

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
File Number: NSD1182/2020  
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v ACBF  
FUNERAL PLANS PTY LTD (ACN 081 021 141) & ANOR  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 29/10/2020 1:46:46 PM AEDT

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 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.



Form 17  
Rule 8.05(1)(a)

**Statement of Claim**

Federal Court of Australia  
District Registry: New South Wales  
Division: General

No. NSD. of 2020

**IN THE MATTER OF ACBF FUNERAL PLANS PTY LTD (ACN 081 021 141) AND  
YOUPLA GROUP PTY LTD (ACN 074 081 146)**

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Plaintiff

**ACBF FUNERAL PLANS PTY LTD (ACN 081 021 141) and another named in the  
schedule**

Defendants

**TABLE OF CONTENTS**

**A. Parties ..... 2**

**B. Issuance of the ACF Plan ..... 2**

**C. Relevant matters relating to the ACF Plan..... 3**

**D. Consumers of the ACF Plan..... 13**

**E. Contraventions in relation to Aboriginal Ownership/Management  
Representation ..... 15**

**F. Contraventions in relation to Aboriginal Approval Representation ..... 16**

**G. Contraventions in relation to Aboriginal Benefit Representation..... 17**

**H. Contraventions in relation to Payout Representation..... 19**

**I. Involvement of ACBF Group in ACBF’s contraventions..... 20**

**J. Relief ..... 22**

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Filed on behalf of (name & role of party) Australian Securities and Investments Commission, Plaintiff

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## A. Parties

1. The Plaintiff, the Australian Securities and Investments Commission (**ASIC**), is and was at all material times:
  - 1.1 a body corporate established by s 7 of the *Australian Securities Commission Act 1989* (Cth) and continued in existence by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**); and
  - 1.2 entitled by s 8(1)(d) of the ASIC Act to sue in its corporate name.
2. The First Defendant, ACBF Funeral Plans Pty Ltd (ACN 081 021 141) (**ACBF**), is a company able to be sued in its own name.
3. The Second Defendant, Youpla Group Pty Ltd (ACN 074 081 146), is a company able to be sued in its own name.
4. During the period between 1 January 2015 and 30 November 2018 (the **Relevant Period**), the Second Defendant was named ACBF Group Holdings Pty Ltd (**ACBF Group**).

## B. Issuance of the ACF Plan

5. In January 2005, ACBF released a funeral insurance policy called the “Aboriginal Community Funeral Plan” (the **ACF Plan**).
6. ACBF offered, promoted and sold the ACF Plan at all times during the Relevant Period.
7. As set out in more detail below:
  - 7.1 the substance of the ACF Plan was to provide, in return for the payment of premiums by a Plan Holder, a chosen level of cover for incurred funeral expenses in the event of the death of a nominated person (a **Nominee**); and
  - 7.2 the intended market for that product was Aboriginal persons.
8. The ACF Plan was a “financial product” within the meaning of s 12BAA(1)(b), s 12BAA(5)(a) and s 12BAA(7)(d) of the ASIC Act.
9. In offering, promoting and selling the ACF Plan throughout the Relevant Period, ACBF was:
  - 9.1 engaging in “trade or commerce” within the meaning of s 12BA(1) of the ASIC Act;

- 9.2 providing a “financial service” within the meaning of s 12BAB(1)(b) and s 12BAB(7)(b) of the ASIC Act;
- 9.3 “engag[ing] in conduct in relation to financial services” within the meaning of s 12DA(1) of the ASIC Act; and
- 9.4 engaging in conduct “in connection with the supply or possible supply of financial services” within the meaning of s 12DB(1) of the ASIC Act.

### C. Relevant matters relating to the ACF Plan

#### i. Name

10. Throughout the Relevant Period:

- 10.1 ACBF used the words “Aboriginal Community” in the full name of the ACF Plan;
- 10.2 ACBF used the full name of the ACF Plan without abbreviation in marketing material and point of sale documentation for the ACF Plan.

#### Particulars

The marketing material variously included the ACBF website, the ACF Plan brochures, the ACF Plan flyers, the ACF Plan Visual Presentation, and the ACF Plan advertisements in the Koori Mail, as they were from time to time during the Relevant Period (collectively, **Marketing Material**).

The point of sale documentation included the ACF Plan Rules, the ACF Plan Information Guide, the ACF Plan Holder Application Form and the Additional Nominee Application Form, as they were from time to time during the Relevant Period (collectively, **Point of Sale Documentation**).

Further particulars may be provided after discovery and prior to trial.

Copies of the documents referred to in these particulars, as they were from time to time, so far as held by ASIC, are available from it upon request.

#### ii. Terms and conditions of the ACF Plan

- 11. At all times during the Relevant Period, the terms and conditions of the ACF Plan were set out in the ACF Plan Rules.

## Particulars

Copies of the ACF Plan Rules, as they were from time to time, so far as held by ASIC, are available from it upon request.

12. At all times during the Relevant Period, the ACF Plan Rules relevantly provided as follows:
  - 12.1 clause 1.2 provided that “Aboriginal Person” included (a) a member of the Aboriginal race of Australia; (b) persons that such a person regarded as members of his or her family, and (c) persons that an Applicant (defined in cl 1.3) considered came within the categories set out in (a) and (b);
  - 12.2 clause 1.3 provided that “Applicant” meant a person who made an application to ACBF pursuant to clause 5.1;
  - 12.3 clause 1.8 provided that a “Nominee” meant a person nominated by an Applicant or a Plan Holder and accepted in writing by ACBF as a person by reason of whose death ACBF would, subject to the Rules, pay a Payout and who had not pursuant to clause 9 of the Rules ceased to be a Nominee;
  - 12.4 clause 1.10 relevantly provided that “Payment” meant an amount paid or payable by a Plan Holder to ACBF (**Payment**);
  - 12.5 clause 1.11 provided that “Payout” meant a benefit consisting of the payment of money (**Payout**);
  - 12.6 clause 1.14 provided that “Plan Holder” meant a person who made an application to ACBF pursuant to clause 5.1, whose application was accepted by ACBF and who had not pursuant to clause 9 ceased to be a Plan Holder, and included the predecessors and successors of such a person (**Plan Holder**);
  - 12.7 clause 2 provided that the scheme or arrangement the subject of the Plan was known as the Aboriginal Community Funeral Plan;
  - 12.8 between 1 January 2015 and around January 2017, clause 4.1 provided that only an Aboriginal person could be a Nominee of an ACF Plan;
  - 12.9 between around January 2017 and 30 November 2018, on a date unknown to ASIC at the time of filing this Statement of Claim, clause 4.1 was amended to provide that any person could be a Nominee of an ACF Plan;

- 12.10 clause 5.1 provided that a person may make an application to become a Plan Holder under the ACBF Plan by submitting to ACBF a completed Application Form;
- 12.11 from around January 2017, clause 6.3 provided that a person would commence to be a Plan Holder or a Nominee immediately upon ACBF accepting their application and in the case of a Nominee, upon receipt of the first full Payment to ACBF with respect to that Nominee;
- 12.12 clause 7.2 provided that a Payment was to be in an amount calculated in accordance with the rates set out in the Application Form submitted by a Plan Holder or in such other amount as may be agreed between ACBF and the Plan Holder;
- 12.13 clause 7.3 provided that a Plan Holder's first Payment was to be made on a date to be agreed between the Plan Holder and ACBF;
- 12.14 clause 7.4 provided that each subsequent Payment was to be made fortnightly;
- 12.15 clause 9.2 provided that if a Plan Holder failed to make Payments as required by the Rules, and the payment arrears became equal to or exceeded the amount of four Payments by that person, that Plan Holder would cease to be a Plan Holder;
- 12.16 clause 10.2 provided that, in the event of the death of a Nominee, the amount of the Payout would be an amount calculated in accordance with the Application Form submitted by the Plan Holder or such other amount as may subsequently have been agreed between ACBF and the Plan Holder;
- 12.17 clause 10.3 provided that no amount was to be payable by reason of the death of a Nominee until ACBF was provided with such evidence as it reasonably required of the death of that Nominee and such further information and documents as it reasonably required;
- 12.18 clause 10.6 provided that, in the event of a death of a Nominee, the ACF Plan would only pay for expenses of and incidental to the Nominee's funeral and burial or cremation; and
- 12.19 clause 10.7 provided to the effect that no amount was payable by ACBF by reason of the death of a Nominee except to the extent that the Payee of that Nominee:
- (a) in the case of a Payment to be made to the Payee, provided to ACBF a written undertaking in a form acceptable to ACBF to use the

amount of the Payout to meet the whole or part of the expenses of and incidental to that Nominee's funeral and burial or cremation;

- (b) in the case of a payment to be made to a person other than the Payee, provided to ACBF a written direction in a form acceptable to ACBF to apply the amount of the Payout in payment of expenses of and incidental to that Nominee's funeral and burial or cremation;
- (c) complied with any other requirement which ACBF considered appropriate to impose on the Payee with the object of ensuring that any Payout it paid was made in accordance with the provisions of clause 10.6; and
- (d) provided ACBF with such other information and documentation as ACBF reasonably required.

iii. Chosen benefit amounts under the ACF Plan

- 13. From 1 January 2015 to about September 2017, a Plan Holder could choose benefit amounts for Nominees ranging from \$4,000 to \$15,000 (**Chosen Benefit Amount**), depending on the health classification level set by ACBF for a Nominee.
- 14. From about September 2017 to 30 November 2018, a Plan Holder could choose a Chosen Benefit Amount ranging from \$4,000 to \$20,000, depending on the health classification level set by ACBF for a Nominee.
- 15. The individual fortnightly Payments required for each Nominee were dependent on:
  - 15.1 the Chosen Benefit Amount;
  - 15.2 the health classification level set by ACBF, consisting of one of Level 1, Level 2 or Level 3; and
  - 15.3 the age of the person at the time a fortnightly payment was due.

**Particulars**

These requirements were set out in the ACF Plan Holder Application Form and the ACF Plan Visual Presentation, as they were from time to time during the Relevant Period. Copies of these documents, as they were from time to time, so far as held by ASIC, are available from it upon request.

iv. Logos

16. During the Relevant Period:

- 16.1 there were various ACBF logos, each of which used colours, and imagery of a character, that are culturally associated with Aboriginal peoples;

**Particulars**

The first logo is an image of six stick figure persons (and an infant) in black holding hands, with one person holding what appears to be a spear, and another person holding what appears to be another Aboriginal object, against the background of a setting sun which is depicted in red, yellow and white (the **Aboriginal Figures Logo**). This logo is depicted in Annexure 1 to this Statement of Claim.

The second logo is the Aboriginal Figures Logo with a banner across it which states "Caring for over 20 years" (the **Caring Logo**). This logo is depicted in Annexure 2 to this Statement of Claim.

The third logo is the Aboriginal Figures Logo with a banner across it which states "20<sup>th</sup> Anniversary" (the **20<sup>th</sup> Anniversary Logo**). This logo is depicted in Annexure 3 to this Statement of Claim.

The fourth logo is a quarter of an image that appears to be a sun, and which is depicted in red, yellow and white (the **Quarter Sun Logo**). This logo is depicted in Annexure 4 to this Statement of Claim.

In the remainder of this Statement of Claim, these logos are collectively referred to as the **Aboriginal Style Logos**.

- 16.2 ACBF, in connection with the offer, promotion and sale of the ACF Plan, used one or more of the Aboriginal Style Logos on Marketing Material, on Point of Sale Documentation and on clothing, identification cards, business cards and company cars used by field representatives; and
- 16.3 ACBF did not use the Aboriginal Style Logos to actively promote any funeral plan other than the ACF Plan.

v. Aboriginal Community Promotional Statements

17. During the Relevant Period, ACBF offered, promoted and sold the ACF Plan using statements (the **Aboriginal Community Promotional Statements**) that were to the effect that:



- 17.1 the ACBF group of companies had been providing funeral cover for Aboriginal persons around Australia for 20 or more years, thereby conveying that ACBF had longstanding ties to the Aboriginal community;
- 17.2 the ACBF group of companies was commenced in the late 1980s after Aboriginal health workers in the Armidale, NSW, area enquired if it was possible to set up a fund that would help Aboriginal families meet the costs associated with funerals, thereby conveying that the ACF Plan was designed to meet the needs of Aboriginal persons in relation to the costs of funerals; and
- 17.3 the ACF Plan was Australia's only funeral plan that was dedicated to the Aboriginal community, thereby conveying that the ACF Plan was designed to meet the needs of the Aboriginal community in relation to the costs of funerals.

### **Particulars**

One or more of the statements was contained in Marketing Material.

#### vi. Advertisements in the Koori Mail

18. Throughout 2015:

- 18.1 ACBF advertised the ACF Plan in the Koori Mail, a fortnightly newspaper consumed predominantly by Aboriginal persons; and
- 18.2 when advertising in the Koori Mail, ACBF used one or more of:
  - (a) the 20<sup>th</sup> Anniversary Logo;
  - (b) the Quarter Sun Logo; and
  - (c) the Aboriginal Community Promotional Statements.

### **Particulars**

ACBF advertised the ACF Plan in the Koori Mail on the following dates: 28 January 2015, 25 February 2015, 25 March 2015, 22 April 2015, 20 May 2015, 17 June 2015, 15 July 2015, 12 August 2015, 4 November 2015.

#### vii. Field representatives and their promotion of the ACF Plan

19. During the Relevant Period, ACBF had field representatives, who were:

- 19.1 employed by ACBF; or

- 19.2 employed by ACBF Administration Pty Ltd (ACN 154 497 195) (**ACBF Administration**), a wholly owned subsidiary of ACBF Group, as agents for ACBF.

### **Particulars**

Pursuant to Administration Agreements between ACBF and ACBF Administration dated 1 July 2013 and 1 July 2015, during the Relevant Period ACBF appointed ACBF Administration to provide certain administrative services to or on behalf of ACBF on the terms of those agreements, including the employment of staff. Field representatives employed by ACBF Administration under these agreements undertook their activities in the field on behalf of ACBF. Copies of the agreements are available from ASIC upon request.

20. The role of field representatives included offering, promoting and selling the ACF Plan by:
- 20.1 travelling to locations, typically regional towns, with a high proportion of Aboriginal residents;
  - 20.2 attending meetings at Aboriginal organisations to explain the role of ACBF and to answer questions;
  - 20.3 attending Aboriginal community events and festivals;
  - 20.4 visiting the houses of Aboriginal persons who had expressed an interest in knowing more about the ACF Plan or in making a Plan Holder application; and
  - 20.5 visiting the houses of Aboriginal persons who were existing Plan Holders and, often, recruiting more Plan Holders or Nominees who might be living in or visiting the house at that time.
21. In carrying out their role, field representatives wore clothing, used identification and business cards, and drove (or frequently drove) cars, that bore one or more of the Aboriginal Style Logos.

### **Particulars**

Field representatives were required to wear the ACBF company T-shirt when promoting the ACF Plan.

The field representatives' first step in promoting the ACF Plan to a person was to introduce it by providing an overview of it. When doing so,

field representatives were required by ACBF to introduce themselves with their identification and business cards.

Field representatives were, or were frequently, provided with an ACBF company car or a removable Aboriginal Style Logo to place on their own car.

22. In carrying out their role, field representatives used printed material that bore:

22.1 one or more of the Aboriginal Style Logos; and/or

22.2 one or more of the Aboriginal Community Promotional Statements.

### **Particulars**

Field representatives would, in promoting the ACF Plan:

(a) show the ACF Plan Visual Presentation (in the form of a printed laminated presentation); and

(b) present the ACF Plan Rules and ACF Plan Information Guide.

If a person sought to become a Plan Holder, or to add a Nominee, field representatives would then require him or her to complete the ACF Plan Holder Application Form or the Additional Nominee Application Form and an ACF Plan Health Statement for each Nominee.

Each of the ACF Plan Visual Presentation, the ACF Plan Rules, the ACF Plan Holder Application Form and the Additional Nominee Application Form bore the Aboriginal Figures Logo or Caring Logo. The ACF Plan Information Guide bore the Caring Logo and one or more of the Aboriginal Community Promotional Statements.

### **viii. Payouts**

23. During the Relevant Period, ACBF offered, promoted and sold the ACF Plan by making the following statements about what the ACF Plan provided:

23.1 “fast payouts of \$4,000 to \$15,000”; and

23.2 “fast payouts ranging from \$4,000 to \$15,000”.

### **Particulars**

ACBF offered, promoted and sold the ACF Plan in that manner in the ACF Plan brochures and the ACF Plan flyers during the Relevant Period and in the Koori Mail during 2015. Copies of these documents, as they

were from time to time, so far as held by ASIC, are available from it upon request.

24. During the Relevant Period:

24.1 the ACF Plan Visual Presentation made the following statements, or statements to the following effect:

- (a) “The whole payout must be used for the sole purpose of paying funeral and related expenses”;
- (b) “You will need to choose a benefit amount for each person you wish to be part of your plan. The benefit amount is the amount you want the insurer to pay after that person passes away for their funeral and related expenses”; and
- (c) “After your first plan payment is received: \*where the benefit amount of \$4,000 or \$6,000 is chosen, there is immediate cover for this amount, \*where a higher benefit amount is chosen, there is immediate cover for \$6,000 and the amount of cover increases each year until it reaches the chosen benefit amount, as set out in the table on the next page”;

24.2 the ACF Plan Information Guide made the following statements, or statements to the following effect:

- (a) “What documents do you require to process a claim? Usually, we will need at least the following documents: \*An official document confirming the Nominee has passed away. \*An official document stating the cause of the Nominee’s passing. \*An undertaking signed by the payee that the payout will be used for the sole purpose of meeting funeral and related expenses”; and
- (b) “How much will be paid when a Nominee passes away? The amount depends on a number of things, including the chosen benefit amount, the length of time the person has been a Nominee, and the person’s health at the time you applied for that person to become a Nominee”;

24.3 the ACF Plan Application Form, under the heading “Payouts”:

- (a) stated, with some minimal variation over the Relevant Period, “When a benefit amount of \$4,000 or \$6,000 is chosen in respect of a Nominee, we will pay the chosen amount following the death of that Nominee;

- (b) stated, with some minimal variation over the Relevant Period, “If you choose a benefit amount of \$8,000 or more in respect of a Nominee, there will be a waiting period – running from the date on which we accept the person as a Nominee – before the full benefit amount chosen will be paid following the death of the Nominee. The amount we will pay following the death of a Nominee will be as set out in Table 1”; and
- (c) set out in table form the “Amount of payout following death of Nominee”, in a way that listed lump sum amounts, including the Chosen Benefit Amount; and

24.4 the Additional Nominee Application Form, under the heading “Payouts”:

- (a) stated, with some minimal variation over the Relevant Period, “When a benefit amount of \$4,000 or \$6,000 is chosen in respect of a Nominee, we will pay the chosen amount following the death of that Nominee”;
- (b) stated, with some minimal variation over the Relevant Period, “If you choose a benefit amount of \$8,000 or more in respect of a Nominee, there will be a waiting period – running from the date on which we accept the person as a Nominee – before the full benefit amount chosen will be paid following the death of the Nominee. The amount we will pay following the death of a Nominee will be as set out in Table 1”; and
- (c) set out in table form the “Amount of payout following death of Nominee”, in a way that listed lump sum amounts, including the Chosen Benefit Amount.

### **Particulars**

Copies of the documents, as they were from time to time, so far as held by ASIC, are available from it upon request.

- 25. During the Relevant Period, when Nominees attained their Chosen Benefit Amount, ACBF provided Nominees with a certificate acknowledging this fact and which stated their Chosen Benefit Amount.
- 26. The certificate included the statement that “The Chosen Benefit Amount is payable for the abovementioned Nominee only and on the following conditions: \*The ACF Plan is current at the time of passing, \*There has not been a total of 4 payments missed on the plan in a calendar year”.

ix. Disclaimer

27. During the Relevant Period, ACBF and ACF Plan documents were labeled with, and field representatives were required to give, a disclaimer (the **Disclaimer**).
28. The Disclaimer was a statement that ACBF was a private company which was not connected with or sponsored by any governmental or similar body or Aboriginal organisation.
29. The Disclaimer did not state that:
  - 29.1 ACBF was not owned or managed by an Aboriginal person or persons;
  - 29.2 ACBF did not have Aboriginal community approval;
  - 29.3 the ACF Plan was no more beneficial to Aboriginal persons than other funeral insurance products generally available in the market;
  - 29.4 the ACF Plan did not provide a Plan Holder with a payout in the form of a lump sum of the Chosen Benefit Amount upon the death of a Nominee.
30. As from about 12 September 2018, ACBF on occasion used a new Disclaimer, in the terms of paragraph 28 above but with the additional words “We are not an Aboriginal company”, on some ACF Plan documents (the **New Disclaimer**).

**D. Consumers of the ACF Plan**

i. ACBF’s intended consumers of the ACF Plan

31. At all times in the Relevant Period, it was Aboriginal persons who were ACBF’s intended consumers of the ACF Plan (**Potential Consumers**), and it was to such persons that ACBF principally offered, promoted and sold the ACF Plan.

ii. Members of an Aboriginal community

32. The Potential Consumers were likely to:
  - 32.1 be members of an Aboriginal community, being residents in a location with a high proportion of Aboriginal persons or having historical or familial connections to such a location;
  - 32.2 identify as members of an Aboriginal community; and
  - 32.3 live in non-metropolitan but non-remote locations with a high proportion of Aboriginal residents.

iii. Cultural significance of funerals

33. The Potential Consumers, as Aboriginal persons, were likely to:

- 33.1 consider that funerals, funeral rites and other rituals associated with death have important Aboriginal cultural significance;
- 33.2 attend, or have cultural obligations to attend, funerals more often than the general Australian population;
- 33.3 pay, or have cultural obligations to pay, for the funerals of close family members and related expenses, including travel and accommodation for wider family members and other Aboriginal community members from the Aboriginal community of the deceased; and
- 33.4 incur or be liable to incur significant costs in meeting those cultural obligations.

iv. Accessing services as Aboriginal persons

34. In accessing services from organisations, the Potential Consumers, as Aboriginal persons, were likely to:

- 34.1 be aware of Aboriginal cultural material, including Aboriginal imagery, language, designs, styles, and patterns;
- 34.2 associate Aboriginal cultural material with their own identity as Aboriginal persons and members of Aboriginal communities;
- 34.3 be aware of services specific to Aboriginal people offered by Aboriginal owned and managed organisations (**Aboriginal organisations**);
- 34.4 consider that an Aboriginal organisation would use Aboriginal cultural material to brand and advertise its services;
- 34.5 consider that an Aboriginal organisation would include references to 'Aboriginal community' in its name or promotional material, as Aboriginal people are and identify as members of an Aboriginal community;
- 34.6 consider that a non-Aboriginal organisation:
  - (a) would not use, or without express reference to the authority or basis upon which it did so would not use, Aboriginal imagery to brand and advertise its services;
  - (b) would not include references to 'Aboriginal community' in its name or promotional material;

- 34.7 have a higher level of trust in Aboriginal organisations over non-Aboriginal organisations; and
- 34.8 prefer to access services offered by organisations which they understood to be Aboriginal organisations.

v. Aboriginal persons as consumers

- 35. As consumers, the Potential Consumers, as Aboriginal persons, were likely to:
  - 35.1 engage in 'demand sharing', namely sharing economic burdens, benefits and obligations, on behalf of or with family members and other members of their Aboriginal community, whether in their individual interest or not;
  - 35.2 make economic decisions, regarding accessing services, based on cultural obligations and their relationships with family members and other members of their Aboriginal community, whether in their individual interest or not; and
  - 35.3 have lower levels of financial literacy than the general population.

**E. Contraventions in relation to Aboriginal Ownership/Management Representation**

i. Aboriginal Ownership/Management Representation

- 36. In offering, promoting and selling the ACF Plan to Potential Consumers during the Relevant Period in the manner referred to in paragraphs 10 and 16-22 above, and in the circumstances described in paragraphs 32-35 above, ACBF impliedly represented to Potential Consumers that ACBF was owned or managed by an Aboriginal person or persons (**Aboriginal Ownership/Management Representation**).

ii. Aboriginal Ownership/Management Representation was false and misleading or deceptive

- 37. The Aboriginal Ownership/Management Representation was false.

**Particulars**

During the Relevant Period:

- (a) no director of ACBF (or any company in the ACBF group) was an Aboriginal person;



- (b) no shares in ACBF were owned by an Aboriginal person or an Aboriginal organisation;
- (c) no shares in any company in the ACBF group were owned by an Aboriginal person or an Aboriginal organisation (save that, as to Aboriginal Community Benefit Fund Pty Ltd, a subsidiary of ACBF Group and a company which, prior to the Relevant Period, had ceased to offer, promote or sell any funeral insurance policy to new customers, 5 of the 100 issued shares were owned by an Aboriginal person); and
- (d) ACBF was not (and all other companies in the ACBF group were not) managed by any Aboriginal person.

38. The falsity of the Aboriginal Ownership/Management Representation was not corrected by:

38.1 the Disclaimer; or

38.2 from 12 September 2018, the New Disclaimer.

39. By reason of paragraphs 37 and 38 above, the Aboriginal Ownership/Management Representation was misleading or deceptive or likely to mislead or deceive.

iii. Contraventions in relation to Aboriginal Ownership/Management Representation

40. In the premises of paragraphs 9.1-9.3 and 39 above, in making the Aboriginal Ownership/Management Representation to Potential Consumers, ACBF contravened s 12DA(1) of the ASIC Act.

41. In the premises of paragraphs 9.1-9.2, 9.4 and 37-39 above, in making the Aboriginal Ownership/Management Representation to Potential Consumers, ACBF contravened s 12DB(1)(f) of the ASIC Act.

**F. Contraventions in relation to Aboriginal Approval Representation**

i. Aboriginal Approval Representation

42. In offering, promoting and selling the ACF Plan to Potential Consumers during the Relevant Period in the manner referred to in paragraphs 10 and 16-22 above, and in the circumstances described in paragraphs 32-35 above, ACBF impliedly represented to Potential Consumers that the ACF Plan had Aboriginal community approval (**Aboriginal Approval Representation**).

ii. Aboriginal Approval Representation was false and misleading or deceptive

43. The Aboriginal Approval Representation was false.

**Particulars**

During the Relevant Period, the ACF Plan did not have Aboriginal community approval.

44. The falsity of the Aboriginal Approval Representation was not corrected by:

44.1 the Disclaimer;

44.2 from 12 September 2018, the New Disclaimer.

45. By reason of paragraphs 43 and 44 above, the Aboriginal Approval Representation was misleading or deceptive or likely to mislead or deceive.

iii. Contraventions in relation to Aboriginal Approval Representation

46. In the premises of paragraphs 9.1-9.3 and 45 above, in making the Aboriginal Approval Representation to Potential Consumers, ACBF contravened s 12DA(1) of the ASIC Act.

47. In the premises of paragraphs 9.1-9.2, 9.4 and 43-45 above, in making the Aboriginal Approval Representation to Potential Consumers, ACBF contravened s 12DB(1)(e) of the ASIC Act.

**G. Contraventions in relation to Aboriginal Benefit Representation**

i. Aboriginal Benefit Representation

48. In offering, promoting and selling the ACF Plan to Potential Consumers during the Relevant Period in the manner referred to in paragraphs 10 and 16-22 above, and in the circumstances described in paragraphs 32-35 above, ACBF impliedly represented to Potential Consumers that the ACF Plan was more beneficial to Aboriginal persons than other funeral insurance products generally available at that time (**Aboriginal Benefit Representation**).

ii. Aboriginal Benefit Representation was false and misleading or deceptive

49. During the Relevant Period, the ACF Plan was less beneficial to Potential Consumers than other funeral insurance products generally available at that time.

### **Particulars**

- (a) Under the ACF Plan, there was no cap on premiums payable and the premiums paid could exceed the Chosen Benefit Amount received in the event of the death of a Nominee. Under other products, consumers were not required to pay further premiums once they reached the benefit amount; or, alternatively, became entitled to receive a benefit equal to the amount paid in premiums if that amount was higher than the existing benefit entitlement.
  - (b) The ACF Plan required Nominees to be assessed and given a "Health Classification 1, 2 or 3". The Health Classification determined the amount of premium required to be paid. Other products did not require a Health Classification. The Health Classification 1 resulted in premiums similar to other products. Health Classifications 2 and 3, however, resulted in significantly higher premiums compared to other products.
  - (c) Under the ACF Plan, once a plan was cancelled, there was no right of reinstatement. Persons who wished to obtain the same cover would have to apply anew, with the consequence that they may have a higher health classification and higher premiums.
  - (d) ACBF did not sign up to the Life Insurance Code of Practice in June 2017, whereas providers of other products did.
  - (e) Further particulars may be provided after discovery and prior to trial.
50. Further or alternatively to the preceding paragraph, during the Relevant Period, the ACF Plan was not more beneficial to Potential Consumers than other funeral insurance products generally available at that time.

### **Particulars**

ASIC refers to and repeats the particulars to the preceding paragraph and says further that the following features of the ACF Plan were common to other funeral insurance products:

- (a) the payment of premiums on a fortnightly basis; and
- (b) immediate payment of a benefit in respect of a Nominee who was deceased upon satisfaction of the requirements under the terms and conditions of the relevant product.

51. By reason of paragraphs 49 and/or 50 above, the Aboriginal Benefit Representation was false.
52. The falsity of the Aboriginal Benefit Representation was not corrected by:
- 52.1 the Disclaimer;
- 52.2 from 12 September 2018, the New Disclaimer.
53. By reason of paragraphs 51 and 52 above, the Aboriginal Benefit Representation was misleading or deceptive or likely to mislead or deceive.

iii. Contraventions in relation to Aboriginal Benefit Representation

54. In the premises of paragraphs 9.1-9.3 and 53 above, in making the Aboriginal Benefit Representation to Potential Consumers, ACBF contravened s 12DA(1) of the ASIC Act.
55. In the premises of paragraphs 9.1-9.2, 9.4 and 51-53 above, in making the Aboriginal Benefit Representation to Potential Consumers, ACBF contravened ss 12DB(1)(a) and 12DB(1)(e) of the ASIC Act.

**H. Contraventions in relation to Payout Representation**

i. Payout Representation

56. In offering, promoting and selling the ACF Plan to Potential Consumers during the Relevant Period in the manner referred to in paragraphs 23-26 above, and in the circumstances described in paragraphs 32-35 above, ACBF impliedly represented to Potential Consumers that, upon the death of a Nominee, a Plan Holder would receive a payout in the form of a lump sum of the Chosen Benefit Amount (**Payout Representation**).

ii. Payout Representation was false and misleading or deceptive

57. The Payout Representation was false.

**Particulars**

Upon the death of a Nominee, and up to the Chosen Benefit Amount, ACBF paid only funeral and related expenses that had in fact been incurred, and did so:

- (a) in a majority of instances, directly to the providers of the relevant funeral and related services;

- (b) otherwise, to Plan Holders only upon receipt of documentation proving the incurring of the relevant funeral and related expenses (or, on rare occasions, upon provision of a statutory declaration to the effect that those expenses had been incurred).

58. The falsity of the Payout Representation was not corrected by:

58.1 the Disclaimer;

58.2 from 12 September 2018, the New Disclaimer; or

58.3 any statement of ACBF that the ACF Plan only covered incurred funeral and related expenses, in any:

- (a) Marketing Material;

- (b) Point of Sale Documentation; or

- (c) other ACBF document provided to the Potential Consumers.

59. By reason of paragraphs 57 and 58 above, the Payout Representation was misleading or deceptive or likely to mislead or deceive.

### iii. Contraventions in relation to Payout Representation

60. In the premises of paragraphs 9.1-9.3 and 59 above, in making the Payout Representation to Potential Consumers, ACBF contravened s 12DA(1) of the ASIC Act.

61. In the premises of paragraphs 9.1-9.2, 9.4 and 57-59 above, in making the Payout Representation to Potential Consumers, ACBF contravened ss 12DB(1)(a) and 12DB(1)(e) of the ASIC Act.

### **I. Involvement of ACBF Group in ACBF's contraventions**

62. Throughout the Relevant Period, ACBF was a wholly owned subsidiary of ACBF Group.

63. At all times during the Relevant Period:

63.1 Ron Pattenden was a director of both ACBF and ACBF Group;

63.2 Jonathan Law was a director of both ACBF and ACBF Group.

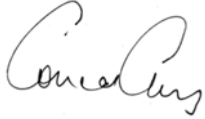
64. From the start of the Relevant Period until 19 December 2017, Michael Brendan Wilson was a director of both ACBF and ACBF Group.

65. From 18 December 2017 until the end of the Relevant Period, Bryn Jones was a director of both ACBF and ACBF Group.
66. During the Relevant Period:
  - 66.1 there were no directors of ACBF Group other than the persons referred to in paragraphs 63-65 above; and
  - 66.2 there was only one director of ACBF other than the persons referred to in paragraphs 63-65 above, namely Kerrie McCallie.
67. During the Relevant Period, the persons referred to in paragraphs 63-65 above were the controlling minds of ACBF Group and ACBF.
68. During the Relevant Period, the persons referred to in paragraphs 63-65 above, in their capacity as directors of ACBF Group, made the key decisions on behalf of ACBF, including approving its marketing and advertising strategies.
69. During the Relevant Period (or, in the case of Mr Wilson and Mr Jones, during the part of the Relevant Period in which they were a director of ACBF Group and ACBF), each of the persons referred to in paragraphs 63-65 above knew of the facts set out above at:
  - 69.1 paragraphs 36-38;
  - 69.2 paragraphs 42-44;
  - 69.3 paragraphs 48-52; and
  - 69.4 paragraphs 56-58.
70. In the premises of paragraphs 67-69 above, ACBF Group, within the meaning of s 12GBA(1)(e) of the ASIC Act, as it stood during the Relevant Period, was knowingly concerned in, or party to, ACBF's contraventions of the ASIC Act alleged above in the following paragraphs:
  - 70.1 paragraphs 40-41;
  - 70.2 paragraphs 46-47;
  - 70.3 paragraphs 54-55; and
  - 70.4 paragraphs 60-61.

**J. Relief**

71. By reason of the matters set out in paragraphs 40, 41, 46, 47, 54, 55, 60, 61 and 70 above, ASIC claims the relief specified in the Originating Application.

Date: 29 October 2020



.....

Signed by Conrad Gray

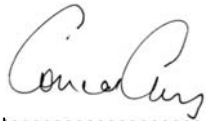
Lawyer for the Plaintiff

This pleading was prepared by Timothy Goodwin, Julia Watson and Sahrah Hogan, and settled by David Batt QC, counsel for the Plaintiff.

**Certificate of lawyer**

I Conrad Gray certify to the Court that, in relation to the Statement of Claim filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 29 October 2020

A handwritten signature in cursive script, appearing to read "Conrad Gray", positioned above a horizontal dotted line.

Signed by Conrad Gray

Lawyer for the Plaintiff



Annexure 1



Annexure 2



Annexure 3



Annexure 4



**Schedule**

Federal Court of Australia

No. NSD

of 2020

District Registry: New South Wales

Division: General

**IN THE MATTER OF ACBF FUNERAL PLANS PTY LTD (ACN 081 021 141) AND  
YOUPLA GROUP PTY LTD (ACN 074 081 146)**

Second Defendant:           YOUPLA GROUP PTY LTD (ACN 074 081 146)