

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 6/09/2018 9:56:53 AM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Originating process (Rule 2.2): Federal Court (Corporations) Rules 2000 form 2
File Number:	NSD1654/2018
File Title:	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v MLC NOMINEES PTY LTD ACN 002 814 959 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 6/09/2018 3:06:27 PM AEST

Registrar

### Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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

## ORIGINATING PROCESS



Federal Court of Australia

No

of 2018

District Registry: New South Wales

Division: General

IN THE MATTER OF NULIS NOMINEES (AUSTRALIA) LIMITED

ACN: 008 515 633

**Australian Securities and Investments Commission**

Plaintiff

**MLC Nominees Pty Ltd (ACN 002 814 959) and another named in the Schedule**

Defendants

### **A. DETAILS OF APPLICATION**

This application is made under section 12GBA of the *Australian Securities and Investments Commission Act 2001*, sections 21 and 43 of the *Federal Court of Australia Act 1976* and the inherent or implied jurisdiction of the Court for civil penalties and declarations of contravention by the Defendants of the general law and sections 912A(1)(a), 912A(1)(c) and 1041H(1) of the *Corporations Act 2001* and sections 12DA and 12DB of the *Australian Securities and Investments Commission Act 2001*.

On the facts stated in the concise statement filed in these proceedings and served with this originating process, the plaintiff claims:

---

Filed on behalf of:	Australian Securities and Investments Commission, the Plaintiff		
Prepared by:	Kim Turner, Solicitor for the Plaintiff		
Tel:	(02) 0911 2230	Fax:	(02) 9911 2414
Email:	kim.turner@asic.gov.au/kirsty.magee@asic.gov.au		
Address for service	Level 5, 100 Market Street SYDNEY NSW 2000		



**Against the First Defendant (MLC Nominees Pty Ltd): no-adviser members**

1. A declaration that, during the period 8 September 2012 to 30 June 2016 whilst MLC Nominees Pty Ltd (**MLC Nominees**) was trustee of The Universal Super Scheme, MLC Nominees acted contrary to the terms of the trust and in breach of trust by:
  - (a) making or authorising the making of monthly deductions from the account balances of approximately 220,000 members in MLC MasterKey Super totalling over \$33,800,000 in respect of **Plan Service Fees** in circumstances where those members (**no-adviser members**) had no linked financial adviser (**Plan Adviser**); and
  - (b) retaining or paying those deductions to the administrator of The Universal Super Scheme.
2. A declaration that, during the period 8 September 2012 to 30 June 2016, MLC Nominees failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 23072 were provided efficiently, honestly and fairly, and thereby contravened section 912A(1)(a) of the *Corporations Act 2001*, in that MLC Nominees made or authorised the making of the deductions referred to in paragraph 1 and retained or paid those deductions to the administrator of The Universal Super Scheme.
3. A declaration that, during the period 4 July 2012 to 12 April 2013, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that MLC Nominees sent a letter to each existing no-adviser member of MLC MasterKey Super which:
  - (a) under the heading "Your new fees", listed the Plan Service Fee as a fee that would apply to the no-adviser member's account on and from the date specified;
  - (b) did not state that the Trustee was not entitled to deduct the Plan Service Fee from the no-adviser member's account or that the no-adviser member was not obliged to pay the Plan Service Fee; and



- (c) in the circumstances, represented that the Trustee was entitled to deduct the Plan Service Fee and the no-adviser member was obliged to pay it whereas there was no such entitlement or obligation.
4. A declaration that, during the period 8 September 2012 to 29 November 2013, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that MLC Nominees issued to each new no-adviser member a "welcome kit" which:
- (a) listed "current fees" by type and amount/Percentage including the Plan Service Fee;
  - (b) did not state that the Trustee was not entitled to deduct the Plan Service Fee from the no-adviser member's account or that the no-adviser member was not obliged to pay the Plan Service Fee; and
  - (c) in the circumstances, represented that the Trustee was entitled to deduct the Plan Service Fee and the no-adviser member was obliged to pay it whereas there was no such entitlement or obligation.
5. A declaration that, during the period 8 September 2012 to 30 June 2016, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that MLC Nominees issued to each no-adviser member of MLC MasterKey Super annual statements which:
- (a) listed "current fees" by type and amount/Percentage including the Plan Service Fee;
  - (b) did not state that the Trustee was not entitled to deduct the Plan Service Fee from the no-adviser member's account or that the no-adviser member was not obliged to pay the Plan Service Fee; and



(c) in the circumstances represented that the Trustee was entitled to deduct the Plan Service Fee and the no-adviser member was obliged to pay it whereas there was no such entitlement or obligation.

6. A declaration that, by reason of the matters set out in paragraphs 3, 4 and 5 above, MLC Nominees in connection with the supply of financial services made false or misleading representations with respect to the fees to be paid by no-adviser members of MLC MasterKey Super, and thereby contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001*.
7. A declaration that, by reason of the matters set out in paragraphs 3, 4 and 5 above, MLC Nominees in connection with the supply of financial services made false or misleading representations concerning the existence of a right of MLC Nominees, namely the right to deduct Plan Services Fee and, further, a condition imposed on no-adviser members, namely the obligation to pay the Plan Service Fee, and thereby contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001*.
8. A declaration that, during the period from 8 September 2012 to 30 June 2016, MLC Nominees failed to exercise the same degree of care, skill and diligence as a prudent trustee would exercise in relation to MLC MasterKey Super and thereby breached:
  - (a) the general law duty which MLC Nominees owed each member of MLC MasterKey Super to exercise the same care and skill as an ordinary prudent person of business would exercise in conducting the business of MLC MasterKey Super as if it were that person's own; and
  - (b) the terms of the trust deed for The Universal Super Scheme dated 12 May 1989 and subsequently amended from time to time, including by amending deed poll dated 28 June 2011 (**Trust Deed**), specifically clause 2.1(b)(2) and the provision required to be included in the Trust Deed by section 52(2)(b) of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*,

in that MLC Nominees:

- (c) did not know which members of MLC MasterKey Super were linked to a Plan Adviser (**linked members**) and which members were no-adviser members;



- (d) did not have in place an effective system to ensure that Plan Service Fees were not deducted from no-adviser member accounts;
  - (e) made or authorised the making of deductions of amounts in respect of the Plan Service Fee from the account balances of no-adviser members;
  - (f) did not comply with the terms of MLC MasterKey Super; and
  - (g) misrepresented to no-adviser members that the Plan Service Fee was a fee which the Trustee was entitled to deduct, and which no-adviser members were obliged to pay.
9. A declaration that, during the period from 8 September 2012 to 30 June 2016, MLC Nominees failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that by reason of the conduct and breach of the term of the Trust Deed referred to in paragraph (b) of the preceding paragraph, MLC Nominees contravened section 55 of the SIS Act.
10. A declaration that, by reason of the matters referred to in paragraph 8 above, during the period from 8 September 2012 to 30 June 2016 MLC Nominees failed to perform its duties and exercise its powers in the best interests of members of MLC MasterKey Super and thereby breached the terms of the Trust Deed, specifically clause 2.1(b)(2) and the provision required to be included in the Trust Deed by section 52(2)(c) of the SIS Act.
11. A declaration that, during the period from 8 September 2012 to 30 June 2016, MLC Nominees failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that by reason of the conduct and breach of the term of the Trust Deed referred to in the preceding paragraph, MLC Nominees contravened section 55 of the SIS Act.
12. A declaration that during the period 8 September 2012 to 30 June 2016 MLC Nominees failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that MLC Nominees:



- (a) contravened sections 1041H of the *Corporations Act 2001* and section 12DB(1)(h) of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraph 3 to 5 above;
  - (b) contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraph 6 above; and
  - (c) contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraph 7 above.
13. A declaration that during the period 8 September 2012 to 30 June 2016 MLC Nominees failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 23072 were provided efficiently, honestly and fairly, and thereby contravened section 912A(1)(a) of the *Corporations Act 2001*, in that MLC Nominees:
- (a) engaged in the misleading or deceptive conduct referred to in paragraphs 3 to 7 above;
  - (b) failed to exercise the same degree of care, skill and diligence as a prudent trustee would exercise in relation to MLC MasterKey Super as referred to in paragraphs 8 and 9 above; and
  - (c) failed to perform its duties and exercise its powers in the best interests of members of MLC MasterKey Super as referred to in paragraphs 10 and 11 above.
14. An order pursuant to section 12GBA of the *Australian Securities and Investments Commission Act 2001* that MLC Nominees pay to the Commonwealth a pecuniary penalty in respect of each declared civil penalty contravention, in such amount as the Court determines to be appropriate.

**Against the First Defendant (MLC Nominees Pty Ltd): linked members**

15. A declaration that during the period 8 September 2012 to 30 June 2016 whilst MLC Nominees was trustee of The Universal Super Scheme, MLC Nominees failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 23072 were provided efficiently, honestly and fairly, and





thereby contravened section 912A(1)(a) of the *Corporations Act 2001*, in that  
Nominees:

- (a) was party to standard Licensee Remuneration Agreements with Plan Advisers in respect of distribution of a superannuation product within The Universal Super Scheme called MLC MasterKey Super, which standard agreements imposed an obligation on MLC Nominees to pay to the Plan Advisers a fee called the Plan Service Fee in respect of linked members of a division of MLC MasterKey Super called MasterKey Personal Super but did not impose any obligation on Plan Advisers to provide any services to linked members in MasterKey Personal Super;
- (b) did not have in place a system to enable it to form a reasonable belief about whether Plan Advisers were providing services to linked members in MasterKey Personal Super;
- (c) did not form a reasonable belief, upon each linked member of MLC MasterKey Super ceasing employment and being transferred to MasterKey Personal Super from another division of MLC MasterKey Super called MasterKey Business Super, that the Plan Adviser was no longer providing that member with the financial services to which the Plan Service Fee related;
- (d) did not terminate payment of the Plan Service Fee for each member upon that linked member ceasing employment and being transferred to MasterKey Personal Super;
- (e) made or authorised the making of monthly deductions from the account balances of 305,287 linked members in MasterKey Personal Super for payment to Plan Advisers of Plan Service Fees totalling \$64,480,099;
- (f) did not inform linked members in MasterKey Personal Super at any time, including when they were transferred from MasterKey Business Super to MasterKey Personal Super, that they had the right to elect to turn off the Plan Service Fee; and
- (g) did not inform linked members in MasterKey Business Super at any time that they would have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super.



16. A declaration that, from 10 September 2012 to 19 November 2012, MLC Nominees gave to people who became a member of MLC MasterKey Super a product disclosure statement dated 10 September 2012 which was defective within the meaning of section 1022A of the *Corporations Act 2001* in that:

- (a) the product disclosure statement contained a statement that was misleading or deceptive, namely:

“Your Plan service fee will continue under MLC MasterKey Personal Super and will be capped at 0.44%.”

whereas upon a linked member being transferred to MasterKey Personal Super the member had the right to elect to turn off the Plan Service Fee; and

- (b) there was an omission from the product disclosure statement of material required to be included by section 1013C(1)(a) of the *Corporations Act 2001* as modified by regulation 7.9.11N of the *Corporations Regulation 2001* and cl 5B.2 of Schedule 10A to those regulations, namely the material specified in regulation 7.9.11O and clause 8(9)(c) of Schedule 10D which required the product disclosure statement to explain how fees which may be paid to the employer’s Plan Adviser were determined, yet the product disclosure statement did not explain that:

- (i) linked members in MasterKey Personal Super had the right to elect to turn off the Plan Service Fee; and

- (ii) linked members in MasterKey Business Super would have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super; and

- (c) there was an omission from the product disclosure statement of material required to be included by section 1013C(1)(a) of the *Corporations Act 2001* as modified by regulation 7.9.11N of the *Corporations Regulation 2001* and cl 5B.2 of Schedule 10A to those regulations, namely the material specified in regulation 7.9.11O, clause 8(5) of Schedule 10D and paragraph 209(k)(iv) of Schedule 10 which required the product disclosure statement to set out information about all the changes in the structure of the Plan Service Fee that were dependent on a



member's change in employment, yet the product disclosure statement did not set out the following information:

- (i) linked members who had ceased to be employed and were now members in MasterKey Personal Super had the right to elect to turn off the Plan Service Fee; and
  - (ii) linked members in MasterKey Business Super would have the right to elect to turn off the Plan Service Fee upon ceasing employment and being transferred to MasterKey Personal Super.
17. A declaration that from 19 November 2012 until 1 July 2013, MLC Nominees gave to people who became a member of MLC MasterKey Super a product disclosure statement dated 19 November 2012 which was defective within the meaning of section 1022A of the *Corporations Act 2001* for the same reasons as for the product disclosure statement dated 10 September 2012 as referred to in paragraph 16 above.
18. A declaration that from 1 July 2013 until 29 November 2013, MLC Nominees gave to people who became a member of MLC MasterKey Super a product disclosure statement dated 1 July 2013 which was defective within the meaning of section 1022A of the *Corporations Act 2001* for the same reasons as for the product disclosure statement dated 10 September 2012 as referred to in paragraph 16 above.
19. A declaration that prior to 8 September 2012, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that MLC Nominees:
- (a) sent a letter to each linked member of MasterKey Personal Super which:
    - i. informed linked members of the introduction of the Plan Service Fee;
    - ii. listed "your new fees" by type and amount/percentage;
    - iii. provided information under the heading "How you can further reduce your fees";



- iv. but did not state that the linked member had the right to elect to turn off the Plan Service Fee;
- (b) enclosed with the letter a reference guide which:
  - i. stated:

**“Plan service fee**

Up to 1.5% pa of your account balance. It may be a dollar amount, as long as it doesn’t exceed this limit.

It is deducted monthly from your account and paid to your adviser.

You can negotiate a lower fee with your adviser.”
  - ii. by stating without qualification, expansion or explanation that “You can negotiate a lower fee with your adviser”, the letter represented that:
    - A. a linked member could not remove the Plan Service Fee unless the Plan Adviser agreed, whereas the linked member had the right to elect to turn off the Plan Service Fee simply by notifying the trustee;
    - B. a linked member could lower the amount he or she had to pay but would still have to pay some amount for the Plan Service Fee, whereas the linked member had the right to elect to turn off the fee altogether;
  - iii. the letter provided information about reducing fees under the heading “How you can further your fees”;
  - iv. but did not state that the linked member had the right to elect to turn off the Plan Service Fee;
- (c) sent a letter to each linked member of MasterKey Business Super which:
  - i. informed linked members of the introduction of the Plan Service Fee;

- ii. listed "your new fees" by type and amount/percentage;
  - iii. provided information under the heading "How you can further reduce your fees";
  - iv. but did not state that the linked member would have the right to elect to turn off the Plan Service Fee upon the linked member being transferred to MasterKey Personal Super; and
- (d) enclosed with the letter a reference guide which:
- i. provided information about reducing fees under the heading "How you can further your fees";
  - ii. stated:

**"Plan service fee**

This fee is up to 1.5% pa of your account balance. It may be a dollar amount, as long as it doesn't exceed this limit.

It is deducted monthly from your account and paid to your Plan adviser.

The fee is for providing financial services that are tailored to the needs of the employees in your company.

The Plan service fee is the Asset based commission plus the Employer service fee."

- iii. further stated:

**"Changes when you leave your employer**

If you leave your employer, we'll automatically transfer your super account to MLC MasterKey Personal Super.

The overall changes to your fees and costs will be:

- your Administration fee may increase as you will no longer be part of an employer Plan
- any Adviser contribution fee will cease
- any Plan service fee will be capped at 0.44%, and
- your Insurance commission will be 23.65%.

Other fees and costs will remain the same at the time of the transfer.”

- iv. but did not at any place state that the linked member would have the right to elect to turn off the Plan Service Fee upon the linked member being transferred to MasterKey Personal Super.

20. A declaration that by reason of the matters referred to in paragraph 19 above, prior to 8 September 2012 MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations with respect to the fees to be paid by linked members in MLC MasterKey Super and thereby contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001*.
21. A declaration that by reason of the matters referred to in paragraph 19 above, prior to 8 September 2012 MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations concerning the existence of a right of linked members of MLC MasterKey Super, namely the right to elect to turn off the Plan Service Fee once the linked member was transferred to MasterKey Personal Super, and thereby contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001*.
22. A declaration that during the period 17 September 2012 to 12 October 2012, MLC Nominees in trade or commerce, engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that MLC Nominees:



- (a) sent a letter to each person to be transferred to MasterKey Personal Super from another superannuation fund of which MLC Nominees was also trustee called Navigator Super Solutions – Employer Super and Personal Option (**NSS**), which letter:
- i. listed “your new fees” by type and amount/percentage;
  - ii. provided information about reducing fees under the heading “How you can further reduce your fees”;
  - iii. but did not state that the linked member had the right to elect to turn off the Plan Service Fee;
- (b) sent a letter to each person to be transferred to MasterKey Business Super from NSS which:
- i. listed “your new fees” by type and amount/percentage;
  - ii. provided information about reducing fees under the heading “How you can further reduce your fees”;
  - iii. but did not state that the linked member would have the right to elect to turn off the Plan Service Fee upon the member being transferred to MasterKey Personal Super; and
- (c) enclosed with the letters referred to in the preceding two subparagraphs a reference guide which:
- i. provided information about reducing fees under the heading “How you can reduce your fees”;
  - ii. with reference to MasterKey Business Super, stated:

**“Plan service fee**



The Adviser services fee will be transferred into a Plan service fee, which can be up to 1.5% pa of your account balance. It may be a dollar amount, as long as it doesn't exceed this limit.

It is deducted monthly from your account and paid to your Plan adviser.

The fee is for providing financial services that are tailored to the needs of the employees in your company."

iii. with reference to MasterKey Personal Super, stated:

**"Plan service fee**

The Adviser services fee will be transferred into a Plan service fee, which can be up to 1.5% pa of your account balance. It may be a dollar amount, as long as it doesn't exceed this limit.

It is deducted monthly from your account and paid to your adviser.

You can negotiate a lower fee with your adviser."

iv. by stating without qualification, expansion or explanation that "You can negotiate a lower fee with your adviser", the letter represented that:

- A. a linked member could not turn off the Plan Service Fee unless the Plan Adviser agreed, whereas the linked member had the right to elect to turn off the Plan Service Fee simply by notifying the trustee;
- B. a linked member could lower the amount he or she had to pay but would still have to pay some amount for the Plan Service Fee, whereas the member had the option of turning off the fee altogether;

v. did not at any place state that linked members in MasterKey Personal Super had the right to elect to turn off the Plan Service Fee; and





- vi. did not at any place state that linked members in MasterKey Business Super would have the right to elect to turn off the Plan Service Fee upon the member being transferred to MasterKey Personal Super.

23. A declaration that by reason of the matters referred to in paragraph 22 above, during the period 17 September 2012 to 12 October 2012 MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations with respect to the fees to be paid by linked members of MLC MasterKey Super and thereby contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001*.

24. A declaration that by reason of the matters referred to in paragraph 22 above, during the period 17 September 2012 to 12 October 2012 MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations concerning the existence of a right of linked members of MLC MasterKey Super, namely the right to elect to turn off the Plan Service Fee once the member was transferred to MasterKey Personal Super, and thereby contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001*.

25. A declaration that, during the period 22 March 2013 to 12 April 2013, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that MLC Nominees:

- (a) sent a letter to each person to be transferred to MasterKey Personal Super from another superannuation fund of which MLC Nominees was also trustee called The Employee Retirement Plan (**TERP**), which letter:

- i. listed "your new fees" by type and amount/percentage;
- ii. stated:

"Plan service fee [x] % pa of your account balance

You can reduce your Plan service fee. To discuss this please contact your adviser or call us after the move."

- iii. by stating without qualification, expansion or explanation that “You can reduce your Plan service fee”, the letter represented that a linked member could reduce the amount he or she had to pay but would still have to pay some amount for the Plan Service Fee, whereas the linked member had the option of turning off the fee altogether;
  - iv. did not state that the linked member had the right to elect to turn off the Plan Service Fee;
- (b) sent a letter to each person to be transferred to MasterKey Business Super from TERP which:
- i. listed “your new fees” by type and amount/percentage;
  - ii. stated:  
  
“Plan service fee [x] % pa of your account balance  
  
If you want to amend your Plan service fee please contact your Plan adviser or call us after the move.”
  - iii. by referring without qualification, expansion or explanation to amending the Plan Service Fee, the letter represented that a linked member could change the amount he or she had to pay but would still have to pay some amount for the Plan Service Fee, whereas the linked member would have the right to elect to turn off the fee altogether;
  - iv. did not state that the linked member would have the right to elect to turn off the Plan Service Fee upon the linked member being transferred to MasterKey Personal Super;
- (c) enclosed with the letters referred to in the preceding two subparagraphs a reference guide which:
- i. provided information about “fees you pay”;

- ii. provided information about reducing fees under the heading "How you can reduce your fees";

- iii. stated:

**"Plan service fee**

0.33% pa (or 0.22% pa if your employer's Plan used to be with National Flexi Super). It's deducted monthly from your account and paid to your Plan adviser."

- iv. did not at any place state that linked members in MasterKey Personal Super had the right to elect to turn off the Plan Service Fee;
- v. did not at any place state that linked members in MasterKey Business Super would have the right to elect to turn off the Plan Service Fee upon the member being transferred to MasterKey Personal Super.

26. A declaration that by reason of the matters referred to in paragraph 25 above, during the period 22 March 2013 to 12 April 2013 MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations with respect to the fees to be paid by linked members of MLC MasterKey Super and thereby contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001*.
27. A declaration that by reason of the matters referred to in paragraph 25 above, during the period 22 March 2013 to 12 April 2013 MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations concerning the existence of a right of linked members of MLC MasterKey Super, namely the right to elect to turn off the Plan Service Fee once the member was transferred to MasterKey Personal Super, and thereby contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001*.
28. A declaration that, between 8 September 2012 and 29 November 2013, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities*



and *Investments Commission Act 2001*, in that MLC Nominees issued to each person who became a new linked member in MLC MasterKey Super a "welcome kit" which:

- (a) listed "current fees" by type and amount/Percentage; and
  - (b) did not at any place state that the member had the right to elect to turn off the Plan Service Fee once the member was transferred to MasterKey Personal Super.
29. A declaration that by reason of the matters referred to in paragraph 28 above, between 8 September 2012 and 29 November 2013, MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations with respect to the fees to be paid by linked members of MLC MasterKey Super and thereby contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001*.
30. A declaration that by reason of the matters referred to in paragraph 28 above, between 8 September 2012 and 29 November 2013, MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations concerning the existence of a right of linked members of MLC MasterKey Super, namely the right to elect to turn off the Plan Service Fee once the member was transferred to MasterKey Personal Super, and thereby contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001*.
31. A declaration that between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that MLC Nominees issued a "porting kit" to each person who was a linked member in MasterKey Business Super as at 29 November 2013 and who was then transferred to MasterKey Personal Super, which "porting kit":
- (a) listed "your new account fees" by type and amount/Percentage; and
  - (b) did not at any place state that the member now had the right to elect to turn off the Plan Service Fee.



32. A declaration that by reason of the matters referred to in paragraph 31 above, between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations with respect to the fees to be paid by linked members of MLC MasterKey Super and thereby contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001*.
33. A declaration that by reason of the matters referred to in paragraph 31 above, between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce in connection with the supply of a financial service made false or misleading representations concerning the existence of a right of members of MLC MasterKey Super, namely the right to elect to turn off the Plan Service Fee once the linked member was transferred to MasterKey Personal Super, and thereby contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001*.
34. A declaration that during the period from 8 September 2012 to 30 June 2016, MLC Nominees failed to exercise the same degree of care, skill and diligence as a prudent trustee would exercise in the relation MLC MasterKey Super and thereby breached:
- (a) the general law duty which MLC Nominees owed each member of MLC MasterKey Super to exercise the same care and skill as an ordinary prudent person of business would exercise in conducting the business of MLC MasterKey Super as if it were that person's own; and
  - (b) the terms of the Trust Deed, specifically clause 2.1(b)(2) and the provision required to be included in the Trust Deed by section 52(2)(b) of the SIS Act,
- in that MLC Nominees:
- (c) was party to standard Licensee Remuneration Agreements with Plan Advisers which imposed an obligation on MLC Nominees to pay the Plan Service Fee to the Plan Advisers in respect of linked members in MasterKey Personal Super but did not impose any obligation on Plan Advisers to provide any services to linked members in MasterKey Personal Super;



- (d) did not obtain information about any agreement between a Standard Employer Sponsor and its Plan Adviser in addition to that contained in the MLC Application Form, namely information about whether there was any agreement by the Plan Adviser to provide services to linked members after they cease employment and, if so, what services;
- (e) did not have in place a system to enable it to form a reasonable belief about whether Plan Advisers were providing services to linked members in MasterKey Personal Super;
- (f) did not form a reasonable belief, upon each linked member of MLC MasterKey Super ceasing employment and being transferred to MasterKey Personal Super from MasterKey Business Super, that the Plan Adviser was no longer providing that linked member with the financial services to which the Plan Service Fee related;
- (g) did not terminate payment of the Plan Service Fee for each linked member upon that member ceasing employment and being transferred to MasterKey Personal Super;
- (h) made or authorised the making of monthly deductions from the account balances of 305,287 linked members in MasterKey Personal Super for payment to Plan Advisers of Plan Service Fees totalling \$64,480,099;
- (i) did not inform linked members in MasterKey Personal Super at any time, including when they were transferred from MasterKey Business Super to MasterKey Personal Super, that they had the right to elect to turn off the Plan Service Fee;
- (j) did not inform linked members in MasterKey Business Super at any time that they would have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super;
- (k) did not inform all linked members that they could exercise that right simply by notifying the Trustee;
- (l) issued the three product disclosure statements with the defects referred to in paragraphs 16, 17 and 18 above; and

- (m) engaged in the misleading or deceptive conduct referred to in paragraphs 19, 22, 25 and 28 above.

35. A declaration that, during the period from 8 September 2012 to 30 June 2016, MLC Nominees failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that by reason of the conduct and breach of the term of the Trust Deed referred to in paragraph (b) of the preceding paragraph, MLC Nominees contravened section 55 of the SIS Act.
36. A declaration that by reason of the matters referred to in paragraph 34 above, during the period from 8 September 2012 to 30 June 2016 MLC Nominees failed to perform its duties and exercise its powers in the best interests of members of MLC MasterKey Super and thereby breached the covenant taken to be contained in the Trust Deed by section 52(2)(c) of the SIS Act.
37. A declaration that, during the period from 8 September 2012 to 30 June 2016, MLC Nominees failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that by reason of the conduct and breach of the term of the Trust Deed referred to in the preceding paragraph, MLC Nominees contravened section 55 of the SIS Act.
38. A declaration that during the period 8 September 2012 to 30 June 2016 MLC Nominees failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that MLC Nominees:
- (a) gave the product disclosure statements which were defective for the purposes of section 1022A of the *Corporations Act 2001* as referred to in paragraphs 16, 17 and 18 above;
  - (b) contravened sections 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraphs 19, 22, 25 and 28 above;
  - (c) contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraphs 20, 23, 26 and 32 above; and





- (d) contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraphs 21, 24, 27 and 33 above.

39. A declaration that during the period 8 September 2012 to 30 June 2016 MLC Nominees failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 23072 were provided efficiently, honestly and fairly, and thereby contravened section 912A(1)(a) of the *Corporations Act 2001*, in that MLC Nominees:

- (a) gave the product disclosure statements which were defective as referred to in paragraphs 16, 17 and 18 above;
- (b) engaged in the misleading or deceptive conduct referred to in paragraphs 19, 22, 25 and 28 above;
- (c) failed to exercise the same degree of care, skill and diligence as a prudent trustee would exercise in the relation MLC MasterKey Super as referred to in paragraphs 34 and 35 above; and
- (d) failed to perform its duties and exercise its powers in the best interests of members of MLC MasterKey Super as referred to in paragraphs 36 and 37 above.

40. An order pursuant to section 12GBA of the *Australian Securities and Investments Commission Act 2001* that MLC Nominees pay to the Commonwealth a pecuniary penalty in respect of each declared civil penalty contravention, in such amount as the Court determines to be appropriate.

**Against the Second Defendant (NULIS Nominees (Australia) Limited): linked members**

41. A declaration that since 1 July 2016 whilst NULIS Nominees (Australia) Limited (**NULIS**) was trustee of the MLC Super Fund, NULIS failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 23646 were provided efficiently, honestly and fairly, and thereby contravened section 912A(1)(a) of the *Corporations Act 2001*, in that NULIS:



- (a) was party to standard Licensee Remuneration Agreements with Plan Advisers in respect of distribution of membership in MLC MasterKey Super, which on 1 July 2016 had become part of the MLC Super Fund, which standard agreements imposed an obligation on NULIS to pay to the Plan Advisers the Plan Service Fee in respect of linked members in MasterKey Personal Super but did not impose any obligation on Plan Advisers to provide any services to linked members in MasterKey Personal Super;
- (b) did not have in place a system to enable it to form a reasonable belief about whether Plan Advisers were providing services to linked members in MasterKey Personal Super;
- (c) did not, upon becoming Trustee on 1 July 2016, form a reasonable belief that the Plan Advisers were no longer providing linked members in MasterKey Personal Super with the financial services to which the Plan Service Fee related;
- (d) did not, upon becoming Trustee on 1 July 2016, terminate the Plan Service Fee for each then linked member in MasterKey Personal Super;
- (e) did not form a reasonable belief, upon each person who had been a linked member in MasterKey Business Super as at 29 November 2013 ceasing employment and being transferred to MasterKey Personal Super, that the Plan Adviser was no longer providing that member with the financial services to which the Plan Service Fee related;
- (f) did not terminate payment of the Plan Service Fee for each such linked member upon that member ceasing employment and being transferred to MasterKey Personal Super;
- (g) between 1 July 2016 and 21 March 2018, made or authorised the making of monthly deductions from the account balances of 138,051 linked members in MasterKey Personal Super for payment to Plan Advisers of Plan Service Fees totalling \$12,196,579; and
- (h) did not inform linked members in MasterKey Personal Super at any time, including when they were transferred from MasterKey Business Super to MasterKey Personal Super, that they had the right to elect to turn off the Plan Service Fee.

42. A declaration that since 1 July 2016 NULIS in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001*, in that NULIS issued a “porting kit” to each person who was a member of MasterKey Business Super as at 29 November 2013 and who was then transferred to MasterKey Personal Super, which “porting kit”:

- (a) listed “your new account fees” by type and amount/Percentage; and
- (b) did not at any place state that the member now had the right to elect to turn off the Plan Service Fee.

43. A declaration that by reason of the matters referred to in paragraph 42 above, since 1 July 2016 NULIS in trade or commerce in connection with the supply of a financial service made false or misleading representations with respect to the fees to be paid by linked members of MLC MasterKey Super and thereby contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001*.

44. A declaration that by reason of the matters referred to in paragraph 42 above, since 1 July 2016 NULIS in trade or commerce in connection with the supply of a financial service made false or misleading representations concerning the existence of a right of linked members of MLC MasterKey Super, namely the right to elect to turn off the Plan Service Fee once the linked member was transferred to MasterKey Personal Super, and thereby contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001*.

45. A declaration that since 1 July 2016, NULIS failed to exercise the same degree of care, skill and diligence as a prudent trustee would exercise in relation to MLC MasterKey Super and thereby breached:

- (a) the general law duty which NULIS owed each member of MLC MasterKey Super to exercise the same care and skill as an ordinary prudent person of business would exercise in conducting the business of MLC MasterKey Super as if it were that person’s own; and

- (b) the terms of the Trust Deed, specifically clause 2.2(b) and the provision to be included in the Trust Deed by section 52(2)(b) of the SIS Act,

in that NULIS:

- (c) was party to standard Licensee Remuneration Agreements with Plan Advisers which imposed an obligation on NULIS to pay the Plan Service Fee to the Plan Advisers in respect of linked members of MasterKey Personal Super but did not impose any obligation on Plan Advisers to provide any services to linked members of MasterKey Personal Super;
- (d) did not obtain information about any agreement between a Standard Employer Sponsor and its Plan Adviser in addition to that contained in the MLC Application Form, namely information about whether there was any agreement by the Plan Adviser to provide services to linked members after they cease employment and, if so, what services;
- (e) did not have in place an effective system to enable it to form a reasonable belief about whether each Plan Adviser was providing services to each linked member in MasterKey Personal Super which related to the Plan Service Fee deducted from that member's account balance and paid by the Trustee to the Plan Adviser;
- (f) upon becoming Trustee on 1 July 2016, did not form a reasonable belief that the Plan Advisers were no longer providing linked members in MasterKey Personal Super with the financial services to which the Plan Service Fee relates;
- (g) upon becoming Trustee on 1 July 2016, did not terminate the Plan Service Fee for each then linked member in MasterKey Personal Super;
- (h) did not form a reasonable belief, upon each linked member of MLC MasterKey Super ceasing employment and being transferred to MasterKey Personal Super from MasterKey Business Super, that the Plan Adviser was no longer providing that member with the financial services to which the Plan Service Fee related;
- (i) did not terminate payment of the Plan Service Fee for each linked member upon that member ceasing employment and being transferred to MasterKey Personal Super;



- (j) between 1 July 2016 and 21 March 2018, made or authorised the making of monthly deductions from the account balances of 138,051 linked members in MasterKey Personal Super for payment to Plan Advisers of Plan Service Fees totalling \$12,196,579;
  - (k) did not inform linked members in MasterKey Personal Super at any time, including when they were transferred from MasterKey Business Super to MasterKey Personal Super, that they had the right to elect to turn off the Plan Service Fee;
  - (l) did not inform linked members of MasterKey Business Super at any time that they would have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super; and
  - (m) engaged in the misleading or deceptive conduct referred to in paragraph 42 above.
46. A declaration that since 1 July 2016, NULIS failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that by reason of the conduct and breach of the term of the Trust Deed referred to in paragraph (b) of the preceding paragraph, NULIS contravened section 55 of the SIS Act.
47. A declaration that by reason of the matters referred to in paragraph 45 above, since 1 July 2016 NULIS failed to perform its duties and exercise its powers in the best interests of members of MLC MasterKey Super and thereby breached the covenant taken to be contained in the Trust Deed by section 52(2)(c) of the SIS Act.
48. A declaration that since 1 July 2016 NULIS failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that by reason of the conduct and breach of the term of the Trust Deed referred to in the preceding paragraph, NULIS contravened section 55 of the SIS Act.
49. A declaration that since 1 July 2016 NULIS failed to comply with the financial services laws and thereby contravened section 912A(1)(c) of the *Corporations Act 2001*, in that NULIS:
- (a) contravened section 1041H of the *Corporations Act 2001* and section 12DA of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraph 42 above;



- (b) contravened section 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraph 43 above; and
- (c) contravened section 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* as referred to in paragraph 44 above.

50. A declaration that since 1 July 2016 NULIS failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 23646 were provided efficiently, honestly and fairly, and thereby contravened section 912A(1)(a) of the *Corporations Act 2001*, in that NULIS:

- (a) engaged in the misleading or deceptive conduct referred to in paragraph 42 above;
- (b) failed to exercise the same degree of care, skill and diligence as a prudent trustee would exercise in relation to MLC MasterKey Super Fund as referred to in paragraphs 45 and 46 above; and
- (c) failed to perform its duties and exercise its powers in the best interests of members of MLC MasterKey Super as referred to in paragraphs 47 and 48 above.

51. An order pursuant to section 12GBA of the *Australian Securities and Investments Commission Act 2001* that NULIS pay to the Commonwealth a pecuniary penalty in respect of each declared civil penalty contravention, in such amount as the Court determines to be appropriate.

**Against both Defendants**

52. Costs.

53. Such further or other order as the Court see fit.

Date: 6 September 2018

A handwritten signature in blue ink, appearing to read "Kim Turner", is written over a horizontal line.

Kim Turner

Plaintiff's legal practitioner



This application will be heard by  
Law Courts, Queens Square, Sydney, NSW 2000 at  
2018.

at Commonwealth  
am/pm on

**B. NOTICE TO DEFENDANTS**

**TO: MLC Nominees Pty Ltd**  
ACN 002 814 959  
Ground Floor, MLC Building  
105-153 Miller Street  
North Sydney NSW 2060

**NULIS Nominees (Australia) Limited**  
ACN 008 515 633  
Ground Floor, MLC Building  
105-153 Miller Street  
North Sydney NSW 2060

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;
- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiff.

**Note** Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.





### **C. FILING**

Date of filing:

---

Registrar

This originating process is filed by the plaintiff.

### **D. SERVICE**

The plaintiff's address for service is Level 5, 100 Market Street, Sydney 2000.

It is intended to serve a copy of this originating process on each defendant.

## Schedule



Federal Court of Australia

No

of 2018

District Registry: New South Wales

Division: General

IN THE MATTER OF NULIS NOMINESS (AUSTRALIA) LIMITED

ACN: 008 515 633

### Defendants

Second Defendant: **NULIS Nominees (Australia) Limited (ACN 008 515 633)**

Date: 6 September 2018