ultimately be sensibly said that the adviser could contravene s 961J if in that example it recommended to the client that they acquire Product A. Recommending an equivalent product with the same annual premium does not have the practical effect of failing to give priority to the client's interests, irrespectively of the receipt by the adviser of a commission and any issue of fully informed consent.

K.5. Relief

537 The entitlement to recover damages under s 961M of the Corporations Act for a contravention of s 961B or s 961J is relevantly engaged if an applicant can demonstrate that it has suffered loss or damage "because of" the contravention: s 961M(1).

538 Count submits that even if the Applicant had established a contravention of either s 961B or s 961J, the claim would fail for want of proof of causation and loss.

539 The Applicant's primary theory of causation is that if the impugned duties had been complied with, the Applicant would have requested and obtained a rebate of the Commissions referrable to the Applicant's Products, and the Applicant would therefore be in a better financial position. The Applicant also advances an alternative theory of causation that had the impugned duties been complied with, the Commissions would have been "dialled down" and the premiums would have been reduced.

540 I do not accept the Applicant's primary theory of causation. It fails to recognise the manner in which Centenary had structured its remuneration. Mr Williams, as I have observed at [167] above, gave the following evidence when he was asked why he did not consider the receipt of commissions gave rise to a conflict of interest:

> The way that we structured our remuneration was that it – a total figure and if the figure we chose, in this instance, was 5500, and the commission that we received, looking in front of me here, was five or $600, then that was a combined fee for looking after the client. If we had rebated those fees, we would have increased the ongoing fee to the client from five-five to six-two or whatever was commensurate with the insurance that we would have rebated. So the client would have paid the same fee.

541 The evidence given by Mr Williams is consistent with the commercial reality of the business operated by Centenary. Commissions were not regarded as a windfall but rather an integral component of the remuneration received by Centenary for the services that it provided as reflected in [14] of the Agreed Facts. There was no mandatory legislative requirement imposed on Centenary to rebate the Commissions. I accept Mr Williams' evidence that any decision to rebate Commissions would have been offset by an adjustment to the "combined fee" that Centenary would have been looking to recover from the Applicant.

542 I accept Mr Williams' evidence that he had never raised with Mrs and Mr Hunter that any rebate of Commissions would have led to an increase in the "advisory fee" paid to Centenary. The absence of such a disclosure speaks more to the unlikelihood of any rebate of the Commissions being provided to the Applicant than casting doubt on Mr Williams' explanation of what would have been likely to have occurred had he ever decided to rebate the Commissions.

543 Nor do I accept the Applicant's alternative "dialling down" causation theory.

544 *First*, other than with respect to the AMP Policy, the evidence was at best equivocal as to whether Commissions could be dialled down by product providers. As explained at [165] above, Mr Williams gave uncontradicted evidence that once a policy had been commenced, it was not possible to dial down or switch off the Commissions, at least for the TCP Policies issued by CommInsure, and this evidence was corroborated in adviser guides issued by CommInsure There was no evidence that the Commission payable on the Macquarie Cash Management Account could be "dialled down".

545 *Second*, any "dialling down" of Commissions by a product provider could only have been undertaken if the Applicant's Representatives had consented to the dialling down. Again, there was no evidentiary basis on which I could conclude that such consent would have been forthcoming independently of a commensurate increase in, or imposition of, advice fees.

K.6. Agreed factual and legal issues for determination

546 For the foregoing reasons, I answer the parties' agreed factual and legal issues for determination with respect to the alleged contraventions of s 961B and s 961J as follows:

9. Section 961B properly construed is directed at the process by which advice is provided, not the adequacy of that advice, and requires the provider to identify and take into account the objectives, financial situation and needs of the client in formulating and providing the advice.

10. Neither Centenary nor Mr Williams failed to act in the best interests of the Applicant in relation to the Relevant Period Advice (other than the March 2018 SOA), by reason of:

    10.1 any alleged failure to comply with the best interests duty by providing defective advice, failing to dial down, switch off, rebate or otherwise turn off the Commissions, failing to reduce ongoing service fees by the amount of the Commissions, not providing any further benefits or services in exchange for the Commissions, and accepting Commissions where there was an ongoing conflict of interests, in circumstances where the Relevant Products were alleged to be more expensive because of the Commissions and were alleged not to have complied with Count's Licensees Standards;

    10.2 any alleged deficiency in the Relevant Period Advice (other than the March 2018 SOA) by reason of any alleged Advice Non-Disclosures; or

10.3 any alleged deficiencies in the records of advice and personal advice provided to the Applicant (other than with respect to the AMP Policy).

11. Neither Centenary nor Mr Hohnen failed to act in the best interests of the Applicant in relation to the advice provided in the March 2018 SOA in relation to the AMP Policy, by reason of:

11.1 any alleged failure to comply with the best interests duty by providing defective advice, failing to dial down, switch off, rebate or otherwise turn off the Commissions, failing to reduce ongoing service fees by the amount of the Commissions, not providing any further benefits or services in exchange for the Commissions, and accepting Commissions where there was an ongoing conflict of interests, in circumstances where the Relevant Products were alleged to be more expensive because of the Commissions and were alleged not to have complied with Count's Licensees Standards;

11.2 any alleged deficiency in the March 2018 SOA by reason of any alleged Advice Non-Disclosures; or

11.3 any alleged deficiencies in the advice provided to the Applicant in relation to the AMP Policy.

12. If I had otherwise found that the answer to AFL 10 or 11 was 'yes', I am not satisfied that the Applicant has established that it has suffered any loss or damage because it has not established that the Applicant's Representatives or Count would have agreed to a rebate of Commissions or consented to any dialling down of Commissions without requiring a commensurate increase in, or introduction of, advice fees.

13. If I had otherwise found that the answer to AFL 10 or AFL 11 was 'yes', and the answer to AFL 12 was also yes, the loss or damage suffered by the Applicant because of the failure(s) by the Applicant's Representatives to act in the best interests of the Applicant in relation to the advice would be an amount equal to the Commissions paid to Count and Centenary in respect of those of the Applicant's Products for which the Applicant's Representatives had failed to act in the best interests of the Applicant.

14. Section 961J properly construed requires a provider of financial advice to give priority to their client's interest in providing advice if they are aware, or ought reasonably be aware, that there is a conflict between relevantly on the one hand, the interests of their client and on the other hand, their interests or the interests of a financial services licensee of whom they are an authorised representative.

15. When giving the Relevant Period Advice, the Applicant's Representative who provided the advice did not know, and ought reasonably not to have known, that there was a conflict between the interests of the Applicant and the interests of an Applicant's Representative or Count arising from the payment of Commissions in relation to the Applicant's Products because the receipt of the Commissions was disclosed and formed part of the agreed remuneration with respect to the AMP Policy and the Relevant Period Advice otherwise did not concern the Applicant's Products.

16. If I had otherwise determined that the answer to AFL 15 was yes, when giving the Relevant Period Advice, the Applicant's Representative who provided the advice did not fail to give priority to the Applicant's interests by reason of:

    16.1 any alleged failure to comply with the conflict priority rule by providing defective advice, failing to dial down, switch off, rebate or otherwise turn off the Commissions, failing to reduce ongoing service fees by the amount of the Commissions, not providing any further benefits or services in exchange for the Commissions, accepting Commissions where there was an ongoing conflict of interests, and in circumstances where the Relevant Products were alleged to be more expensive because of the Commissions and were alleged not to have complied with Count's Licensees Standards;

    16.2 any alleged deficiency in the Relevant Period Advice by reason of any alleged Advice Non-Disclosures; or

    16.3 any alleged deficiencies in the records of advice and personal advice provided to the Applicant.

17. If I had otherwise found that the answer to AFL 16 was 'yes', I am not satisfied that the Applicant has established that it has suffered any loss or damage because it has not established that the Applicant's Representatives or Count would have agreed to a rebate of Commissions or consented to any dialling down of Commissions without requiring a commensurate increase in, or introduction of, advice fees.

18. If I had otherwise found that the answer to AFL 16 was 'yes', and the answer to AFL 17 was also yes, the loss or damage suffered by the Applicant because of the failure(s) by the Applicant's Representative(s) to give priority to the Applicant's interests when giving the advice would be an amount equal to the Commissions paid to Count and Centenary in respect of those of the Applicant's Products for which the Applicant's

Representatives had failed to give priority to the Applicant's interests when giving the advice.

L. SECTION 961L CLAIM

L.1. Overview

547 Section 961L of the Corporations Act provides that a financial services licensee "must take reasonable steps to ensure" that representatives of the licensee comply with, relevantly, s 961B and s 961J.

548 The supervision obligation in s 961L is directed at the conduct of the licensee in taking "reasonable steps", not the provision of advice by the representative, although the reasonable steps are directed at the conduct of the representative: *Australian Securities and Investments Commission v **AMP Financial Planning** Pty Ltd (No 2)* (2020) 377 ALR 55; [2020] FCA 69 at [106] (Lee J). It is not necessary to establish any underlying contravention by a representative of s 961B or s 961J to ground a contravention of s 961L, although an underlying contravention may provide persuasive evidence of a licensee's failure to take reasonable steps: *Financial Circle* at [123] (O'Callaghan J).

549 The reasonable steps necessary to ensure a representative complied with its obligation under s 961B and s 961J may extend to adjustments to commission models to remove conflicts and the provision of specific training to representatives, as Lee J contemplated in *AMP Financial Planning* at [131]:

> To adopt an example from ASIC's submissions, different reasonable steps might be required to ensure representatives comply with their obligation under s 961J to give priority to a client's interests where there is a conflict (such as by adjusting the Commission Model to remove any financial incentive for a representative to prefer his own interests) than those that might be required to ensure representatives comply with their obligation in s 961B to act in their clients' best interests (such as by implementing and enforcing a policy prohibiting Rewriting Conduct and ensuring training is provided to representatives regarding such a policy).

550 The s 961L claim ultimately advanced by the Applicant is that Count contravened s 961L by:

(a) deliberately developing and implementing a remuneration policy that entrenched the receipt of Commissions;

(b) failing to supervise how its corporate authorised representatives remunerated their financial advisers by way of Commissions, Other Benefits or both;

(c) having a QAA program that suffered from serious control gaps including a failure to test for conflicts of interest as required by the Count Licensee Standards; and

(d) failing to include in the Count Licensee Standards an explanation of the matters necessary to obtain fully informed consent from a client.

551 I address each of these contentions below after first describing Count's remuneration policies, including the CTC Program, during the Relevant Period and Centenary's remuneration arrangements.

L.2. Remuneration policies of Count

L.2.1. Count's remuneration policy as at October 2015

552 The remuneration policy that Count operated as at October 2015 differentiated between Grandfathered Member Firms that joined Count prior to the date the FoFA reforms were introduced, namely 1 July 2013 and New Member Firms who joined Count after that date. The policy provided for the following Splits of advice fees and commissions between Member Firms and Count:

(a) Grandfathered Member Firms retained all advice fees on products offered by platforms that were still available for purchase. Namely, between 95% and 100% of advice fees that were no longer available for purchase on Count's APL, depending on their ranking in the CTC Program, between 70% and 87.5% of all other initial advice fees, and 95% of all other ongoing advice fees.

(b) New Member Firms retained 85% of all advice fees.

(c) Grandfathered Member Firms received a brokerage split on Commissions of between 70% and 87.5% depending on their CTC Program ranking. The split on commissions from platform products between Grandfathered Member Firms was product specific. New Member Firms received an 85% brokerage split on all commissions.

(d) Grandfathered Member Firms, but not New Member Firms, were eligible to participate in the CTC Program.

(e) Both Grandfathered Member Firms and New Member Firms were paid LSFs of up to 0.22% or $110 per annum for each client, LAFs of 0.3% on the first $600,000 invested and then 0.1% thereafter, but only on the next $1,400,000 invested, and CFSFs of 0.22% on all funds invested in a specific Colonial First State wholesale product.

L.2.2. Count's remuneration policy from 1 July 2017

553 On 1 July 2017, Count introduced a new remuneration policy for Member Firms. The principal change from the previous policy was to adopt a more consistent policy across all Member Firms and to move away from the use of the CTC Program to calculate brokerage Split rates for Grandfathered Member Firms.

554 The brokerage Split on advice fees and commissions for all Member Firms was based on each firm's GBE over the past 12 months, recalculated at six month intervals at the end of June and December each year. Member Firms received 85% on the first $125,000 of GBE accrued by the firm and then increasing percentages in various GBE brackets that finally increased to a percentage of 97.5% for all GBE over $750,000. GBE comprised the sum of adviser service fees and commissions paid by clients of Member Firms.

555 Brokerage Splits for pre-existing active client accounts and ongoing fee arrangements were retained at the rates that applied prior to 1 July 2017.

556 Member Firms were paid LSFs and LAFs of 0.22% per annum on amounts invested up to $1,000,000 and 0.11% per annum on the next $1,000,000 invested up to a cap of $3,300 per client (where the investment was made on advice from the Member Firm) and LSFs of $110 per annum per client for investments made without advice from the Member Firm.

557 No CFSFs were paid for any new accounts from 1 July 2017. Existing accounts continued to receive CFSFs but only at 0.11% per annum, being an amount that was half the rate that applied prior to 1 July 2017.

558 Grandfathered Member Firms continued to be entitled to participate in the CTC Program, but as was the case prior to 1 July 2017, New Member Firms were not entitled to participate in the program.

559 Centenary could rebate commissions but could not dial-down or switch off commissions once a policy commenced.

L.2.3. Contribution to Count program

560 The CTC Program was introduced prior to the commencement of the Relevant Period. As explained above, only Grandfathered Member Firms were eligible to participate in the CTC Program. Its stated objective was to incentivise Grandfathered Member Firms to grow their financial planning businesses as measured by their contribution to Count's revenue. As Mr

Spurr explained in a discussion draft document he prepared in January 2016, the program was developed as a means to enable eligible Count Representatives to receive "a share of their contribution to growing Count's profitability via options" and a means of "incentivising desired adviser behaviour – whether it be to attend the annual conference or to try a new service".

561 The three principal CTC Benefits offered under the CTC Program were:

(a) waiver of Count's franchise membership fees for the following financial year;

(b) cash payments for maintaining the Member Firm's contributions to Count above thresholds, described as "scale benefits"; and

(c) cash payments for growing the Member Firm's contributions to Count, described as an "incentive rebate".

562 During the Relevant Period, eligible Member Firms were awarded what were described as "CTC points" calculated by reference to fees paid by clients, investments made and maintained by clients in specified products, commissions generated and funds placed in the administration or management of particular products. Subject to meeting specified CTC points targets, firms were entitled to fee waivers, cash rebates and other benefits, as described above. In addition, each firm was given a specific CTC points target linked to its performance over the previous year and if the firm achieved or came close to its target, it was entitled to an incentive payment.

563 In the period to the end of June 2017, eligible Member Firms were given a ranking ranging from "All Star" (the lowest) to "Abacus" (the highest) referrable to the number of CTC points that they had been awarded and that ranking then determined Splits that were deducted from the fees and commissions earned on products.

564 From 1 July 2017, the structure of the CTC Program was revised. The number of CTC points awarded on certain products and revenue was reduced and the ranking obtained by firms was calculated by reference to GBE.

565 Then, at the end of FY2017/2018 and FY2018/2019, a "risk overlay" system was introduced that provided for the withholding of CTC Benefits under the CTC Program to eligible Member Firms that were the subject of formal compliance actions taken by Count to address their conduct or the conduct of one of their advisers. This was described as "consequence management". In FY2017/2018, $1,407,812.33 was approved by Count for rebates and incentives and $36,961.93 was withheld due to compliance concerns. In FY2018/2019,

$1,076,147.76 was approved by Count for rebates and incentives and $58,643.06 was withheld due to compliance concerns.

566 In summary, the CTC Program was directed at providing incentives to Count Representatives to grow their respective businesses and providing a mechanism by which Member Firms could be encouraged to comply with their regulatory obligations by depriving Member Firms the subject of formal compliance action from CTC Benefits under the program.

L.3. Entrenchment of payment of Commissions

L.3.1. Submissions

567 The Applicant submits that Count developed a conflict riddled remuneration system designed to enhance the continued receipt of Commissions, to the detriment of clients. It submits that this is evident from the terms of the Distribution Agreements, the CTC Program, the Rebates, and the decision to retain the CTC Program, notwithstanding that it recognised the harm the program created. It submits that Mr Spurr recognised a problem with the CTC Program and its regulatory implications in January 2016 but in February 2016, Mr Spurr and the CEO of Count made separate agreements with the CBA Executive General Manager, Marianne Perkovic, "to keep the scheme – solely to protect and maintain the relationship with the Member Firms".

568 The Applicant submits that the deliberate development and implementation of a remuneration policy that entrenched the receipt of commissions was not a reasonable step for the purposes of s 961L. It further submits that the existence of compliance systems is not a sufficient answer to an alleged breach of s 961L by a licensee if it is not accompanied by a corporate will to ensure that it works in practice.

569 Count submits that its remuneration policy adequately managed compliance risks, particularly when assessed in the context of Count's overarching compliance framework. It further submits that in any event the FoFA reforms did not prohibit advisers from receiving and retaining grandfathered commissions.

L.3.2. Consideration

570 The proposition that the implementation and development of a remuneration system that provided for the payment of Commissions from product providers was necessarily not a reasonable step for the purposes of s 961L cannot be accepted. It ignores the grandfathering arrangements for the receipt of commissions that were introduced as part of the same legislative scheme that introduced s 961L. Construing the implementation and development of a

remuneration system by a licensee that provided for the receipt of grandfathered commissions as a failure to take reasonable steps to ensure that representatives of the licensee complied with s 961B or s 961J would be contrary to the clear intention of the legislature.

571 The remuneration system implemented and developed during the Relevant Period by Count only provided for the continued receipt of Commissions consistent with the grandfathering provisions included in the Corporations Act pursuant to the FoFA reforms. That dimension of Count's remuneration policies as those policies are outlined at [552] to [559] above, is fundamentally different to measures to prohibit "Rewriting Conduct" as contemplated by Lee J in *AMP Financial Planning* at [131]. The Rewriting Conduct the subject of that case was described by Lee J at [4] in the following terms:

> What Panganiban was doing, repeatedly, was engaging in a form of "churning". He was advising his clients to apply for new insurance products issued by AMP Life Limited (**AMP Life**). With one apparent exception, his conduct involved a practice of cancelling the client's existing insurance. Hence, rather than advising his clients to transfer their existing cover (or, for existing AMP Life insureds, advising them to retain their existing cover), he arranged for his clients to sign cancellation letters and then, some days later, arranged for an application for new insurance to be submitted to AMP Life, which stated that the client did not have other AMP Life insurance in force or was not eligible for insurance transfer. In these reasons, I refer to this delinquency as **Rewriting Conduct**.
>
> (Emphasis in original.)

572 As his Honour observed at [5], the "motivation for this conduct is as obvious as it is unworthy".

573 Further, contrary to the submissions advanced by the Applicant, the retention of the CTC Program could not fairly be characterised as a failure to take reasonable steps to ensure that the Count Representatives complied with s 961B and s 961J. The "problems" identified by Mr Spurr in a discussion draft document prepared in January 2016 were the complexity of the scheme and commercial equity issues that arose because New Member Firms that had joined Count since 1 July 2013 were not eligible to participate in the CTC Program because of the FoFA reforms, unlike existing firms that were permitted to do so under the grandfathering provisions. The references that Mr Spurr made in his discussion draft document were limited to the following relatively anodyne observations:

> 4. Regulatory – The CTC system is permitted under FOFA's grandfathering provisions. However, it might be considered desirable to discontinue the scheme now to prevent unwanted attention in the future and ensure uniformity across the group.
>
> …

> An alternative considered and disregarded was to effectively "buy out" the rebates from Members in a lump sum payment. The issues around valuation methodology (likely to be controversial and expensive) and potential regulatory issues (who owns the rebates?) would be difficult to navigate.

574 It is next necessary to turn to the alleged failure by Count to supervise how Centenary, as a Member Firm, remunerated its employees who were Count Representatives.

L.4. Supervision of remuneration

L.4.1. Centenary's remuneration arrangements

575 Financial advisers employed by Centenary were paid a fixed salary during the Relevant Period. Mr William's average annual salary for the 2015 to 2019 financial years was $251,339.20 (excluding superannuation). Mr Hohnen's average annual salary for the 2016 to 2019 financial years was $98,653.50 (excluding superannuation).

576 During the period July 2016 to July 2019, Mr Williams, Mr Hohnen and Mr Relf were also eligible to be paid variable quarterly bonuses by Centenary.

577 The pool of funds from which the variable quarterly bonus was paid comprised 30% of "new business" that had been issued during the previous quarter, excluding GST, any applicable fees and "dealer splits". "New business" comprised all upfront commissions written across both superannuation and insurance products.

578 The bonus pool was split equally between Mr Williams, Mr Hohnen and Mr Relf which resulted in each of them receiving approximately 10% of "new business" (less GST, any applicable fees and dealer splits) issued by Centenary. Centenary employees who joined Centenary after 1 July 2013 were not excluded from participating in the bonus pool arrangements.

579 The total amount of "new business" issued by Centenary for the financial years ending:

(a) 30 June 2017 was $88,779.29;

(b) 30 June 2018 was $93,428.44; and

(c) 30 June 2019 was $66,006.20.

580 The last variable quarterly bonus was paid in July 2019.

581 Centenary was generally eligible for an annual payment of $10,000 from Count under the CTC Program but CTC Benefits were not given to individual advisers. The majority of the CTC

points obtained by Centenary were used for pre-paid conference fees for four or five Centenary employees.

582 A significant proportion of the business that Mr Williams received was placed into products on the APL that did not accrue CTC points, including retail employee superannuation plans that were often arranged through platform providers such as Colonial First State.

L.4.2. Submissions

583 The Applicant submits that it was not a reasonable step for the purposes of s 961L for Centenary's new employees after 1 July 2013, relevantly Mr Hohnen, to be made eligible for bonus pool arrangements, driven by Commissions. It submits that the Centenary bonus pool arrangements enabled employees who were not eligible to participate in "one conflicted CTC bonus program (CTC Program)" to join another conflicted bonus program.

584 The Applicant submits that the Centenary bonus arrangements for its financial advisers arose because of a systemic supervisory failure which CBA had regularly acknowledged in documents in the period leading up to an audit in June 2018 that recognised that it was "a serious failure".

585 It submits that while Count has led evidence as to its "expansive compliance systems" it has not led any evidence of systems addressing individual adviser supervision. The Applicant submits that in the absence of any evidence that Count regularly supervised and approved adviser remuneration at the individual adviser level, the Court should infer that it did not take any such steps, given it was in Count's power to have produced such evidence.

586 Count submits that the contention that it contravened s 961L by failing to take reasonable steps to supervise the remuneration of Count Representatives was not pleaded, and in any case, lacked a proper foundation. It submits that the Applicant appears to be contending as part of its s 961L case that Count failed to ensure that Count Representatives complied with their obligations in s 963G of the Corporations Act not to receive conflicted remuneration and Centenary's remuneration arrangements with Mr Hohnen contravened s 963G.

587 Count submits that given it operated a franchise model, its reliance upon corporate guidance and training was entirely appropriate and the Applicant has not led any evidence that such reliance was inappropriate.

L.4.3. Consideration

588 On no view could it be suggested that the Applicant pleaded any case that Count contravened s 961L by failing to take reasonable steps to ensure that Centenary or any other Member Firm failed to take reasonable steps to ensure that their financial advisers who were also Count Representatives failed to comply with s 963G. Moreover, the obligation to take reasonable steps in s 961L plainly does not extend to compliance with s 963G.

589 Further, and in any event, as explained at [577] above, the Centenary bonus pool during the Relevant Period was calculated by reference to "new business" defined as upfront commissions that had been written across superannuation and insurance products during "the previous quarter". These commissions were thus commissions that were "exempt commissions" that were permitted under the FoFA reforms.

590 Count relied on corporate guidance and training to supervise the remuneration of Count Representatives and their compliance with their statutory and regulatory obligations, as demonstrated in the CBA Solutions Requirements Document for the Adviser & Conflicted Remuneration Project issued on 9 October 2015.

591 The stated purpose of the Solutions Requirements Document was to detail the solution requirements necessary to meet the requirements of Count and two other CBA financial licensees, in relation to the responsibilities of their authorised representatives when establishing remuneration agreements with their advisers. The document included confirmation that the selected requirements will meet capability gaps and provide a basis to determine that the solution delivered will meet those requirements. The document identified specific training and communication requirements needed to ensure that authorised representatives met their obligations under the FoFA conflicted remuneration obligations as explained in the Australian Securities and Investment Commission's Regulatory Guide 246: Conflicted Remuneration and noted that each licensee was relying on corporate guidance and training to ensure that their authorised representatives were meeting their compliance obligations with respect to FoFA conflicted remuneration.

592 I am satisfied that Count's reliance on corporate guidance and training to monitor and supervise compliance was appropriate in the absence of any expert evidence to the contrary. Count operated its business through a franchise model. It did not employ financial advisers. I do not accept, contrary to the approach taken by the Applicant, that pointing to selective statements in the Control Gap Spreadsheet and the Key Risk Indicator Document recording compliance

failures by Count Representatives is sufficient to establish that relying on corporate guidance and training was inadequate.

L.5. QAA program

L.5.1. Overview

593 In 2018, Count began testing its Count Representatives for compliance with their statutory duties through a preventative audit and review control of financial planning advice files referred to as the Best Interest Duty Assessment and Coaching Review, (**BAC Review**) which concluded that 95% of Count Representatives had failed to comply with their statutory duties.

L.5.2. Count Quality Advice Assurance

594 One of the ways in which Count monitored and supervised Count Representatives during the Relevant Period was a procedure described as a QAA process.

595 During the Relevant Period, Count employees and other individuals who conducted file reviews as part of the QAA process were issued with QAA question sets to assist in the performance of the file review, that were prepared and issued by Count employees and other individuals.

596 From the start of the Relevant Period until approximately 1 October 2019, the individuals who conducted the QAA file reviews were part of the Advice Licensee Services, Advice Review and Remediation, Advice Professional Services or Advice Shared Services business units, within CBA.

597 From 1 October 2019, employees of Count conducted the QAA process.

598 As at 2015, the QAA question sets:

(a) included a question as to whether there had been appropriate disclosure of, amongst other matters, commissions in the advice document;

(b) 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;

(c) identified that the best interests duty required not recommending a product or service to create extra revenue for themselves or a related party where additional benefits for the client could not be demonstrated; and

(d) identified that the more material the conflict of interest, the more the adviser needed to demonstrate that they prioritised the clients' best interests.

599 The QAA question sets prior to November 2018 stated that:

(a) the best interest duty required an adviser to not recommend a product or service to create extra revenue for themselves or a related party where additional benefits for the client could not be demonstrated; and

(b) the more material the conflict of interest, the more the adviser would need to demonstrate that they prioritised the client's best interests.

600 As at 1 November 2018, the QAA question sets included the following questions and statements:

> Has there been appropriate disclosure of fees, commission, benefits or incentives in the advice document and/or have the appropriate fees been charged?
>
> …
>
> An adviser cannot comply with the Best Interest duty (conflicts priority rule) merely by disclosing a conflict of interest or getting the client to consent to a conflict.
>
> …
>
> Conflicts to be considered when determining whether the client's interests have been prioritised in order to avoid any breach of s 961J include:
>
> (i) recommending insurance, more insurance or replacement insurance where that results in additional remuneration for the adviser than would otherwise be the case;
>
> (ii) recommending a CBA Group product or platform;
>
> (iii) recommending a hold on a product paying grandfathered commissions.
>
> …
>
> Best interest duty requires that an adviser must not recommend a product or service to create extra revenue for themselves (or a related party) where additional benefits for the client cannot be demonstrated. [sic] eg. where the adviser recommends a new insurance policy - could the client instead have applied to increase the cover from an existing policy? What benefits has the client obtained from purchasing the new policy?

601 The QAA question set in place during 2020 stated that "[t]he relevant fees, commissions, soft dollar benefits and costs of recommendations were all correctly disclosed in writing".

L.5.3. Submissions

602 The Applicant submits that the QAA program suffered from serious control gaps including a failure to test for conflicts of interest. It seeks to rely on the Control Gap Spreadsheet that it contends was dated 19 November 2014 and the Key Risk Indicators Document, a Count document identifying key risk indicators that were effective from May 2018 as evidence of these serious control gaps.

603 The Applicant submits that when the BAC Review was implemented, Count knew that 95% of the Count Representatives had failed to comply with their best interests obligation and there were widespread failings within Count. It submits that this demonstrates that the BAC Review should have been implemented from the commencement of the Relevant Period and continued throughout that period. It submits that the QAA process, the primary tool used by Count to monitor advice quality, did not identify that Count Representatives recommending an acquisition, or a "hold", of a commission paying product were in a conflict of interest position. It submits that therefore there was no meaningful supervision of the critical conflict of keeping clients in grandfathered commission paying products.

604 The Applicant also submits that Count's decision to discontinue the BAC Review on the basis that it was "overly legalistic" resulted in Count adopting an even less stringent quality assurance system. It submits that logically had Count continued the BAC Review, and had it been implemented from the commencement of the Relevant Period, it would have uncovered a higher rate of failure by Count Representatives to comply with their obligations under s 961B and s 961J.

605 Count submits that the deficiency alleged by the Applicant with respect to "holds" on grandfathered products misunderstands the nature of the QAA process, its relationship with the BAC Review and its role within Count's supervision and monitoring framework. It submits that the question sets that it utilised appropriately addressed conflict issues and when regard is had to all its relevant systems and processes and the fact that "control gaps" were "proactively identified in an isolated spreadsheet", the existence of any broader "control gaps" is not borne out.

606 Next, Count submits that, for the following reasons, the Applicant's complaint that the decision to terminate the BAC Review was motivated by a desire to obfuscate the discovery of non-compliance by Count Representatives is "far-fetched and ignores relevant evidence about the organisational context for the BAC Review, its operation and its cessation".

607 *First*, Count submits that the BAC Review process was inflexible and inhibited timely implementation of updated supervision and monitoring frameworks and advice to clients.

608 *Second*, Count submits that the "failure rates" that had been detected in the BAC Review cannot be equated with breaches of legal obligations because they arose in the course of a "pre-vetting process" of advice *before* it was provided to clients.

609 *Third*, Count submits that the criterion by which the advice was assessed in the BAC Review was not limited to compliance by Count Representatives with s 961B and s 961J, including by way of example, questions such as "Do you have any other concerns regarding the advice process?" and "[w]as the TFN held on file?".

L.5.4. Consideration

610 I do not accept that the QAA process suffered from serious control gaps including a failure to test for conflicts of interest. The QAA questions sets, as explained above at [598] to [600], included specific questions directed at compliance with obligations to avoid conflicts. The guidance included statements that an adviser cannot comply with those obligations by merely disclosing a conflict of interest or getting the client to consent to a conflict, and that the best interests duty required an adviser not to recommend a product or service to create extra revenue for themselves, or a related party, where additional benefits to the client could not be demonstrated.

611 The absence of an express statement that recommending a hold on grandfathered products gave rise to a conflict of interest is not in itself sufficient to give rise to a contravention of s 961L. It may well constitute an example of a potential conflict of interest, as recognised in the QAA question set dated 1 November 2018, but the more critical issue is the extent to which conflict of interest principles in the context of best interest obligations were addressed in the question sets. In the context of Count's overall supervision and monitoring framework outlined at [590] to [601] above, the absence of any express reference to conflicts of interest that might arise if an adviser recommended a hold on a grandfathered product was not a "significant control gap" sufficient to give rise to a contravention of s 961L.

612 Moreover, it is necessary to distinguish between an adviser making a recommendation to retain a grandfathered product and an adviser simply continuing to receive trail commissions on a grandfathered product. Grandfathered products were acquired under a commission arrangement rather than a fee for service arrangement. It would significantly undermine the

rationale for the grandfathering provisions if they carried with them an obligation on advisers, independently of any request for advice, to identify and recommend equivalent products to products that were not grandfathered.

613 Nor am I persuaded that the following statements in the Control Gap Spreadsheet, independently of any context, demonstrate a failure to take reasonable steps to ensure that Count Representatives complied with their obligations under s 961B and 961J:

> CONTROL GAP
>
> Sole reliance for Member Supervision & Monitoring is placed on the QAA process, which is completed on an annual basis. Due to the structure of Count there is little span of control over Member firms by any head office staff.
>
> There is no method in which to 'risk rate' Member firms to ensure adequate supervision. There is no consistent or formal collation of data from available sources such as paraplanning, compliance and member services
>
> Note: CAP test plans are to be defined post control development and implementation

614 The identification of control gaps in the Control Gap Spreadsheet in 2014 and the preparation of the Key Risk Indicators Document in 2018 are consistent with the existence of a process by which potential shortcomings and deficiencies in Count's compliance framework could be discovered and addressed. The absence of any control gap assessment or identification of key risk indicators would be of greater concern than evidence of a process by which control gaps and key risk indicators were identified.

615 Next, as submitted by Count it is necessary to put the 95% failure rate recorded for "a number of NewCo Advice planners" (comprised of both Financial Wisdom Ltd and Count Representatives) in context. The failure rate reported to the Count Board on 11 March 2019 was recorded across a broad range of indicia in what was described as a "pre-vet of advice, Best Interests Duty and Coaching Assessments (BAC) process". The failure rate did not extend to any advice provided to clients; it was a "pre-vetting" process and extended to many indicia beyond compliance with obligations under s 961B and s 961J. Moreover, on balance, it more reflected the implementation of a rigorous and exacting testing process intended to identify potential problems consistent with the taking of reasonable steps to ensure compliance, rather than a failure to take reasonable steps.

616 Finally, the termination of the BAC Review was plainly not due to any desire by Count to avoid or otherwise diminish its compliance framework. As Mr Spurr explained in an update to the Count Board dated 28 October 2019, Count management was concerned that CBA had taken

an "overly legalistic view" of the best interests duty and related obligations which was not effective in training and coaching advisers to understand their obligations and requirements. More specifically, Mr Spurr observed (a) the existing checklist of some 16,000 words was repetitive and difficult to follow, (b) the volume of vetting necessary had resulted in it being performed inconsistently by less experienced external contractors and advisers could not be debriefed directly by the person who vetted their advice, (c) there was little to no focus on identifying themes in advice so that appropriate training and coaching could be developed and implemented, and (d) the volume of vetting had caused delays of up to two to three months between when an adviser may have prepared a plan and it being presented to clients after the plan had been vetted and had otherwise resulted in advisers not receiving feedback on their proposed advice in a timely fashion.

617 Mr Spurr then advised in his report to the Count Board that Count management had decided to discontinue the BAC Review process that had been inherited from CBA and address best interests duty obligations with (a) a more practical checklist to assist advisers in meeting best interests duty obligations, (b) targeted pre-vetting and post-advice audits of advisers, (c) one-on-one coaching to advisers on specific identified areas, (d) mandatory group learning on particular focus areas, and (e) reviewing business as usual audits and providing one to one and one to many coaching on best interests duty activities.

618 Mr Spurr's observations and Count management's decision to terminate the BAC Review process are consistent with a responsible and considered approach to the formulation and implementation of a compliance framework that focuses on practical commonsense approaches to taking steps to seek to ensure that Count Representatives complied with their best interests duty obligations.

L.6. Count Licensee Standards

L.6.1. Overview

619 The Applicant contends in the 2FASOC at [136] that the Count 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.

L.6.2. Submissions

620 The Applicant submits, without any elaboration, that the Count Licensee Standards were deficient because they failed to disclose the matters pleaded in the 2FASOC at [136] necessary to obtain fully informed consent from a client.

621 The Applicant accepts that the Count Licensee Standards correctly identified that informed consent was required and it was necessary to disclose the relationships between product providers and the licensee but it submits that Count Representatives were never in a position to comply with that standard as Count did not disclose the terms of the Distribution Agreements to them.

622 Count submits that when regard is had to the totality of the relevant Count Licensee Standards, including those identified in Ms Light's affidavit, it is plain that they provided reasonable guidance to Count Representatives in relation to both the best interests duty and conflict priority rule. Further, Count submits that throughout the Relevant Period, the Count Licensee Standards provided specific guidance in relation to potential conflicts of interest arising from grandfathered commissions and how they could be managed.

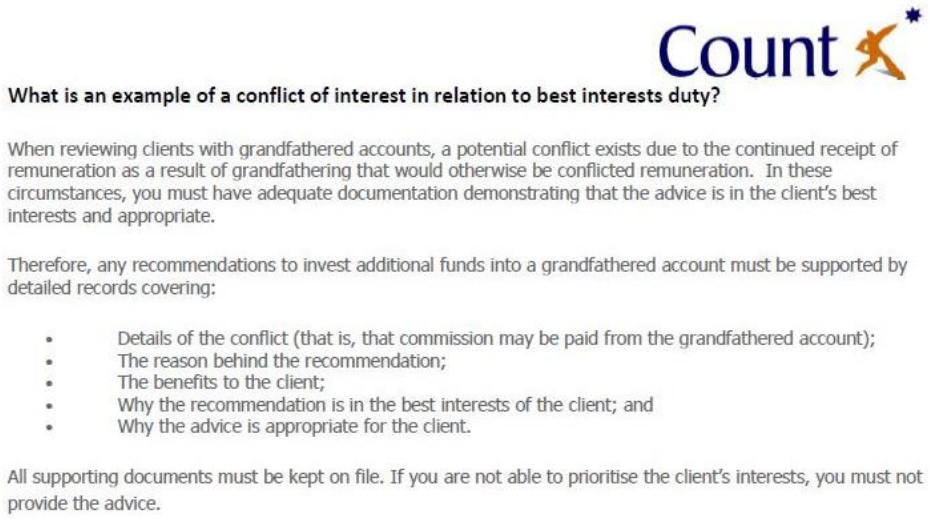
L.6.3. Consideration

623 An immediate difficulty with the proposition that there was any requirement that it was necessary for the Count Licensee Standards to include explanations of the matters pleaded in the 2FASOC at [136] in order to obtain fully informed consent from a client is that the only particulars provided of [136] were references to pages and paragraphs in expert reports that were not ultimately tendered or otherwise sought to be relied upon by the Applicant.

624 Moreover, I am otherwise satisfied, in the absence of any expert evidence to the contrary, that the Count Licensee Standards did provide specific and appropriate advice in relation to

potential conflicts that may have arisen in relation to grandfathered commissions, as demonstrated in the following examples.

625 Count's "Conflicts of Interest (Including Alternative Remuneration) Licensee Standard" dated 17 June 2014 included following practical advice in relation to any recommendation to invest additional funds into a grandfathered account:



What is an example of a conflict of interest in relation to best interests duty?

When reviewing clients with grandfathered accounts, a potential conflict exists due to the continued receipt of remuneration as a result of grandfathering that would otherwise be conflicted remuneration. In these circumstances, you must have adequate documentation demonstrating that the advice is in the client's best interests and appropriate.

Therefore, any recommendations to invest additional funds into a grandfathered account must be supported by detailed records covering:

- Details of the conflict (that is, that commission may be paid from the grandfathered account);
- The reason behind the recommendation;
- The benefits to the client;
- Why the recommendation is in the best interests of the client; and
- Why the advice is appropriate for the client.

All supporting documents must be kept on file. If you are not able to prioritise the client's interests, you must not provide the advice.

626 Similar practical advice in relation to recommendations made by Count Representatives in relation to grandfathered accounts was provided in the following terms in Count's "Conflict of Interest (Including Alternative Remuneration) Licensee Standard" dated 3 August 2015:

Where a conflict exists, how do I demonstrate that I have acted in the client's best interest?

You should consider what a reasonable adviser without a conflict of interest would do, and then act accordingly. Your client file should demonstrate the following:

- Details of the conflict as discussed with the client;
- The reasons behind the recommendation;
- The benefits to the client (i.e. the product and the strategy are appropriate for the client); and
- Why the recommendation is in the best interests of the client.

An example of a potential conflict may be where the adviser continues to receive grandfathered remuneration. In addition to the above, the adviser must have adequate documentation

demonstrating the below:

- That the recommendation for the client to continue to hold (or possibly increase) his/her investment in the grandfathered account is in the client's best interests;
- That you have explained the conflict to the client and documented the conflict in a detailed file note or in your working documents; and
- The reasoning behind the recommendation. The Statement of Advice (SoA) must clearly show how you have placed the client's interests ahead of your own, explain the reasoning behind your recommendations and describe the additional benefits of your recommendation to the client.

627 The advice provided in the Count Licensee Standards was not that the receipt of grandfathered commissions contravened the best interests duty but rather recommendations to increase investments in grandfathered accounts or even specific recommendations to retain grandfathered accounts may give rise to a potential conflict of interest that would have to be addressed and documented by the Count Representative at the time that the recommendation was made.

628 Nor do I accept, that in order to obtain informed consent it was necessary for Count Representatives to disclose the specific terms of Distribution Agreements to clients. The critical issue for informed consent was that Count and the Count Representatives were receiving Commissions and Rebates from product providers not the contractual terms by which those Commissions and Rebates were calculated and provided.

L.7. Agreed factual and legal issues for determination

629 For the foregoing reasons, I answer the parties' agreed factual and legal issues for determination with respect to the Applicant's licensee case as follows:

> 8.3 I do not accept that the CTC Program incentivised advisers to recommend products that promoted the interests of Count in a manner adverse to the Applicant given the CTC Program was structured to provide incentives to Centenary to be more profitable rather than promote the interest of Count in a manner that was adverse to the Applicant.
>
> 8.4 The Count remuneration policies incentivised advisers to recommend products that were on the APL but not to the exclusion of any product not on the APL.
>
> 8.5 The Applicant's Representatives were ranked by Count on the revenue they generated for Count and financially rewarded for their revenue.
>
> 8.6 I am not satisfied that the Splits, and the variable remuneration received as a result of the Splits, could give rise to a material conflict of interest.
>
> …
>
> 24. During the Relevant Period, Count did not fail to take reasonable steps to ensure that the Applicant's Representatives complied with s 961B and s 961J of the Corporations Act by reason of (a) any alleged deliberate development and implementation of a renumeration policy that entrenched the receipt of Commissions, (b) any alleged failure to supervise remuneration at the Count Representative level or otherwise adequately

supervise compliance with statutory duties, or (c) any alleged failure to develop appropriately and enforce its licensee standards.

25. If I had otherwise found that the answer to AFL 24 was 'yes', I am not satisfied that the Applicant has established that it has suffered any loss or damage because I am not satisfied that the Applicant has established that the Applicant's Representatives would have agreed to dial down the Commissions or otherwise rebated them.

26. If I had otherwise found that the answer to AFL 24 was 'yes', and the answer to AFL 25 was also 'yes', the loss or damage suffered by the Applicant because of the failure by Count to take reasonable steps to ensure that the Applicant's Representative(s) acted in the best interests of the Applicant or gave priority to the Applicant's interests when giving the advice would be an amount equal to the Commissions paid to Count and Centenary in respect of those of the Applicant's Products for which the Applicant's Representatives had failed to act in the best interests of the Applicant or failed to give priority to the Applicant's interests when giving the advice.

M. REPRESENTATIVE S 961B, S 961J AND S 961L CLAIMS

M.1. Proposed common questions

630 The Applicant advances the following proposed common questions in relation to its s 961B, s 961J and s 961L claims:

> 13. If ss 961B or 961J are engaged, did Count and / or the Representatives breach the provision(s) if:
>
> 13.1 they failed to obtain the fully informed consent of Group Members in respect of the Commissions or Benefits;
>
> 13.2 they failed to provide a service to the Group Members in exchange for the Commission or Benefit; and / or
>
> 13.3 the Commissions made the Relevant Product more expensive to acquire.
>
> 14. If the answer to question 13.1 is yes, which (if any) of the additional facts identified in question 10 (if established on the evidence) would Group Members needed to have known in order for Count and / or the Representatives to avoid a breach of the provision(s)?
>
> 15. Does the answer to question 13 depend on whether the Commission or Benefit was provided pursuant to a "grandfathered" arrangement?
>
> 16. During the Relevant Period, did Count fail to take reasonable steps to ensure that its Representatives complied with ss 961B and 961J by:
>
> 16.1 developing and designing a remuneration policy that entrenched the receipt of Commissions;

16.2 failing to supervise remuneration at the Representative level and otherwise adequately supervise compliance with statutory duties; and / or

16.3 failing to appropriately develop and enforce its licensee standards?

631 Count proposed the following common questions in relation to the s 961B, s 961J and s 961L claims:

17. Upon a proper construction of s 961B, does a provider of personal advice to a person as a retail client necessarily contravene s 961B if the advice provided results, or will result, in the receipt of commissions or other benefits by the provider, or by a licensee of which the provider is an authorised representative?

18. Upon a proper construction of s 961J, does a provider of personal advice to a person as a retail client necessarily contravene s 961J if the advice provided results, or will result, in the receipt of commissions or other benefits by the provider, or by a licensee of which the provider is an authorised representative?

19. During the Relevant Period, did Count fail to take reasonable steps to ensure that its Representatives complied with ss 961B and 961J by:

19.1 developing and designing a remuneration policy that entrenched the receipt of Commissions;

19.2 failing to supervise remuneration at the Representative level and otherwise adequately supervise compliance with statutory duties; and / or

19.3 failing to appropriately develop and enforce its licensee standards?

M.2. Submissions

M.2.1. The Applicant

632 The Applicant submits that s 961B and s 961J mirror equitable fiduciary obligations and therefore the statutory claims can be adopted as common questions for the same reasons that it advances with respect to its proposed common questions for the fiduciary claims that it advances on behalf of Group Members.

633 Moreover, the Applicant submits that s 961B and s 961J are replicated in s 52 of the *Superannuation Industry (Supervision) Act 1993* (Cth). It submits that in ***Brady** v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund (No 3)* [2022] FCA 224, Markovic J ordered a common question in respect of the scope and operation of s 52 that is analogous to ACQ 13 to ACQ 16 (**Question 7**).

634 Further, the Applicant submits that RCQ 17 and RCQ 18 "continue Count's dogmatic approach of asking the Court to answer a question that is not the Applicant's case".

M.2.2. Count

635 Count submits that ACQ 13 to ACQ 15 are "particularly problematic" and cannot be accepted for the following principal reasons.

636 Counts submits that ACQ 13 is inappropriate because (a) it invites an impermissible and archetypal advisory opinion, (b) it plainly could not be answered on a common basis because it would depend on the individual circumstances of each instance of advice to Group Members, and (c) neither s 961B nor s 961J is concerned with disclosure.

637 Count submits that ACQ 14 is inappropriate because it proceeds on the basis that the impermissible advisory opinion sought in ACQ 13 has been provided.

638 Further, Count submits that ACQ 13 and ACQ 14 do not reflect the Applicant's pleaded case. It submits that the Applicant does not contend in its pleaded case that either s 961B or s 961J impose any positive obligation on a provider of financial advice to obtain the fully informed consent of a retail client where the provision of advice would result in the receipt of Commissions or Other Benefits by the provider or the financial services licensee.

639 Count submits that ACQ 15 is inappropriate because (a) whether a provider of advice has acted in the best interests of their client for the purpose of s 961B or given priority to the interests of their client for the purposes of s 961J can only be determined having regard to the particular circumstances relevant to the advice in issue, and (b) given the way in which the Applicant has advanced its case it is necessary to have regard to "individualised" evidence in order to determine whether advice provided to each Group Member had the features pleaded by the Applicant in the 2FASOC at [101] and relied upon by the Applicant as giving rise to the contraventions of s 961B and s 961J.

640 Count submits that the only common questions that can be answered with respect to the s 961B and s 961J cases sought to be advanced by the Applicant on behalf of Group Members are questions of law concerning the proper construction of those provisions. It submits that RCQ 17 and RCQ 18 appropriately frame common questions to address matters of construction of those provisions and its answers to those questions are reflected in the matters it has advanced in its principal closing written submissions in response to the Applicant's personal s 961B and s 961J claims.

641 Finally, Count submits that ACQ 16, as replicated in RCQ 19, is an agreed to common question that can be determined on a common basis and its answer to that question is reflected in the

matters that it has advanced in its principal closing written submissions in response to the Applicant's s 961L claim.

M.3. Consideration

642 The common questions advanced by Count, unlike those proposed by the Applicant with respect to s 961B and s 961J, are in a form that can be addressed in this proceeding.

643 Both ACQ 13 and ACQ 14 are expressed to be conditional on s 961B and s 961J being engaged. They both impermissibly invite the Court to provide an advisory opinion and therefore cannot definitively resolve any issue between Group Members and Count. In any event, as submitted by Count, both necessarily would depend on the individual circumstances of each Group Member, including the subject matter of the advice and the scope of the specific advice sought by the client. In particular, ACQ 13.3 which is directed at whether the receipt of Commissions would make the Relevant Products "more expensive", would necessarily depend on the individual aggregate remuneration structure agreed between the Count Representative and the Group Member. It would also turn on whether the Count Representative would increase general advice fees or implement a new fee for advice if it agreed to rebate the Commissions or consented to a dialling down of the Commissions by a product provider.

644 Further and in any event, I have concluded that neither s 961B nor s 961J imposes any requirement on a provider of financial advice to obtain fully informed consent to any conflict of interest and it was an agreed fact for the purpose of the proceeding that Commissions formed part of the way in which financial advisers, including Count Representatives, were remunerated for the provision of personal advice. Therefore the matters sought to be raised in ACQ 13.1 (a failure to obtain fully informed consent) and ACQ 13.2 (the failure to provide any service in exchange for the Commissions or Other Benefits) simply could not relevantly arise as a basis for a contravention by the Count Representatives of s 961B or s 961J.

645 Moreover, and relatedly, contrary to the chapeaux to ACQ 13, Count itself could never contravene s 961B or s 961J, both provisions are directed at authorised representatives of a financial services licensee, not at a financial services licensee.

646 ACQ 15 is inextricably tied to ACQ 13 to which it is directed and cannot be answered without having regard to the individual circumstances in which the Commission or Benefit was given.

647 As submitted by the Respondent, the determination of whether a provider of personal advice has contravened s 961B or s 961J is necessarily dependent on the individual circumstances of

Group Members given the specific matters pleaded in the 2FASOC at [101], including, (a) did the advice contain any of the matters described as the Advice Non-Disclosures in the 2FASOC at [26.1]-[26.11] (at [101.1]), (b) whether the advice was concerned with a Commission paying product and if so, could it be dialled down, switched off or rebated (at [101.2]), (c) were ongoing advice fees payable and were they subject to any reduction by reason of the receipt of Commissions (at [101.3], and (d) whether the financial product acquired was more expensive because of the payment of Commissions (at [101.5]).

648 The Applicant's reliance on the form of Question 7 in *Brady* is misplaced. The question was directed at the scope and content of duties if the answer to Question 2 of the common questions was answered "yes". Question 2 of the common questions was directed at issues common to all Group Members, namely did **NULIS** Nominees (Australia) Limited, as the trustee of the MLC Super Fund, make the alleged "Grandfathering Decision", how was it implemented and did NULIS make the "LRA Approval Decision". These issues did not appear on their face to turn on the individual circumstances of Group Members. In any event, the form of the question was agreed between the parties and therefore was not the subject of any specific consideration by Markovic J in her reasons for judgment in *Brady*.

649 Finally, I am satisfied that the questions of construction identified in RCQ 17 and RCQ 18 can be determined as common questions and there is utility in addressing those questions given the breadth of the approach taken by the Applicant to the construction of s 961B and s 961J.

650 Otherwise, for the reasons advanced at [472] to [484] and [511] to [530] above, the answer to each of RCQ 17 and 18 must be "no" and for the reasons advanced at [547] to [628] above, the answer to each of RCQ 19.1 to 19.3 must also be "no".

N. MISLEADING AND DECEPTIVE CONDUCT CLAIMS

N.1. Overview

651 The Applicant contends that throughout the Relevant Period, Count by itself or through Count Representatives made Representations as to future matters to the Applicant and to some or all of the Group Members. It contends that the Representations were misleading or deceptive or were likely to mislead or deceive the Applicant and Group Members by reason of Count's failure to disclose matters, defined as the True Position, to the Applicant and Group Members and Count contravened s 1041H of the Corporations Act, s 12DA of the ASIC Act and s 18(1) of the ACL.

652 The Applicant relies on the same Representations and True Position for the statutory misrepresentation cases that it advances on its own behalf and on behalf of Group Members.

N.2. Statutory provisions and principles

653 Section 1041H of the Corporations Act provides:

> **1041H Misleading or deceptive conduct (civil liability only)**
>
> (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.
>
> Note 1: Failure to comply with this subsection is not an offence.
>
> Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

654 Section 18(1) of the ACL provides:

> **18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

655 Section 12DA(1) of the ASIC Act provides:

> **12DA Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

656 The relevant principles are well settled and the principles under s 1041H are largely the same as those applicable to s 18 of the ACL: *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147; [2018] FCA 751 at [2262] (Beach J). I recently summarised these principles in *J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen* [2024] FCA 1472 at [187] in the following terms:

> Conduct will be misleading or deceptive for the purposes of s 1041H of the Corporations Act and s 12DA of the ASIC Act if it caused, or was likely to cause, a reasonable person in the position of a member of the class to whom the representation was directed to be "[led] astray in action or conduct; to [be led] into error; to cause to err": *Weitmann v Katies Ltd* (1977) 29 FLR 336 at 343 (Franki J), or has a tendency to lead into error: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 at [39] (French CJ, Crennan, Bell and Keane JJ). It is necessary to make that assessment in the light of all the relevant surrounding facts and circumstances: *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147; [2018] FCA 751 at [2278] (Beach J).

657 The test is objective, and conduct will likely be misleading or deceptive where there is a "real or not remote chance or possibility regardless of whether it is less or more than fifty per cent": *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [10] (Gordon J) quoting *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87 (Bowen CJ, Lockhart and Fitzgerald JJ).

658 Conduct may, as a whole, carry implied representations as well as express representations: ***Traderight*** *(NSW) Pty Ltd v Bank of Queensland Limited (No 17) and 13 related matters* [2014] NSWSC 55 at [1118] (Ball J). In establishing the existence of an implied representation, the relevant question is whether the conduct, viewed holistically, conveyed "something more" than the express representation, such that it "lead the applicant into error": *Traderight* at [1118] (Ball J) quoting *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 202 FCR 72; [2012] FCA 211 (Reeves J) at [40].

659 Further, silence can amount to misleading or deceptive conduct: ***Semrani*** *v Manoun* [2001] NSWCA 337 at [58] (Beazley JA). However, unless the circumstances give rise to a "reasonable expectation" that a relevant fact would be disclosed if it existed, it is "difficult to see how mere silence could support the inference that the fact does not exist": *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41 (Gummow J) quoting *Kimberley NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR (Digest) 46,054 at 53,195 (French J).

660 Similarly, Beazley JA observed in *Semrani* at [60] that silence may more readily lead to misleading or deceptive conduct where a duty of disclosure exists. In such cases, Lockhart J explained in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 557:

> The duty to disclose is not confined to cases where there are particular relationships, such as trustee and beneficiary or solicitor and client, principal and agent and guardian and ward. There is no useful purpose in seeking to analyse the circumstances in which the duty to disclose will arise as this must depend on the facts of each case.

N.3. The pleaded Representations and True Position

661 The Representations are pleaded in the 2FASOC at [74], as comprising, collectively, on their own, or in any combination the following representations:

> 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.

662 The True Position is pleaded in the 2FASOC at [75] as comprising, jointly and severally, the following facts during the Relevant Period:

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);

(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, Count had contractually promised to promote, market and sell the Applicant's 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;

N.4. Submissions

663 The Applicant submits that Count, on its own or through Count Representatives, made a series of continuing Representations to the Applicant and Group Members during the Relevant Period. The Applicant submits the Representations were either express, implied and/or conveyed by silence. The Applicant contends that the relationship of "financial adviser and client" is a "paradigm example" of where a duty of disclosure arises "given the fiduciary

relationship" alleged. The Applicant then alleges therefore that a reasonable person in the position of the Applicant, in the context of receiving personal advice and paying ongoing fees and Commissions would expect Count to disclose the True Position, including that it did not have adequate systems in place to address the "risks" in Count's advice business and had not taken reasonable steps to ensure its Count Representatives would act in the best interests of clients.

664 The Applicant submits that each Representation was misleading for the following reasons.

665 *First*, the Applicant submits, as it contended in relation to the Applicant's s 961L claim, that (a) the development and implementation of a remuneration policy that embedded the receipt of Commissions was not a reasonable step in ensuring compliance with best interest obligations, (b) Count did not supervise how financial advisers were remunerated through Commissions and/or Other Benefits provided by Member Firms such as Centenary, (c) the QAA program contained "serious control gaps", such as the failure to test for conflicts of interest as required by the Count Licensee Standards, and (d) the Count Licensee Standards were "deficient" for failing to explain the matters necessary to obtain the client's fully informed consent.

666 *Second*, the Applicant submits that neither the Applicant nor Group Members were required to pay the Commissions in order to acquire the Relevant Products.

667 *Third*, the Applicant submits that Commissions were not paid in exchange for benefits or services, or additional benefits or services.

668 *Fourth*, the Applicant submits that the Commissions were a cost to the Group Members but were paid by the product providers. The Relevant Products were made more expensive by virtue of the Commissions, and further or in the alternative, the premiums and/or costs paid by the Applicant and Group Members in respect of the Relevant Products would have been reduced if Commissions were "dialled down", switched off, or rebated.

669 Count submits that that misleading and deceptive claim must fail for the following reasons.

670 *First*, Mrs Hunter did not give evidence that any of the Representations were made to her. Count further submits that her evidence is inconsistent with any of the Representations having been made to her. Count refers in particular to the Representations concerning the payment of Commissions and Mrs Hunter's denials that she was aware of the payment of Commissions.

671 *Second,* none of the Representations arise from the conduct or documents particularised by the Applicant in support of its misleading and deceptive conduct claims.

672 *Third,* even if the Representations, or any of them, were made, they were not misleading. Count submits that it had adequate systems and processes in place to manage any risks arising from the receipt of Commissions or Other Benefits and it took reasonable steps to ensure that the Count Representatives complied with their obligations pursuant to s 961B. In addition, it submits that because it was an agreed fact that Commissions formed part of the remuneration received for the provision of personal advice, it must follow that the Commissions were required to be paid in that they formed part of the agreed remuneration.

673 *Fourth,* Mrs Hunter does not give any evidence that she relied upon any of the Representations when deciding to acquire, renew or hold any of the Applicant's Products.

N.5. Consideration

674 It is first necessary to determine whether each of the Representations was made to the Applicant and Group Members and then, to the extent that they were conveyed, were they misleading or deceptive or likely to mislead or deceive. The second question turns on the extent to which the Applicant has established the pleaded True Position.

675 With one exception, the Representations are alleged to have been conveyed by implication or to be conveyed by a combination of implication and by silence. I accept that given the case was largely advanced as a misrepresentation by silence case, the absence of any evidence from Mrs Hunter that she was aware of the payment of Commissions or that the Representations were not made in the documents particularised by the Applicant in support of its misrepresentation case is not of any real significance.

676 I am satisfied that each of the Representations alleged in the 2FASOC at [74.1] (a), (b)(i) and (iii), (c), (d) and (e) were conveyed by necessary implication to the Applicant and Group Members. Each was expressed in relatively general and uncontentious terms reflecting usual commercial practice and regulatory obligations. If the "true position" was inconsistent with the Representations, I accept that it would give rise to a reasonable expectation on the part of a client of a financial services provider that it would be disclosed. By way of example, a client could readily be inferred to expect that Count would have adequate systems and processes in place to address and manage the risks in their advice business generated by the Commissions and Other Benefits.

677 As to [74.2], I accept that a representation could be implied that the Applicant and Group Members were required to pay Commissions in order to acquire the Relevant Products given that was the basis on which Count Representatives structured their remuneration arrangements with their clients, including the Applicant.

678 As to [74.3], I accept that a representation could be implied that Commissions would be paid in exchange for benefits or services, namely advice with respect to the acquisition of specific Relevant Products given that was the basis on which Count Representatives structured their remuneration arrangements with their clients, including the Applicant.

679 I am not satisfied that the other Representations alleged in the 2FASOC at [74] were conveyed by implication or silence in the terms alleged.

680 As to [74.1](b)(ii), I do not accept that a representation could be implied that the Count Representatives would take reasonable steps to *ensure* any life insurance policy was structured to *ensure* that the client paid the cheapest premium possible for the "same product" in *addition* to it being suitable for a client's financial circumstances, objectives and needs. It may well be expected to be the case that the cheapest possible product may not necessarily be suitable for the client's financial circumstances, objectives and needs.

681 As to [74.4], I do not accept that a representation was expressly made or could be implied that the Commissions were not "a cost" to the Applicant and Group Members, except in a literal and illusory sense. The Commissions were not paid directly by the Applicant and Group Members to the Count Representatives but rather, as made clear in statements of advice, records of advice and the various iterations of the Financial Services Guide and consistently with industry practice by the product provider, as a proportion of the fees paid by the client to the product provider.

682 Many of the alleged facts in the True Position largely reflect and are inextricably tied to the fiduciary and statutory s 961B, s 961J and s 961L claims sought to be advanced by the Applicant. The Applicant relies on the conduct and facts giving rise to the alleged breaches of fiduciary duty and s 961B, s 961J and s 961L contraventions to establish the foundation for the reasonable expectation and duty to disclose the True Position and thereby the falsity of the Representations because of the failure to disclose the True Position.

683 The facts alleged to comprise the True Position proceed on the basis that the receipt of the Commissions, Rebates and Other Benefits was antithetical to the best interests of the Applicant

and Group Members, gave rise to an inevitable conflict of interest and constituted a failure to act in the best interests of the Applicant in relation to the provision of personal financial advice. Further, the facts alleged as comprising the True Position in the 2FASOC at [75.7] proceed on the assumption that the Commissions were not paid to Count and the Count Representatives in exchange for any benefit or service and were rather simply a fee paid to product providers for the provision of marketing services.

684 For the reasons advanced above, I do not accept that Count's Representatives or Count breached the pleaded fiduciary duties, that Count's Representatives breached s 961B or s 961J, that Count was responsible for any breach by the Count Representatives of s 961B or s 961J nor that Count contravened s 961L.

685 More specifically and contrary to the Applicant's submissions advanced on its misleading and deceptive case, I was *not* satisfied for the reasons advanced at [547] to [628] above, that (a) the development and implementation of a remuneration policy that embedded the receipt of the Commissions was not a reasonable step, that (b) Count did not supervise how Centenary remunerated financial advisers through Commissions and/or Other Benefits, that (c) the QAA program contained "serious control gaps", or that (d) the Count Licensee Standards were deficient.

686 Moreover, I accept as submitted by Count, that given the agreed fact that the receipt of Commissions was part of the remuneration received for the provision of personal advice to acquire or invest in products, it was plainly correct that it had to be paid by the Applicant in order for it to acquire each of the Applicant's Products and could not be characterised as simply a marketing fee paid for the provision of marketing services by Count and Count Representatives to product providers.

687 For the foregoing reasons, I am not satisfied that any of the Representations that I have found were conveyed by implication or silence were misleading or deceptive or likely to mislead by reason of any failure to disclose those elements of the True Position that I am satisfied have been established by the Applicant.

N.6. Relief

688 Given my conclusion that none of the Representations that I have found to have been conveyed were misleading or deceptive or likely to mislead or deceive, the issue of causation and loss or damage does not strictly arise.

689 Nevertheless, had I found that any of the Representations had given rise to a contravention of s 1041H of the Corporations Act, s 12DA of the ASIC Act or s 18 of the ACL, the Applicant has suffered loss "by reason" of that contravention. The causation theory advanced by the Applicant, as for the s 961B and s 961J cases, is that had it known that Commissions could be dialled down or rebated it would have elected not "to pay" the Commissions and it would therefore have acquired the Applicant's Products at rates that did not include the Commissions. As explained above at [166] to [167] and [174], [532], [540] and [545], that theory necessarily is based on a premise that has not been established, namely the Applicant's Representatives would have agreed to the Commissions being dialled down or would otherwise have rebated the Commissions, without any commensurate increase in the fees paid in the Total Financial Care Agreements.

690 Finally, if I had otherwise been satisfied that the Applicant's Representatives would have agreed to the Commissions on the Applicant's Products being dialled down to zero or would have agreed to rebate all of the Commissions to the Applicant, the loss or damage suffered by the Applicant would have been the amounts calculated by Mr Cairns in Scenario 1 of his first report, as corrected in his reply report.

N.7. Agreed factual and legal issues for determination

691 For the foregoing reasons, I answer the parties' agreed factual and legal issues for the misleading and deceptive conduct claims as follows:

27. Count by itself or through the Applicant's Representatives made each of the Representations to the Applicant during the Relevant Period by implication or silence, other than the Representations pleaded in the 2FASOC at [74.1](b)(ii) and [74.4].

28. The Representations that Count had by itself or through the Applicant's Representatives made to the Applicant during the Relevant Period, continued throughout the Relevant Period.

29. During the Relevant Period:

    29.1 Count Representatives were permitted by Count (including through the Count Licensee Standards) to continue to receive Commissions, other than in circumstances where there was a conflict of interest;

    29.2 Count did not require its Count Representatives in 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; or

(c) charge Commissions or an ongoing service fee, rather than both or a combination of both;

29.3 Count permitted and incentivised (including through its remuneration arrangements) Grandfathered Member Firms to receive Commissions, Other Benefits and/or CTC Benefits;

29.3A Count instructed its Count Representatives that conflicts of interest could be managed by disclosure and did not instruct its Count Representatives not to receive them and/or did not instruct its Count Representatives to "dial down", rebate or switch off the Commissions, or to reduce the Count Representatives' fee by the amount of the Commissions.

[Note this is erroneously marked as "22.1" in the Agreed facts and legal issues for determination]

29.4 Count:

(i) had systems in place, during the Relevant Period, to enable it to monitor the compliance by Count Representatives with their statutory and regulatory obligations relating to the terms of the Total Financial Care Agreements;

(ii) did not have widespread significant failings in its advice business relating to "fees for no service" conduct during the Relevant Period; and

(iii) did not permit the advice given by the Count Representatives to be affected by any alleged Advice Non-Disclosures by any failure to develop QAA question sets that tested for the Advice Non-Disclosures;

29.5 Group Members were required to pay the Commissions in order to acquire the Relevant Products;

29.6 Commissions were paid in exchange for advice given in connection with the acquisition of Relevant Products;

29.7 Commissions were ultimately a cost to Group Members but were paid by the product providers to Count and in turn, also to the Count Representatives;

29.8 Pursuant to the Distribution Agreements with the providers of the Applicant's Products, Count contractually agreed to variously promote, market and/or sell the Applicant's Products.

30. Count was aware of each of the matters comprised in the answers to AFL 29 during the Relevant Period.

31. Insofar as it has been found that the Representations were made to the Applicant, the Representations were not misleading or deceptive within the meaning of s 12DA(1) of the ASIC Act, s 18(1) of the ACL, or s 1041H of the Corporations Act by reason of the matters comprised in the answers to AFL 29 and/or Count's knowledge of those matters.

32. Insofar as it has been found that the Representations were made to the Applicant, the Applicant relied on the Representations in deciding to:

32.1 acquire the AMP Policy; and

32.2 continue to hold and/or renew the Macquarie Cash Management Account and each of the TCP Policies.

33. Insofar as it may otherwise have been found that the Representations were misleading or deceptive, the Applicant did not suffer any loss or damage because I am not satisfied that the Applicant has established that the Applicant's Representatives would have agreed to dial down the Commission or otherwise rebated them.

34. Insofar as it may otherwise have been found that the Applicant suffered loss and damage, the amount of loss or damage that the Applicant has suffered because of the contraventions of s 12DA(1) of the ASIC Act, s 18(1) of the ACL, and s 1041H of the Corporations Act would have been the amounts calculated by Mr Cairns in Scenario 1, as corrected in his reply report.

O. REPRESENTATIVE MISLEADING AND DECEPTIVE CONDUCT CLAIMS

O.1. Legal principles

692 The analysis of whether conduct is misleading or deceptive can proceed either by reference to a class of persons to which conduct is directed in a general sense and in such cases, identification by some criterion or criteria of a representative member of the class is required. Alternatively, misleading or deceptive conduct can be determined by reference to identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact or circumstance has been withheld: *Campomar Sociedad, Limitada v Nike International*

Ltd (2002) 202 CLR 45; [2000] HCA 12 at [103] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ). The former approach is common when remedies other than damages are concerned but the "former is inappropriate, and the latter is inevitable" where monetary relief is sought by an applicant who alleges that misrepresentations have been made to identified persons, including the applicant: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; [2004] HCA 60 at [37] (Gleeson CJ, Hayne and Heydon JJ).

693 The need to focus on the impugned conduct of the respondent in relation to particular applicants where damages are sought was emphasised by French CJ in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; [2009] HCA 25 at [27]-[29]:

> In *Butcher v Lachlan Elder Realty Pty Ltd* the approach to characterisation of conduct directed to identified individuals was set out in the joint judgment of the majority as follows:
>
> > The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.
>
> Although this passage begins by referring to the need to establish a causal link between the impugned conduct and the claimed loss, it is clear that thereafter their Honours were addressing the task of characterisation.
>
> Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.
>
> A person accused of engaging in misleading or deceptive conduct may claim that its effects were negated by a contemporaneous disclaimer by that person, or a subsequent disclaimer of reliance by the person allegedly affected by the conduct. The contemporaneous disclaimer by the person engaging in the impugned conduct is likely to go to the characterisation of the conduct. A subsequent declaration of non-reliance by a person said to have been affected by the conduct is more likely to be relevant to the question of causation.
>
> (Footnotes omitted.)

694 The task of determining whether representations were made to Group Members that are alleged to have arisen from silence in the course of dealings between Count Representatives and Group Members requires a consideration of the particular circumstances of Group Members.

695 In *Stack*, Beach J stated at [200]-[201]:

> To determine whether there was misleading or deceptive conduct by silence requires an analysis of all of the circumstances, including the awareness of the persons to whom the commission representations were allegedly conveyed. To determine whether there was a reasonable expectation that the matters comprising the commissions representations ought to have been but were not disclosed to any group member requires analysis of the peculiar circumstances of each of those group members. It is insufficient to establish that those group members received personal advice from an AMP authorised representative and that commissions might have been paid in respect of any investment they made. Put another way, the quality of these commonalities identified by the applicants is de minimis to the extent they assist in determining the misleading or deceptive conduct allegations.
>
> The respondents say that it is difficult to understand how there is utility in attempting to answer the question of whether the representations were made when the commission representations are said to have been made by the silence of the AMP authorised representatives. How can I answer this question without considering what each of the AMP authorised representatives in fact said, or did not say, to their clients? The fact of whether the commission representations were made is peculiar to each group member.

696 In *Lloyd*, Lee J, after observing that the parties had acknowledged that there were some deficiencies in the common questions that they had proposed by consent, then stated at [379]-[380]:

> The *first* issue that arose has some importance. Despite advancing written submissions which tended to meet the misleading and deceptive conduct case at a level of generality as if it was being determined on behalf of all group members, the respondents in both cases accepted (indeed, at times, stressed) the prospect that the determination of a misleading and deceptive conduct case, or an unconscionability case, in relation to a representative applicant, will not be determinative of the case that may be made by an individual group member. They were correct to do so.
>
> Individual group members in both proceedings may have a range of individual circumstances, which may be relevant to the circumstances of determining whether there has been contravention of a relevant statutory norm and, if so, whether casually [sic] related loss was suffered. As counsel for Belconnen and the Barton Developers noted, an obvious example is that we do not know the precise dealings between any solicitors acting for individual group members and the solicitors for Belconnen or the Barton Developers. These communications may have qualified the representations which I have found were made to the representative applicants.
>
> (Emphasis in original.)

O.2. Proposed common questions

697 The Applicant advances the following proposed common questions in relation to its misleading and deceptive conduct claims:

> 17. During the Relevant Period, was it a fact that: (2FASOC [75])
>
> 17.1 Representatives were permitted by Count (including through Count Licensee Standards) to continue to receive Commissions, even in circumstances of a conflict of interest;
>
> 17.2 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;

17.3 Count permitted and incentivised (including through its remuneration arrangements) Grandfathered Member Firms to receive Commissions and / or Benefits;

17.4 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 Representative's fee by the amount of the Commissions or to avoid the conflict altogether;

17.5 Count, for most of the Relevant Period:

(a) did not have any systems 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) permitted the advice given by the Representatives to be affected by the Advice Non-Disclosures by not developing Question Sets that tested for the Advice Non-Disclosures;

17.6 Group Members were not required to pay the Commissions in order to acquire the Relevant Products;

17.7 Commissions were not paid in exchange for benefits or services, or additional benefits or services;

17.8 Commissions were a cost to … Group Members, but were paid by the product providers to Count and/or the Representatives;

17.9 Count, by the Applicant Products Distribution Agreements contractually promised to promote, market and sell the Applicant's Relevant Products?

18. Insofar as any representations in 2FASOC [74] were made to Group Members, was the making of the representation misleading or deceptive or likely to mislead or deceive, in contravention of s 18 if the ACL, s 12DA of the ASIC Act or s 1041H of the Corporations Act, subject to any individual defences to individual Group Members that may apply?

698 The only question proposed by Count in their proposed common questions in relation to the Applicant's misleading and deceptive conduct claims was RCQ 20 which was in identical terms to ACQ 17.

O.3. Submissions

699 Count accepts that ACQ 17, which is in the same terms as RCQ 20, can be answered on a common basis.

700 The Applicant submits that it is incontrovertible that whether conduct is misleading or deceptive can be determined on a common basis, citing *Toyota Motor Corporation Australia* and by analogy *Wingecarribee*, subject to "any fact relevant to the issues which are peculiar to the said plaintiff or a particular group member": ***Asirifi-Otchere*** *v Swann Insurance (Aust) Pty Ltd (No 2)* [2020] FCA 1355; (2020) 148 ACSR 14 at [36] (Gleeson J).

701 The Applicant, submits that given (a) the consistency of Count's business model, (b) the commonality of the statements made to all Group Members, (c) the absence of any contradictory evidence, and (d) the matters that Count contends in its defence that did not have to be disclosed, the reasoning of Rares J in *Wingecarribee*, which "echoes the same analysis vis-à-vis fiduciary duties" applies with equal force to the misleading and deceptive conduct claims advanced by the Applicant on behalf of Group Members in this proceeding.

702 Count submits that ACQ 18 cannot be determined on a common basis because it is impermissibly hypothetical in that it invites the Court to provide an advisory opinion as it is expressed in terms of 'if the representation was in fact made'.

703 Moreover, Count submits that whether any particular representation was misleading necessarily cannot be determined on a common basis because it requires consideration of the circumstances and context in which the representation was made as it pertains to each Group Member to whom the representation was made, including the state of knowledge of the Group Member as it relates to the content and circumstances of that conduct.

O.4. Consideration

O.4.1. ACQ 18

704 I do not accept that ACQ 18 can be determined on a common basis.

705 *First*, ACQ 18 requires the Court to determine whether alleged failures to disclose information to Group Members constituted Representations, by silence, that were misleading or deceptive

or likely to mislead or deceive, without any consideration of the circumstances and context in which they were made to Group Members and the state of knowledge of the Group Members. This is a fundamentally different position to a situation where representations were alleged to be made expressly and the question of whether they were misleading or deceptive was an objective matter that could be determined without regard to individual circumstances, as was the case in *Toyota Motor Corporation*.

706 *Second*, even accepting that common questions in a fiduciary representative claim can relevantly inform whether common questions in a misleading and deceptive conduct claim can be determined, the Applicant's misleading and deceptive conduct claims in this proceeding are advanced on a magnitude significantly beyond the relatively narrow compass of the conduct the subject of *Wingecarribee.* In that case, the impugned conduct the subject of the common questions was limited to three councils and a single common product, a synthetic collateralised debt obligation.

707 Moreover, the observations made by Gleeson J in *Asirifi-Otchere* at [36] were made in the course of reasons for judgment in which common questions were being formulated prior to the initial trial and were never in fact answered because the proceeding was the subject of a successful settlement approval application: *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885; (2020) 385 ALR 625 (Lee J).

708 In any event, each case must turn on its individual facts and circumstances. I am satisfied in this proceeding that adding the qualification "subject to any individual defences to individual Group Members that may apply" to ACQ 18 does not enable it to be included as a common question. The breadth of the Group Member definition and the generality of the relevant dealings between Count Representatives and Group Members sought to be encompassed necessarily requires consideration of all the circumstances, including the specific advice sought and provided, and the particular circumstances of the Group Members to whom the Representations were alleged to have been conveyed.

709 *Third*, as submitted by Count, ACQ 18 by its prefatory words, "Insofar as any representations in 2FASOC [74] were made to Group Members", is inherently hypothetical and thereby is impermissibly seeking an advisory opinion.

O.4.2. ACQ 17/RCQ 20

710 I accept that this question can be answered on a common basis as it is directed at the existence of facts that would not turn on the individual circumstances of Group Members.

711 The facts alleged in ACQ 17/RCQ 20 replicate the agreed factual and legal issues for determination for the Applicant's misleading and deceptive conduct claim in AFL 29 and can be answered on the same basis. Again, as for previous common questions, many of the facts alleged in ACQ 17/RCQ 20 are framed in a manner that precludes a simple yes or no answer to the question.

P. DISPOSITION

712 For the foregoing reasons, the respondent's common questions are to be answered in the terms set forth in Schedule 1 to these reasons for judgment. The amended originating application is otherwise to be dismissed, and the Applicant is to pay Count's costs, as taxed or agreed.

I certify that the preceding seven hundred and twelve (712) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley.

Associate:

Dated: 27 May 2025

SCHEDULE 1

COMMON QUESTIONS

A FIDUCIARY CLAIMS

Existence of a Fiduciary Duty

1. During the Relevant Period, was a Financial Services Guide (as updated from time to time) distributed or provided to each Group Member by a Representative?

   The Financial Services Guide (as updated from time to time) was distributed or provided during the Relevant Period to most, but not necessarily, all Group Members by a Count Representative

2. If the answer to question 1 is 'yes', then, did the Representative who distributed or provided a Financial Services Guide to the Group Member, by reason of so doing:

   2.1 "*undert[ake] to provide advice to [that] Group Member*" (FASOC [43.2], and see [95.1]);

   Yes, to the extent that the Count Representative distributed or provided a Financial Services Guide to the Group Member.

   2.2 "*h[o]ld themselves out [to that Group Member] as [an] expert financial advisor*" (FASOC [43.3], and see [95.2)]?

   Yes, to the extent that the Count Representative distributed or provided a Financial Services Guide to the Group Member.

3. Was each Group Member provided with financial advice during the Relevant Period by:

   3.1 a Representative; or

   3.2 Count?

   No, because the definition of Group Member in the 2FASOC was not limited to persons who received personal advice during the Relevant Period.

4. If the answer to questions 2 and 3 is 'yes', then, by reason solely of the distribution or provision of the Financial Services Guide (as updated from time to time) to the Group Member during the Relevant Period, and without enquiry into any other circumstances,

was each Group Member owed fiduciary obligations (in relation to the provision of financial advice to the Group Member) by (2FASOC [43], [95.2] and [95.3]):

4.1 a Representative; or

4.2 Count?

Does not arise, but had the answers to questions (2) and (3) been "yes", then the answer to this question (4) is No.

Scope of Fiduciary Duty

5. Can question 6 be answered on a common basis, without regard to individual circumstances?

No, but had the answer to questions (2) and (3) been "yes", then the answer to this question (5) is "yes".

6. If the answer to question 4 is "yes", did those fiduciary obligations require Count and / or the Representatives to:

6.1 avoid the real or substantial possibility of conflict between the interests of the Group Members on one hand, and the interests of the Representatives and / or Count on the other; and

6.2 not to profit by reason of their position as a fiduciary?

Does not arise, but had the answer to question (4) been "yes", then in the absence of fully informed consent, the answer to this question (6) is "yes".

Breach of Fiduciary Duty

7. Can questions 8 to (16) be answered on a common basis, without regard to individual circumstances?

No.

8. During the Relevant Period, was each Group Member advised to acquire, invest in, or remain in a financial product on Count's Approved Product List:

8.1 by a Representative; or

8.2 by Count?

Does not arise.

9. During the Relevant Period, did each Group Member acquire, invest in, or remain in a financial product on Count's Approved Product List?

Does not arise.

10. During the Relevant Period, did the acquisition by a Group Member of, or investment by a Group Member in, a financial product on Count's Approved Product List necessarily result in:

    10.1 the receipt of Commissions or Benefits by a Representative; or

    10.2 the receipt of Rebates, Commissions or other benefits by Count?

Does not arise.

11. During the Relevant Period, did the decision by a Group Member to remain in a financial product on Count's Approved Product List necessarily result in:

    11.1 the receipt of Commissions or Benefits by a Representative; or

    11.2 the receipt of Rebates, Commissions or other benefits by Count?

Does not arise.

12. [Left blank].

13. Was it in the interests of Group Members to minimise the costs to acquire, invest in or remain in financial products?

Does not arise.

14. If the answer to question 9 is 'yes', then, in respect of each Group Member:

    14.1 did the payment of any Rebates to Count by the product issuer of the financial product that the Group Member acquired, invested in or remain in increase the costs to the Group Member to acquire, invest in or remain in the financial product;

    14.2 could Commissions payable in respect of the financial product be 'dialled down', 'switched off', or rebated;

    14.3 if so, would dialling down, switching or rebating the Commissions have reduced the overall cost to the Group Member (including the cost of advice) to acquire, invest in or remain in the financial product?

Does not arise.

15. Did there exist "an actual conflict" (FASOC [97]) between the interests of each Group Member on one hand, and:

    15.1 the interests of the Representative , of the kind pleaded in FASOC [97]; or

    15.2 the interests of Count, of the kind pleaded in FASOC [97]?

Does not arise.

16. Having regard to the answers to questions 9 and 11 above:

    16.1 did each Group Member accept the advice referred to in question 8; and

    16.2 if so, did Count and / or the Representatives earn revenue and / or profits by reason of the acceptance by the Group Members of that advice ?

Does not arise.

B STATUTORY CLAIMS

17. Upon a proper construction of s 961B, does a provider of personal advice to a person as a retail client necessarily contravene s 961B if the advice provided results, or will result, in the receipt of commissions or other benefits by the provider, or by a licensee of which the provider is an authorised representative?

No.

18. Upon a proper construction of s 961J, does a provider of personal advice to a person as a retail client necessarily contravene s 961J if the advice provided results, or will result, in the receipt of commissions or other benefits by the provider, or by a licensee of which the provider is an authorised representative?

No.

19. During the Relevant Period, did Count fail to take reasonable steps to ensure that its Representatives complied with ss 961B and 961J by:

    19.1 developing and designing a remuneration policy that entrenched the receipt of Commissions;

    No.

    19.2 failing to supervise remuneration at the Representative level and otherwise adequately supervise compliance with statutory duties; and / or

    No.

    19.3 failing to appropriately develop and enforce its licensee standards?

    No.

C Misleading or Deceptive Conduct

20. During the Relevant Period, was it a fact that: (2FASOC [75])

20.1 Representatives were permitted by Count (including through Count Licensee Standards) to continue to receive Commissions, even in circumstances of a conflict of interest;

Count Representatives were permitted by Count (including through the Count Licensee Standards) to continue to receive Commissions, other than in circumstances where there was a conflict of interest.

20.2 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;

Count did not require its Count Representatives (in 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;

(c) charge Commissions or an ongoing service fee, rather than both or a combination of both.

20.3 Count permitted and incentivised (including through its remuneration arrangements) Grandfathered Member Firms to receive Commissions and / or Benefits;

Yes.

20.4 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 Representative's fee by the amount of the Commissions or to avoid the conflict altogether;

Count instructed its Count Representatives that conflicts of interest could be managed by disclosure and did not instruct its Count Representatives not to receive them and/or did not instruct its Count Representatives to "dial down", rebate or switch off the Commissions, or to reduce the Count Representatives' fee by the amount of the Commissions.

20.5 Count, for most of the Relevant Period:

(a) did not have any systems 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) permitted the advice given by the Representatives to be affected by the Advice Non-Disclosures by not developing Question Sets that tested for the Advice Non-Disclosures;

Count:

(a) had systems in place, during the Relevant Period, to enable it to monitor the compliance by Count Representatives with their statutory and regulatory obligations relating to the terms of the Total Financial Care Agreements;

(b) did not have widespread significant failings in its advice business relating to "fees for no service" conduct during the Relevant Period; and

(c) did not permit the advice given by the Count Representatives to be affected by any alleged Advice Non-Disclosures by any failure to develop QAA Question Sets that tested for the Advice Non-Disclosures.

20.6 Group Members were not required to pay the Commissions in order to acquire the Relevant Products;

Group Members were required to pay the Commissions in order to acquire the Relevant Products unless a Count Representative agreed to "dial down" or rebate the Commission to the client.

20.7 Commissions were not paid in exchange for benefits or services, or additional benefits or services;

Commissions were paid in exchange for advice given in connection with the acquisition of Relevant Products.

20.8 Commissions were a cost to Group Members, but were paid by the product providers to Count and/or the Representatives;

Yes.

20.9 Count, by the Applicant Products Distribution Agreements contractually promised to promote, market and sell the Applicant's Relevant Products?

Count, by some of the Distribution Agreements contractually agreed to variously promote, market and sell the Relevant Products.

SCHEDULE 2

AGREED LIST OF FACTUAL AND LEGAL ISSUES FOR DETERMINATION

A. THE APPLICANT'S ADVISER CASE

A.1 The Relevant Period Advice and the Applicant's Products

1. Did any of the Relevant Period Advice pleaded at FASOC [25.1], [25.2], [25.4] and [25.5] include provision of advice to renew or continue to hold those Applicant's Products that were acquired prior to the Relevant Period (see FASOC [81]), being:
   1.1 the Macquarie CMA, described at FASOC [8.1]; and
   1.2 the Total Care Plans described at FASOC [8.2] and [8.3].
2. Did any of the Relevant Period Advice include a recommendation (express or implied) to the Applicant to (see FASOC [28]):
   2.1 continue to pay Commissions in respect of the Macquarie CMA?
   2.2 continue to pay Commissions in respect of Total Care Plans?
   2.3 pay Commissions in respect of the AMP Elevate Life Insurance Policy?
3. Did the receipt of Commissions or Benefits by the Applicant's Representatives in relation to the Applicant's Products during the Relevant Period give rise to a conflict of interest between the interests of the Applicant and the interests of the Applicant's Representatives? If so, what was the nature of the conflict (FASOC [26.4]?
4. Did the Applicant's Representatives fail to disclose to the Applicant the matters that are said to constitute the Advice Non-Disclosures (see FASOC [26])?
5. In respect of each of the Applicant's Relevant Products, was it possible, during the Relevant Period, for the Applicant to obtain the same products without paying Commissions (see FASOC [26.8])?
6. In respect of each of the Applicant's Relevant Products, was it possible, during the Relevant Period, for the Applicant's Representatives to "dial down", "switch off", "rebate" or "otherwise turn off" any Commissions payable in respect of the relevant product (see FASOC [26.3], [101.2])?
7. Insofar as the answer to Question 6 is 'yes', if any Commissions payable in respect of the Applicant's Products had been "dialled down", "switched off", "rebated" or

"otherwise turned off", would the Applicant's Products have been materially cheaper to acquire (FASOC [26.2], [26.10], [32], [33], [115.4])?

8. In relation to the Relevant Period Advice provided to the Applicant, was it the case that:

   8.1 no additional benefits or services would be provided to the Applicant in exchange for the payment of Commissions; [26.6]

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

   8.3 the Contribution to Count program incentivised advisers to recommend products that promoted the interests of Count; [26.4(b)]

   8.4 the Count remuneration policies incentivised advisers to only recommend products that were on the APL; [26.4(c)]

   8.5 the Applicant's Representatives were ranked by Count on the revenue they generated for Count and financially rewarded for their revenue; [26.4(d)]

   8.6 the Splits, and the variable remuneration received as a result of the Splits could give rise to a conflict? [26.4(e)]

A.2 Alleged contravention of s 961B

9. What is the proper construction of s 961B?

10. Did Centenary or Mr Michael Williams fail to act in the best interests of the Applicant in relation to the advice pleaded at FASOC [25.1], [25.2], [25.3] and [25.5], by reason of the matters pleaded in:

   10.1 FASOC [101];

   10.2 FASOC [102];

   10.3 FASOC [106]-[111]?

11. Did Centenary or Mr Chad Hohnen fail to act in the best interests of the Applicant in relation to the advice pleaded at FASOC [25.6], by reason of the matters pleaded in:

   11.1 FASOC [101];

   11.2 FASOC [102];

   11.3 FASOC [112]?

12. If the answer to questions 10 or 11 is ‘yes’, did the Applicant suffer loss or damage because of the failure(s) by the Applicant’s Representative(s) to act in the best interests of the Applicant in relation to the advice?

13. If the answer to question 12 is ‘yes’, what is the amount of loss or damage that the Applicant has suffered because of the failure(s) by the Applicant’s Representative(s) to act in the best interests of the Applicant in relation to the Relevant Period Advice.

[13A. Any common factual or legal issues for determination at the initial trial]

A.3 Alleged contravention of s 961J

14. What is the proper construction of s 961J?

15. Having regard to the answer to Question 3, when giving the Relevant Period Advice, did the Applicant’s Representative who provided the advice know, or ought he reasonably to have known, that there was a conflict between the interests of the Applicant and the interests of an Applicant’s Representative or Count arising from the payment of Commissions in relation to the Applicant’s Products (see FASOC [115.3])?

16. If the answer to Question 15 is yes, when giving the Relevant Period Advice, did the Applicant’s Representative who provided the advice fail to give priority to the Applicant’s interests by reason of the matters pleaded in:

    16.1 FASOC [101];

    16.2 FASOC [102];

    16.3 FASOC [106]-[112].

17. If the answer to Question 16 is ‘yes’, did the Applicant suffer loss or damage because of the failure(s) by the Applicant’s Representative(s) to give priority to the Applicant’s interests when giving the advice?

18. If the answer to Question 17 is ‘yes’, what is the amount of loss or damage that the Applicant has suffered because of the failure(s) by the Applicant’s Representative(s) to give priority to the Applicant’s interests when giving the advice?

[18A. Any common factual or legal issues for determination at the initial trial]

A.4 Alleged breach of fiduciary duty

19. During the Relevant Period, was the Applicant owed fiduciary obligations in relation to the provision of financial [services (Applicant's wording)] / [advice to the Applicant (Respondent's wording)] by (2FASOC [43], [95.2] and [95.3]):

    19.1 Mr Williams;

    19.2 Mr Hohnen;

    19.3 Centenary; or

    19.4 Count?

20. If the answer to Question 19 is 'yes', then, was the scope of the fiduciary obligations owed by any such person to the Applicant:

    20.1 to avoid the real or substantial possibility of conflicts between the interests of the Applicant, and their own interests (and, in the case of the Representatives, also the interests of Count); and

    20.2 not to profit by reason of their position as a fiduciary?

21. Did any person(s) who owed fiduciary obligations to the Applicant breach those obligations? If so, how? Did the applicant give fully informed consent to the conduct said to give rise to the breach(es) of duty?

22. Insofar as any person who owed a fiduciary obligation to the Applicant breached such obligation, what relief, if any, is the Applicant entitled to?

23. Is Count liable to the Applicant for any breach of fiduciary duty committed by any of the Applicant's Representatives (FASOC [151])?

[23A Any common factual or legal issues for determination at the initial trial]

B. THE APPLICANT'S LICENSEE CASE

24. During the Relevant Period, did Count fail to take reasonable steps to ensure that the Applicant's Representatives complied with ss 961B and 961J of the Act during the Relevant Period by reason of one or more of the matters identified in the Applicant's Opening Submissions at [101] and, if so, in what respect?

25. If the answer to question 24 is 'yes', did the Applicant suffer loss or damage because of the failure(s) by Count to take reasonable steps to ensure that the Applicant's Representatives complied with ss 961B and 961J of the Act (FASOC [148])?

26. If the answer to question 25 is 'yes', what is the amount of loss or damage that the Applicant has suffered because of the failure(s) by Count to take reasonable steps to

ensure that the Applicant's Representatives complied with ss 961B and 961J of the Act?

C. ALLEGED MISLEADING OR DECEPTIVE CONDUCT

27. Did Count by itself or through the Applicant's Representatives make the Representations to the Applicant during the Relevant Period (FASOC [74.1])?

28. Were the Representations continuing throughout the Relevant Period? (FASOC [144])?

29. During the Relevant Period, was it a fact that (FASOC [75]):

29.1 "Representatives were permitted by Count (including through Count Licensee Standards) to continue to receive Commissions, even in circumstances of a conflict of interest";

29.2 "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";

29.3 "Count permitted and incentivised (including through its remuneration arrangements) Grandfathered Member Firms to receive Commissions and/or Benefits";

22.1 "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".

29.4 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) "[have] 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) "… permit … the advice given by the Representatives to be affected by the Advice Non-Disclosures by not developing Question Sets that tested for the Advice Non-Disclosures";

29.5 "Group Members were not required to pay the Commissions in order to acquire the Relevant Products";

29.6 "Commissions were not paid in exchange for benefits or services, or additional benefits or services";

29.7 "Commissions were a cost to … Group Members, but were paid by the product providers to Count and/or the Representatives";

29.8 Count, by the Applicant Products Distribution Agreements "contractually promised to promote, market and sell the Applicant's Relevant Products"?

30. Was Count aware of each of the matters comprising the True Position from the time that each of the Representations were made during the Relevant Period (FASOC [76])?

31. Insofar as any of the Representations were made to the Applicant, were the Representations misleading or deceptive within the meaning of ss 12DA(1) or 18(1) of the ACL, or ss 769C or 1041H of the Act, by reason of the True Position as pleaded at FASOC [75] and/or Count's knowledge of the True Position?

32. Did the Applicant rely on any of the Representations in deciding to:

32.1 acquire one or more of the Applicant's Products (FASOC [77.1]); or

32.2 continue to hold and/or renew one or more of the Applicant's Products (FASOC [77.2])?

33. If the answer to Question 31 is 'yes', did the Applicant suffer loss or damage because of the contraventions of ss 12DA(1) or 18(1) of the ACL, and/or ss 769C or 1041H of the Act (FASOC [146])?

34. If the answer to question 33 is ‘yes’, what is the amount of loss or damage that the Applicant has suffered because of the contraventions of ss 12DA(1) or 18(1) of the ACL, and/or ss 769C or 1041H of the Act?