

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v MLC Limited [2023]

FCA 539

File number: VID 681 of 2021

Judgment of: **MOSHINSKY J**

Date of judgment: 18 May 2023

Catchwords: **CORPORATIONS** – financial services – false or misleading representations in connection with the supply of financial services – where the respondent failed to provide a rehabilitation bonus benefit to 119 customers who were entitled to that benefit under their insurance policies – where the respondent impliedly represented to those customers that they were not entitled to that benefit – where the respondent admitted that the representations were false or misleading and that it contravened the relevant provision – pecuniary penalty – where the parties jointly proposed declarations of contravention and a pecuniary penalty of \$10 million – whether proposed penalty within the appropriate range – held: declarations made and penalty of \$10 million imposed

INSURANCE – duty of utmost good faith – where the respondent failed to provide a rehabilitation bonus benefit to customers who were entitled to that benefit under their insurance policies – where the respondent impliedly represented that the customers were not entitled to that benefit – where the respondent admitted that it thereby breached its duty of utmost good faith – where the parties jointly proposed declaration of contravention – held: declaration made

CORPORATIONS – financial services – obligations of financial services licensee – where the respondent held a financial services licence – where the respondent admitted that it contravened its obligation to do all things necessary to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly – where the parties jointly proposed declarations of contravention – held: declarations made

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth), ss 12DA, 12DB, 12GBA
Corporations Act 2001 (Cth), ss 912A, 1041H

Crimes Act 1914 (Cth), s 4AA
Federal Court of Australia Act 1976 (Cth), s 21
Insurance Contracts Act 1984 (Cth), s 13
Trade Practices Act 1974 (Cth)

Cases cited:

Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 [2022] HCA 38; 406 ALR 632
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 113; 254 FCR 68
Australian Building and Construction Commissioner v Pattinson [2022] HCA 13; 399 ALR 599
Australian Competition and Consumer Commission v AGL South Australia Pty Ltd [2015] FCA 399; 146 ALD 385
Australian Competition and Consumer Commission v Mazda Australia Pty Limited [2023] FCAFC 45
Australian Competition and Consumer Commission v Optus [2022] FCA 1397
Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181; 340 ALR 25
Australian Competition and Consumer Commission v Valve Corporation (No 3) [2016] FCA 196; 337 ALR 647
Australian Competition and Consumer Commission v Woolworths Limited [2016] FCA 44; [2016] ATPR ¶42-251
Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd [2022] FCA 1115
Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 790
Australian Securities and Investments Commission v TAL Life Ltd (No 2) [2021] FCA 193; 389 ALR 128
Australian Securities and Investments Commission v Youi Pty Ltd [2020] FCA 1701
Commonwealth v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; 258 CLR 482
Forster v Jododex Australia Pty Ltd [1972] HCA 61; 127 CLR 421
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; 71 FCR 285
Trade Practices Commission v Allied Mills Industries Pty Ltd (No 5) (1981) 60 FLR 38; 37 ALR 256
Trade Practices Commission v CSR Ltd [1990] FCA 762; [1991] ATPR ¶41-076

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

Number of paragraphs: 115

Date of hearing: 18 May 2023

Counsel for the Plaintiff: Mr C Archibald KC with Mr A Di Stefano

Solicitor for the Plaintiff: Webb Henderson

Counsel for the Defendant: Mr D Thomas SC with Ms EL Murphy

Solicitor for the Defendant: Clyde & Co

ORDERS

VID 681 of 2021

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **MLC LIMITED (ABN 90 000 000 402)**
Defendant

ORDER MADE BY: MOSHINSKY J

DATE OF ORDER: 18 MAY 2023

THE COURT NOTES THAT:

In these declarations and orders, terms have the following meaning:

- (a) **AFSL** means Australian Financial Services Licence.
- (b) **ASIC Act** means the *Australian Securities and Investments Commission Act 2001* (Cth) as in force during the relevant period.
- (c) **Corporations Act** means the *Corporations Act 2001* (Cth) as in force during the relevant period.
- (d) **Insurance Contracts Act** means the *Insurance Contracts Act 1984* (Cth) as in force during the relevant period.
- (e) **MLCL** means the defendant, MLC Limited (ACN 000 000 402).
- (f) **SRA** means severe rheumatoid arthritis.
- (g) **MS Breach** means the Mail Suppression breach.

THE COURT DECLARES THAT:

- 1. a. In the period up to 31 October 2018:
 - (i) MLCL provided income protection cover to customers under policies of insurance (**RBB Policies**) which contained a term (**RBB Term**) by which MLCL promised to pay a sum of money to the customer described as a “Rehabilitation Bonus Benefit” (**RBB**) if the customer was eligible;

- (ii) 119 customers made a claim to MLCL for indemnity under their respective RBB Policy and were in receipt of income protection benefits (each a **RBB Impacted Customer**);
 - (iii) each RBB Impacted Customer participated in an approved rehabilitation program, by reason of which each RBB Impacted Customer was eligible for the RBB;
 - (iv) between 18 November 2015 and 31 October 2018 each RBB Impacted Customer (or their agent or doctor) provided information to MLCL by which it knew or should have known that each RBB Impacted Customer was eligible for the RBB; and
 - (i) MLCL did not pay the RBB to each RBB Impacted Customer within a reasonable period of time after proof of satisfactory participation by the RBB Impacted Customer in an approved rehabilitation program.
 - b. By the above conduct in paragraphs 1(a)(i) - (v), MLCL represented to each of the 119 RBB Impacted Customers that the RBB Impacted Customers were not eligible for RBB (the **Representation**).
 - c. The Representation was made in trade or commerce and constituted:
 - (i) a false or misleading representation, that services were of a particular standard, had benefits, or contained conditions or rights, in connection with the supply or possible supply of financial services, in contravention of ss 12DB(1)(a), (e) and (i) of the ASIC Act; and
 - (ii) misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in relation to financial services, in contravention of s 12DA(1) of the ASIC Act and s 1041H of the Corporations Act.
2. MLCL breached the requirements of s 13 of the Insurance Contracts Act in relation to the 119 RBB Impacted Customers in the period 18 November 2015 to 31 October 2018 in that it failed to act towards each RBB Impacted Customer, in respect of each matter arising under or in relation to that customer's RBB Policy, with the utmost good faith, by reason of engaging in the conduct the subject of declaration 1 above.
3. By reason of:
- a. MLCL engaging in the conduct the subject of declaration 1 above; and

- b. MLCL not having appropriate processes and procedures to ensure that it would pay the RBB to the 119 RBB Impacted Customers in the period 18 November 2015 to 31 October 2018,

MLCL thereby failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

- 4.
 - a. On 30 June 2017, MLCL updated its definition of SRA in MLCL Insurance and Personal Protection Portfolio policies for SRA (**SRA Policies**) diagnosed after 30 June 2017.
 - b. In the period 27 February 2015 to 30 June 2017, MLCL did not have adequate processes to review and if appropriate promptly update, medical definitions for critical illnesses in SRA Policies, in circumstances where it had received expert medical evidence or opinion concerning the currency of medical definitions which ought to have prompted it to review the relevant medical definitions.
 - c. By reason of the foregoing, between 27 February 2015 to 30 June 2017, MLCL failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.
- 5.
 - a. Between 18 November 2015 to March 2018:
 - (i) MLCL had a policy administration system called Eclipse which provided for, amongst other things, communications to insureds under MS Policies;
 - (ii) Eclipse was configured to enable MLCL to suppress the automated communications to insureds by manually applying the “mail suppression flag” (**Flag**) to the insured in Eclipse;
 - (iii) however, MLCL did not:
 - A. adequately train relevant MLCL staff to remove the Flag after the reasons for the suppression ended; nor
 - B. appropriately monitor relevant MLCL staff’s use of the Flag.
 - b. Accordingly, in the period 18 November 2015 to March 2018 and in relation to 282 life insureds (374 policies), MLCL failed to remove the Flag within a reasonable time after the reason for the mail suppression ended.

- c. By reason of the matters in paragraph 5 (a)(iii) above, MLCL failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

THE COURT ORDERS THAT:

6. Pursuant to s 12GBA(1) of the ASIC Act, within 30 days of the date of this order, MLCL pay to the Commonwealth of Australia a pecuniary penalty of \$10 million in respect of MLCL's conduct in paragraph 1 of the declarations declared to be contraventions of ss 12DB(1)(a), (e) and (i) of the ASIC Act.
7. MLCL pay the plaintiff's costs of and incidental to the proceeding as agreed, and if not, taxed.
8. Pursuant to s 12GLB(1)(a) of the ASIC Act, within 30 days of the order, MLCL publish, at its own expense, a written adverse publicity notice in the terms set out in Annexure A to these orders (**Written Notice**), by, for a period of no less than 90 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the following web address: <https://www.mlcinsurance.com.au> (the **webpage**).
9. The proceeding otherwise be dismissed.

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

Annexure A

Misconduct Notice

The Federal Court of Australia has ordered MLC Limited to publish this misconduct notice.

On [date], Justice Moshinsky of the Federal Court ordered MLC Limited to pay a total pecuniary penalty of \$[10 million] in connection with making false or misleading representations that services were of a particular standard, had benefits, or contained conditions or rights to insurance customers throughout the period spanning 18 November 2015 to 31 October 2018, (the **Penalty Period**).

Justice Moshinsky also declared that, by the conduct MLC Limited:

- a. failed to do all things necessary to provide financial services fairly, honestly and efficiently; and
- b. failed to act with the utmost good faith towards some insurance customers.

A total of \$2,062,958.92 in rehabilitation bonus benefits were not paid to 119 eligible insurance customers within a reasonable period of time after proof of satisfactory participation in an approved rehabilitation program during the Penalty Period.

MLC Limited made admissions of contravention in the proceeding.

Prior to the proceeding, MLC Limited conducted a remediation program in which it paid \$6,195,633.68 including interest to 293 insurance customers.

The conduct subject of the proceeding affected 119 customers of the following insurance policies during the Penalty Period:

- (a) MLC Personal Protection Portfolio Income Protection Plus;
- (b) MLC Insurance Income Protection (including Platinum and Special Risk);
- (c) MLC Protection^{first} Income Protection Gold;
- (d) NAFM Protection Plan Income Protection Plus.

Further information

The above conduct contravened the following financial services laws:

- sections 12DA(1) and 12DB(1)(a), (c) and (i) of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- sections 1041H and 912A(1)(a) of the *Corporations Act 2001* (Cth); and
- section 13 of the *Insurance Contracts Act 1984* (Cth).

For further information about the conduct, see the following links:

- Justice Moshinsky’s judgment on penalty [\[hyperlink\]](#);
- ASIC media release [\[hyperlink\]](#); and
- Statement of facts agreed between the parties to the proceeding [\[hyperlink\]](#).

REASONS FOR JUDGMENT

MOSHINSKY J:

Introduction

1 This proceeding concerns three distinct categories of conduct relating to the provision of financial services by MLC Limited (**MLCL**) during the period 1999 to 9 November 2020.

2 The three categories of conduct can be summarised as follows:

- (a) the non-provision of a rehabilitation bonus benefit (**RBB**) on top of monthly income protection benefits (which MLCL was providing) to 119 customers;
- (b) MLCL's lack of adequate processes for reviewing and, if appropriate, updating medical definitions for critical illness, including, in particular, severe rheumatoid arthritis (**SRA**); and
- (c) MLCL's failure to adequately train staff as regards the removal of a mail suppression (**MS**) 'flag' (**Mail Suppression Flag**) and appropriately monitor staff use of the flag, resulting in some customers not receiving communications from MLCL regarding their policies.

3 The plaintiff (**ASIC**) commenced this proceeding on 18 November 2021. By its originating process, ASIC sought declarations of contravention of provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**), the *Corporations Act 2001* (Cth) and the *Insurance Contracts Act 1984* (Cth), pecuniary penalty orders, adverse publicity orders and costs. ASIC's case was set out in a concise statement.

4 Subsequently, MLCL filed a concise response in which it made substantial admissions.

5 Following a mediation, the parties reached an agreed position in relation to proposed declarations and proposed orders.

6 The parties have prepared a statement of agreement facts and admissions. An amended version of this document was subsequently prepared (**SOAF**). This document was filed with the Court on 16 May 2023. A copy of that document is annexed to these reasons.

7 By the SOAF, MLCL admits that its conduct in the three categories outlined above contravened the ASIC Act, the *Corporations Act* and the *Insurance Contracts Act*. The SOAF describes

the three categories of conduct referred to above as the “RBB Breach”, the “SRA Breach” and the “MS Breach”. I will adopt those expressions in these reasons.

8 MLCL admits that:

- (a) the RBB Breach contravened: ss 12DA(1) and 12DB(1)(a), (e) and (i) of the ASIC Act and s 1041H of the *Corporations Act*; s 13 of the *Insurance Contracts Act*; and s 912A(1)(a) of the *Corporations Act*;
- (b) the SRA Breach contravened s 912A(1)(a) of the *Corporations Act*; and
- (c) the MS Breach contravened s 912A(1)(a) of the *Corporations Act*.

9 The parties propose that the Court make declarations to reflect these admitted contraventions.

10 The conduct constituting the RBB Breach ceased by no later than on or around 31 October 2018. In the relevant period for that conduct, s 12DB of the ASIC Act was a provision in respect of which a pecuniary penalty could be imposed. The parties jointly propose that a pecuniary penalty of \$10 million be imposed on MLCL in respect of its contraventions of s 12DB of the ASIC Act by the conduct described as the RBB Breach.

11 The parties also propose an order requiring MLCL to publish an adverse publicity notice in an agreed form. It is also proposed that there be an order that MLCL pay ASIC’s costs of the proceeding.

12 The material before the Court is as follows. In addition to the SOAF, there is a tender bundle of documents referred to in the SOAF, and an affidavit of Kent Bernard Griffin, the Chief Executive Officer and Managing Director of MLCL. The parties have provided joint submissions in support of the proposed declarations and orders (the **Joint Submissions**). MLCL has also filed submissions that supplement the Joint Submissions (**MLCL’s Submissions**). The parties appeared today and made oral submissions in support of the proposed declarations and orders.

13 In my view, for the reasons that follow, there is a proper basis and it is appropriate to make the declarations proposed by the parties. These will record, in a formal and public way, that MLCL contravened the law on multiple occasions in its dealings with its customers and in the conduct of its insurance business.

14 Further, in my view, the pecuniary penalty proposed by the parties appropriately reflects the seriousness of MLCL’s contraventions of s 12DB of the ASIC Act, and should serve the

purposes of specific and general deterrence. I therefore consider it appropriate to impose a penalty of \$10 million in respect of the relevant conduct.

15 I also consider the adverse publicity order and the order as to costs to be appropriate.

16 In preparing these reasons, I have drawn substantially on the Joint Submissions and MLCL's Submissions.

Overview of the contravening conduct

General

17 MLCL at all material times held an Australian Financial Services Licence (**AFSL**).

18 MLCL is, and was at all relevant times, a major provider or issuer, in Australia, of life insurance products to consumers which it offers under its AFSL. Throughout the period 18 November 2015 (6 years before the proceeding was issued) to 18 November 2021 (the date of commencement of the proceeding) (this being the relevant period for penalty purposes), MLCL had net assets ranging from \$1 billion to \$2.8 billion.

19 In the period from 1999, National Australia Financial Management Limited (**NAFM**) and Norwich Union Life Australia Limited (**Norwich**) sold similar products. On 1 October 2006 and 2 October 2010, the life insurance businesses of each of NAFM and Norwich respectively were amalgamated with the life insurance business of MLCL. MLCL thereby assumed all contractual liabilities of NAFM and Norwich under the policies issued by those entities, and assessed claims under them.

RBB Breach

20 During the relevant period, MLCL, NAFM and Norwich issued income protection insurance policies which provided for the payment of an additional benefit (the RBB) to a customer if the customer was participating in an approved vocational rehabilitation program, subject to the terms and conditions of the relevant policy.

21 The RBB terms vary in detail, but broadly provided that if a customer was receiving a monthly income protection benefit and participated in a rehabilitation program approved by MLCL, an additional 50% of the monthly benefit would be paid to the customer each month for a period up to a maximum of either 6 or 12 months.

22 The typical stages of a claim by a customer under their policy during the relevant period are summarised at paragraph 26 of the SOAF.

23 In the period up to 31 October 2018, MLCL failed to pay the RBB to 119 customers (the **RBB Impacted Customers**) in receipt of income protection benefits, within a reasonable period of time after proof of satisfactory participation by the RBB Customer in an approved rehabilitation program, despite the RBB Impacted Customer (or their agent or doctor) providing information to MLCL such that it knew or should have known that the customer was eligible for the RBB.

24 In respect of the RBB Impacted Customers, MLCL has admitted that:

(a) in the period up to 31 October 2018:

- (i) each of the relevant policies held by the RBB Impacted Customers contained a term by which MLCL promised to pay the RBB to the customer if the customer was eligible, subject to the terms and conditions of the policy;
- (ii) the RBB Impacted Customers made a claim for indemnity (income protection) under their respective policies and were in receipt of income protection benefits;
- (iii) each RBB Impacted Customer participated in an approved rehabilitation program, by reason of which each customer was eligible for the RBB;

(b) between 18 November 2015 and 31 October 2018:

- (i) each RBB Impacted Customer (or their agent or doctor) provided information to MLCL by which MLCL knew or should have known that each RBB Impacted Customer was eligible for the RBB;
- (ii) MLCL did not pay the RBB Impacted Customers the RBB within a reasonable period of time after proof of satisfactory participation by the RBB Impacted Customer in an approved rehabilitation program; and

(c) by reason of the conduct in sub-paragraphs (a) and (b), MLCL represented to each RBB Impacted Customer that they were not eligible for the RBB (the **Representation**); and

(d) the Representation was made in trade or commerce and, by reason of the MLCL's conduct in relation to the RBB Impacted Customers set out in paragraphs 29 and 30 of the SOAF, constituted a false or misleading representation to each, and misleading or deceptive conduct in relation to each, RBB Impacted Customer (the **RBB MD Conduct**).

25 The SOAF contains examples of the process of claims assessment for three RBB Impacted Customers.

26 The RBB MD Conduct arose as a result of MLCL not having appropriate processes and procedures in place to ensure that it would pay the RBB to the RBB Impacted Customers.

27 As set out above, MLCL admits that the making of the Representation resulted in contraventions of the prohibitions against false or misleading representations and misleading or deceptive conduct in the ASIC Act and *Corporations Act*. By engaging in the RBB MD Conduct MLCL admits that it breached the duty of utmost good faith implied into insurance contracts by s 13 of the *Insurance Contracts Act*. MLCL also admits that it contravened the obligation on financial services licensees in s 912A of the *Corporations Act* to do all things necessary to ensure that the financial services covered by its licence are provided efficiently, honestly and fairly by engaging in the RBB MD Conduct and by not having appropriate processes and procedures in place to ensure it would pay the RBB to the RBB Impacted Customers.

28 As explained in the Joint Submissions, ASIC and MLCL submit that each element of the relevant provisions is satisfied by the RBB Breach as admitted in the SOAF.

29 The relevant provisions relating to misleading or deceptive conduct, and false or misleading representations, are as follows. At the relevant times for the RBB Breach, ss 12DA(1) and 12DB(1)(a), (e) and (i) of the ASIC Act and s 1041H(1) of the *Corporations Act* provided:

12DA Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

...

12DB False or misleading representations

- (1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

- (a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

...

- (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits; or

...

- (i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); or

...

1041H Misleading or deceptive conduct (civil liability only)

- (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

...

30 The phrase “misleading or deceptive or likely to mislead or deceive” has received extensive judicial consideration, and it is not necessary to discuss those cases for present purposes.

31 The RBB MD Conduct was directed to the RBB Impacted Customers, not to the public at large. Accordingly, “attention must be directed to the relationship between the two persons, the context in which the statement is made, the reasonably known characteristics of the recipient of the statement, and the effect on a reasonable person in the position of the recipient of the statement”: *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196; 337 ALR 647 at [219] per Edelman J.

32 The gravamen of the RBB MD Conduct is:

- (a) a positive statement in the documented policy terms by MLCL to each of the RBB Impacted Customers that it would pay the RBB if certain conditions were met;
- (b) MLCL being typically involved in the arrangement and/or monitoring of progress of the RBB Impacted Customers undertaking an MLCL approved rehabilitation program;
- (c) MLCL receiving information by which it knew or should have known the RBB Impacted Customers were eligible for RBB; however,
- (d) MLCL not paying the RBB Impacted Customers the RBB within a reasonable period of time after proof of satisfactory participation by the RBB Impacted Customers in an approved rehabilitation program.

33 That conduct, viewed as a whole, had the tendency to lead each of the RBB Impacted Customers into the false assumption that they were receiving their full entitlements under their policy, and therefore, represented they were not eligible for the RBB. An implicit nature of representations does not diminish their misleading character. As Lee J held in *Australian*

Competition and Consumer Commission v Mazda Australia Pty Limited [2023] FCAFC 45 at [639]:

In my respectful view, the fact the contravening conduct was based on implied rather than express representations is not to the point. Speaking generally, and depending upon the context, conduct in the nature of silence or implied representations can often be as seriously misleading as express representations (and, in some circumstances, may be more serious because the misleading nature of the conduct may be more difficult to appreciate).

34 Section 12DB of the ASIC Act requires the Representation to concern specific matters. For ss 12DB(1)(a), (e) and (i) there must be a false or misleading representation that the financial services in question were (relevantly):

- (a) of a particular standard;
- (b) had benefits; or
- (c) contained conditions or rights.

35 The RBB MD Conduct falls within each of those heads. Eligibility for the RBB upon participating in an approved rehabilitation program was a benefit, condition or right of the relevant policies held by the RBB Impacted Customers, and a feature or quality which gave those policies a particular standard. MLCL made a false or misleading representation that the RBB Impacted Customers were not eligible for the RBB, which thereby was directed to a benefit, standard, condition or right under the relevant policies.

36 The final requirement is that the misleading or deceptive conduct have the required connection to the financial product or services. This requirement is satisfied for the reasons set out in the Joint Submissions.

37 I am therefore satisfied that the agreed contraventions of ss 12DA and 12DB of the ASIC Act and s 1041H of the *Corporations Act* are established.

38 The requirements of utmost good faith are implied into insurance contracts by reason of s 13(1) of the *Insurance Contracts Act*. That provision provides:

13 The duty of the utmost good faith

- (1) A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

- 39 A breach of the implied requirement of utmost good faith under the *Insurance Contracts Act* is actionable by ASIC (see, for example, *Australian Securities and Investments Commission v Youi Pty Ltd* [2020] FCA 1701) in the sense that ASIC has standing to seek declarations that the provision has been breached: see *Australian Securities and Investments Commission v TAL Life Ltd (No 2)* [2021] FCA 193; 389 ALR 128 at [217] per Allsop CJ.
- 40 There has been significant judicial consideration of the bounds of the requirement to act with the utmost good faith. This includes the recent judgment of the High Court in *Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788* [2022] HCA 38; 406 ALR 632.
- 41 MLCL admits that the RBB MD Conduct amounts to a failure by it to act towards each of the RBB Impacted Customers with utmost good faith in respect of their eligibility to be paid benefits arising under or in relation to that customer’s relevant policy. MLCL’s conduct was not dishonest. However, it was inconsistent with commercial standards of decency and fairness for MLCL to fail to pay the benefit to customers in circumstances where it had information revealing their entitlement to it, particularly given the context in which the conduct occurred – namely, MLCL knew or should have known those customers were eligible to be paid the RBB, and there was a lack of appropriate processes and procedures on MLCL’s part to ensure payment of the RBB to the RBB Impacted Customers.
- 42 Section 912A(1)(a) of the *Corporations Act* requires a financial services licensee to:
- do all things necessary to ensure that the financial services covered by [its] licence are provided efficiently, honestly and fairly
- 43 Section 912A of the *Corporations Act*, and in particular s 912A(1)(a), has been considered extensively and it is not necessary for present purposes to refer to those cases.
- 44 In the present circumstances, MLCL was required to do all things necessary to ensure that its dealings in relation to the relevant policies were efficient, honest and fair. This required, among other things, that MLCL have appropriate processes and procedures in place to ensure that the benefits provided for in the relevant policies were paid to the RBB Impacted Customers within a reasonable period of time after them being eligible.
- 45 MLCL has admitted that its conduct contravened s 912A(1)(a) in two respects:
- (a) by engaging in the RBB MD Conduct; and
 - (b) by not having appropriate processes and procedures to ensure that it would pay the RBB to the RBB Impacted Customers in the period 18 November 2015 to 31 October 2018.

SRA Breach

46 MLCL provided insurance coverage for customers who suffered “critical illness” under certain policies (together, the **SRA Policies**).

47 SRA was included as a “critical condition” capable of constituting a “critical illness” under the SRA Policies. This means that where a customer with an SRA Policy was assessed as having SRA, as defined all else equal, they would receive a benefit for SRA under their SRA Policy.

48 The SRA Policies contained a definition of SRA by reference to medical diagnosis supported by evidence of specified criteria. In 2011 MLCL adopted the definition set out at paragraph 49 of the SOAF for the SRA Policies.

49 Over 2013 and 2014, the claims team responsible for assessing critical illness claims (the **Claims Team**) started to see an increase in the number of SRA claims being denied. In March 2014, a customer asked MLCL to review a claim decision relating to SRA. These events appear to have prompted MLCL to question whether the SRA Definitions set too high a bar for the diagnosis of SRA, having regard to then current medical diagnostic standards and treatments for rheumatoid arthritis. That occurred in around July 2014, when the matter was brought to MLCL’s Product Manager for “MLC Insurance” policies.

50 In October 2014, the Product Manager escalated the issue of whether the SRA Definitions were no longer current to MLCL’s General Manager – Claims.

51 In January 2015, MLCL engaged Professor Lesley Barnsley, Head of the Department of Rheumatology at Concord Hospital, to review the currency of the SRA Definition in one SRA Policy – a MLC Insurance policy – and a proposed upgraded definition of SRA (**First Proposed Definition**).

52 On 27 February 2015, Professor Barnsley provided his report to MLCL. Professor Barnsley advised to the effect that the First Proposed Definition was considerably in excess of current accepted definitions of rheumatoid arthritis which had become more liberal over time in that fewer joints and fewer other criteria were required to diagnose rheumatoid arthritis. A more detailed description of Professor Barnsley’s opinion is provided in the SOAF.

53 From around March 2015 until April 2016, the definition of SRA in the SRA Policies was not updated. In 2015 MLCL checked the SRA definitions of competitors, only to find that none had a more contemporaneous definition to use as a benchmark. As part of its consideration of

updating the SRA definition, MLCL had to agree criteria for a new SRA definition that was fair to customers who may suffer SRA, and could be passed on to existing and prospective customers, but was premium neutral. This neutral pricing meant MLCL had to consider whether claims arising under a new SRA definition would exceed projected claims for SRA and, therefore, whether it would impact the pricing for existing and new customers.

54 In April 2016, MLCL’s Product Manager for MLC Insurance policies consulted with MLCL’s Chief Medical Officer about an update to the SRA Definitions. MLCL’s Chief Medical Officer advised that the existing definitions were not “serviceable in the Western World”. On 15 June 2016, MLCL’s Chief Medical Officer proposed new wording to replace the SRA Definitions.

55 In May 2016, MLCL instigated an informal process for assessing potential declinatures of claims for SRA. The process involved consultation with medical staff and claims were assessed against criteria that were less onerous than those in the SRA Definitions. This informal process was documented by MLCL in August 2016 but without specifying alternative criteria for meeting SRA.

56 In September 2016, MLCL engaged Dr Loretta Reiter to provide a further opinion concerning the adequacy of the SRA Definitions in personal protection portfolio policies. Dr Reiter produced a report dated 12 September 2016, which identified a guideline for determining whether a patient suffered from SRA that was employed by the American College of Rheumatology. MLCL continued to consider its SRA Definitions from late 2016 (including at the time of its separation from NAB in October 2016) to mid-2017.

57 In early 2017, MLCL undertook work to update its critical illness medical definitions, including SRA. On 30 June 2017, MLCL determined the wording it would adopt for the definition of SRA in the SRA Policies (**Upgraded Definition**). It is set out at paragraph 67 of the SOAF.

58 On 30 June 2017, the Upgraded Definition was introduced into the SRA Policies by product disclosure statements.

59 MLCL admits that in the period 27 February 2015 to 30 June 2017, it did not have adequate processes to review and, if appropriate, promptly update, medical definitions for critical illnesses in SRA Policies, in circumstances where it had received expert medical evidence or opinion concerning the currency of medical definitions which ought to have prompted it to review the relevant medical definitions.

60 MLCL admits that, by failing as such, it contravened s 912A(1)(a) of the *Corporations Act*.

MS Breach

61 During the relevant period, MLCL and Norwich used an information technology platform called “Eclipse” to store customer and policy data to assist with the administration of insurance policies. Norwich used Eclipse to administer its retail life insurance policies from 16 February 2002 until October 2010, at which time Norwich was amalgamated into MLCL. From October 2010, MLCL continued to use Eclipse to administer retail policies previously issued by Norwich, as well as new policies issued by MLCL (within the MLC Insurance range) from that date. Eclipse was decommissioned on 26 April 2020.

62 Among other things, Eclipse:

- (a) stored customer and policy information (including customers’ personal information and contact details; the product type, policy commencement date, cover type, and sum insured for any policies held by the customer; and the premiums paid and payable by the customer); and
- (b) generated written communications to customers, which related to the administration of their policy (for example, policy schedules and premium notices).

63 Norwich and MLCL were under a legal obligation to provide to customers certain communications. As explained in the SOAF, Eclipse was used to generate these (and other) communications by batch, in bulk.

64 From 2002, Eclipse included a function – the Mail Suppression Flag – which could be applied by Norwich or MLCL to a given customer’s profile to stop batch-triggered policy communications for that customer. The Mail Suppression Flag was primarily used by the “Customer Maintenance Insurance Team” (**CMI Team**), though there was no restriction on access for users of Eclipse. Relevantly, anyone with access to Eclipse could apply the Mail Suppression Flag at the customer level.

65 From time to time, MLCL or Norwich (as the case may be) applied the Mail Suppression Flag at a customer level, to customer profiles. This was done when a particular course of action had been agreed with a customer, which would be contradicted by the sending of system-generated correspondence that was automatically issued. The Mail Suppression Flag was applied primarily by the CMI Team when a customer activated the “economiser option”, or, where a policy anniversary needed to be “undone”.

66 In the period until April 2017, the Mail Suppression Flag had to be manually switched off by MLCL staff when the reason for suppression of communications ended. Otherwise, the customer would not receive batch-triggered communications suppressed by the Mail Suppression Flag relating to their policy.

67 Prior to identification of the MS Breach, training for the Mail Suppression Flag was only provided to members of the CMI Team, and not all staff who had access to Eclipse and who may therefore have used the Mail Suppression Flag.

68 Between 18 November 2015 (6 years before commencement of the proceeding) and March 2018, MLCL failed to adequately train relevant staff to remove the Mail Suppression Flag after the reasons for the suppression of communications ended. MLCL also failed to appropriately monitor the use of the Mail Suppression Flag. Prior to the identification of the MS Breach:

- (a) there were no documented processes for how to apply and remove the Mail Suppression Flag appropriately;
- (b) there was no monitoring in place to ensure that the Mail Suppression Flag was being applied and removed appropriately; and
- (c) there were no limitations within Eclipse for how long the Mail Suppression Flag could be applied.

69 As a result of the limitations in training and monitoring identified above, between 18 November 2015 and March 2018 MLCL failed to remove the Mail Suppression Flag within a reasonable time after the reason for the mail suppression ended from the profiles of 282 customers, affecting 374 policies (**MS Impacted Customers**).

70 As a consequence, the MS Impacted Customers did not receive communications from MLCL that MLCL was under a legal obligation to provide. Those communications, one or more of which was not received by each MS Impacted Customer, included:

- (a) First Notice of Premium Due – which provided notice of the premiums due by the customer, including an increase or variation in premium;
- (b) Overdue Notices and Dishonour Notices – both of which contained notice of a proposed cancellation of the policy;

- (c) Confirmation of Cancellation letters – which were issued where policies were cancelled for non-payment of premiums, at the request of a customer, or at the natural expiry of the policy;
- (d) Annual Renewal Notices; and
- (e) Exit Statements – provided on termination or expiry of a policy held within a superannuation fund.

71 Section 912A(1)(a) required MLCL to do all things necessary to ensure that services that it provided in relation to the administration of the relevant policies were provided efficiently, honestly and fairly, which encompasses providing correspondence of the nature the subject of the MS Breach (e.g. annual renewal notices, exit notices and confirmations of cancellation) under those policies.

72 MLCL admits that during the period between 18 November 2015 and March 2018 it failed to:

- (a) adequately train relevant MLCL staff to remove the Mail Suppression Flag after the reasons for the suppression ended; nor
- (b) appropriately monitor relevant MLCL’s staff’s use of the Mail Suppression Flag.

73 MLCL also admits that as a result of these failures, for the MS Impacted Customers, it failed to remove the Mail Suppression Flag within a reasonable time after the reason for the suppression ended, and that MS Impacted Customers therefore did not receive communications from MLCL that MLCL was under a legal obligation to provide.

74 This is plainly a failure by MLCL to do all things necessary to ensure the efficient, honest and fair provision of financial services (in relation to policy administration on Eclipse).

Applicable principles

75 I discussed the applicable principles in *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd* [2022] FCA 1115 and *Australian Competition and Consumer Commission v Optus* [2022] FCA 1397. This section of these reasons is substantially based on those judgments.

Declaratory relief

76 This Court has the power to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth).

77 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68, the Full Court stated (at [90]):

The fact that the parties have agreed that a declaration of contravention should be made does not relieve the Court of the obligation to satisfy itself that the making of the declaration is appropriate. ... It is not the role of the Court to merely rubber stamp orders that are agreed as between a regulator and a person who has admitted contravening a public statute.

(Citations omitted.)

78 The Full Court continued (at [93]):

Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions ...

(Citations omitted.)

79 In *Forster v Jododex Australia Pty Ltd* [1972] HCA 61; 127 CLR 421, Gibbs J stated (at 437-438) that before making declarations three requirements should be satisfied:

- (a) the question must be a real and not a hypothetical or theoretical one;
- (b) the applicant must have a real interest in raising it; and
- (c) there must be a proper contradictor.

Civil penalties

80 At the relevant times for the imposition of a pecuniary penalty for the contraventions of s 12DB(1) of the ASIC Act by the conduct described as the RBB Breach (i.e. from 18 November 2015 to 31 October 2018), s 12GBA of the ASIC Act provided in part:

12GBA Pecuniary penalties

- (1) If the Court is satisfied that a person:
 - (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA); or
 - ...

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.
- (2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
 - (a) the nature and extent of the act or omission and of any loss or damage

suffered as a result of the act or omission; and

- (b) the circumstances in which the act or omission took place; and
- (c) whether the person has previously been found by the Court in proceedings under this Subdivision to have engaged in any similar conduct.

...

81 At the relevant times, the maximum penalty for a contravention of s 12DB(1) by a body corporate was 10,000 penalty units. The value of a penalty unit was set by s 4AA of the *Crimes Act 1914* (Cth). During the relevant period, the value of a penalty unit was:

- (a) \$180 between 31 July 2015 and 30 June 2017;
- (b) \$210 between 1 July 2017 and 30 June 2020; and
- (c) \$222 between 1 July 2020 and 31 December 2022.

82 The maximum penalty for the 119 contraventions of s 12DB(1) by the conduct described as the RBB Breach is therefore over \$100 million.

83 In *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (the ***Agreed Penalties Case***), the High Court emphasised that the primary purpose of civil penalties is to secure deterrence. In contrast to criminal sentences, they are not concerned with retribution and rehabilitation but are “primarily if not wholly protective in promoting the public interest in compliance”: *Agreed Penalties Case* at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; see also at [110] per Keane J. This point was also emphasised by the High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 399 ALR 599 (***Pattinson***) at [15]-[16], [43], [45], [55] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.

84 The plurality in *Pattinson* affirmed (at [18]) the well-known statements of French J, as his Honour then was, in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR ¶41-076. In that case, his Honour listed several factors that informed the assessment of a penalty of appropriate deterrent value under the *Trade Practices Act 1974* (Cth). His Honour stated:

The assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases. These include the following:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.

3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the contravention and the period over which it extended.
7. Whether the contravention arose out of the conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

85 After setting out the above passage, the plurality in *Pattinson* stated at [19]:

It may readily be seen that this list of factors includes matters pertaining both to the character of the contravening conduct (such as factors 1 to 3) and to the character of the contravenor (such as factors 4, 5, 8 and 9). It is important, however, not to regard the list of possible relevant considerations as a “rigid catalogue of matters for attention” as if it were a legal checklist. The court’s task remains to determine what is an “appropriate” penalty in the circumstances of the particular case.

(Footnotes omitted.)

86 The plurality in *Pattinson* considered the role of the prescribed maximum penalty as a yardstick in a civil penalty context, affirming (at [53]) the explanation provided by the Full Court of this Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [155]-[156]. See also *Pattinson* at [54]-[55].

87 In determining the appropriate penalty, it is relevant to consider steps taken to ameliorate loss or damage (such as payment of compensation) as potentially mitigatory considerations: *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44; [2016] ATPR ¶42-251 at [166]-[167] per Edelman J; *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2015] FCA 399; 146 ALD 385 at [38] per White J.

88 Co-operation with authorities in the course of investigations and subsequent proceedings can properly reduce the penalty that would otherwise be imposed. The reduction reflects the fact that such co-operation: increases the likelihood of co-operation in future cases in a way that furthers the object of the legislation; frees up the regulator’s resources, thereby increasing the likelihood that other contravenors will be detected and brought to justice; and facilitates the course of justice: see, eg, *Agreed Penalties Case* at [46]; *NW Frozen Foods Pty Ltd v Australian*

Competition and Consumer Commission [1996] FCA 1134; 71 FCR 285 at 293-294 (*NW Frozen Foods*).

89 In the *Agreed Penalties Case*, the High Court held that, in the context of civil penalty provisions, it was open to the Court to receive submissions, including joint submissions, as to an appropriate penalty. French CJ, Kiefel, Bell, Nettle and Gordon JJ (with whom Keane J agreed) stated at [46] that there is “an important public policy involved in promoting predictability of outcome in civil penalty proceedings” and that “the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers”. Their Honours stated that, as was recognised in *Trade Practices Commission v Allied Mills Industries Pty Ltd (No 5)* (1981) 60 FLR 38; 37 ALR 256 and determined in *NW Frozen Foods*, “such predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention”.

90 Their Honours stated, at [57], that in civil proceedings there is generally very considerable scope for the parties to agree on the facts and their consequences, and that there “is also very considerable scope for them to agree upon the appropriate remedy and for the court to be persuaded that it is *an* appropriate remedy” (emphasis in original). In relation to civil penalty proceedings, their Honours stated at [58]:

Subject to the court being sufficiently persuaded of the accuracy of the parties’ agreement as to facts and consequences, and that the penalty which the parties propose is an appropriate remedy in the circumstances thus revealed, it is consistent with principle and, for the reasons identified in *Allied Mills*, highly desirable in practice for the court to accept the parties’ proposal and therefore impose the proposed penalty.

(Footnote omitted.)

91 Their Honours in the *Agreed Penalties Case* also made observations, at [60]-[61], regarding submissions by a regulator in such a context.

Application of principles to this case

Declarations

92 The parties have proposed declarations that reflect the agreed contraventions as summarised above. I am satisfied that the contraventions that are the subject of the proposed declarations are established by the facts and admissions set out in the SOAF. I consider it appropriate to

make declarations as proposed by the parties. The preconditions for the making of declarations, set out above, are satisfied.

Civil penalties

93 The parties propose that a penalty of \$10 million be imposed for MLCL's contraventions of s 12DB(1) of the ASIC Act by the conduct described as the RBB Breach. There were 119 contraventions of that provision. The maximum penalty has been set out above.

94 For the reasons set out below, which include consideration of the mandatory considerations in s 12GBA(2) and other considerations referred to in the authorities, I am satisfied that the proposed penalty is appropriate.

95 The contraventions involved MLCL having received information that 119 customers were entitled to the RBB benefit, but over an extended period not paying that benefit to those customers. The RBB Breach therefore represents a serious failure by MLCL which ought to be denounced by a serious penalty.

96 The RBB Breach extended from at least 18 November 2015 (the beginning of the relevant period for penalty purposes). MLCL did not have appropriate processes and procedures in place to prevent the breach. Facts prior to the penalty period may be taken into account in determining the penalty in the instinctive synthesis performed by the Court. An example is in *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790, where Beach J held (at [9]) that although the pleaded contravening conduct occurred over a period of less than two years, "the seriousness of those contraventions is to be viewed in the context of CBA's failings for a broader period of over 10 years".

97 Here, similarly, although the RBB Impacted Customers are limited to those 119 people who were left unpaid during the penalty period, MLCL's failure to have appropriate processes and procedures in place commenced well before that date.

98 It can be inferred that for the period in which the RBB Impacted Customers were not paid, MLCL retained the benefit of being able to apply those monies to other uses.

99 As the example of R066 (described in the SOAF) illustrates, some of the RBB Impacted Customers remained unpaid for significant periods of time, sometimes years. This underpayment was at a time when those people were undertaking rehabilitation for the purpose of recovering from their disabling conditions and, it can be inferred, were either not otherwise

working or were working in a limited capacity (as they were in receipt of income protection benefits at the time).

100 MLCL is a major provider or issuer, in Australia, of life insurance products to consumers. The SOAF discloses that it had very significant assets during the period that is relevant for penalty purposes. A large penalty is required to provide for appropriate specific deterrence for a company of such substance.

101 Another relevant consideration is MLCL's conduct in remediating the RBB Impacted Customers. Part C-3 of the SOAF sets out the actions taken by MLCL to investigate the RBB Breach and to report the conduct to ASIC. Annexure C to the SOAF sets out each of the RBB Impacted Customers individually and lists the amount of the RBB (and interest) they were paid in remediation, and the period during which the customer was first eligible to receive the RBB but was nevertheless not paid the benefit.

102 Despite being rectified, Annexure C discloses that many of the RBB Impacted Customers were not remediated for months or years after first becoming eligible to receive the RBB, with some individuals not having received a benefit of tens of thousands of dollars. Further, the RBB Breach was first brought to MLCL's attention by reason of the escalation of a customer complaint in 2016, then taking two years for the matter to be fully investigated and remediation to be completed.

103 In the SOAF, MLCL makes admissions of liability in respect of each category of conduct pressed by ASIC in the proceeding, including the RBB MD Conduct. MLCL's admissions and its remediation of impacted customers provide evidence of contrition on the part of MLCL.

104 The contrition of MLCL is further emphasised by direct affidavit evidence from its Chief Executive Officer. In his affidavit, Mr Griffin conveys his deep regret that the breaches occurred and apologises to the Court, MLCL's customers and all persons affected by the contraventions for their occurrence. Mr Griffin has given his apology on an informed basis and after a review of materials that include the SOAF. The provision of an apology through direct evidence is a matter that the Court is entitled to take into account in being satisfied that a proposed penalty meets the requirements of general and specific deterrence. MLCL has also expressed its contrition through apologies conveyed to customers at the time they were remediated.

105 MLCL has cooperated with ASIC in respect of its investigation into the RBB Breach. MLCL's cooperation included voluntarily disclosing documents to ASIC. MLCL also reported the breaches to ASIC.

106 MLCL made an early admission in its concise response and sought an early order for mediation. An agreed resolution was reached prior to the filing of evidence, thereby saving ASIC costs that would otherwise have been expended in the preparation and presentation of the case.

107 ASIC has not alleged in this proceeding that the conduct described as the RBB Breach was committed knowingly or deliberately. Nor is it suggested that MLCL engaged in dishonesty or sought to conceal the contraventions.

108 Relevantly for the purposes of penalty, the RBB MD Conduct instead arose as a result of MLCL not having appropriate processes and procedures in place to ensure it would pay the RBB to the RBB Impacted Customers. While the contraventions remain serious, the absence of deliberate, intentional and dishonest misconduct is a relevant matter in assessing the appropriateness of the penalty.

109 The agreed facts do not suggest that senior officers of MLCL were involved in the RBB MD Conduct or directed, facilitated or condoned the conduct.

110 It is not suggested that MLCL has previously been found to have contravened the ASIC Act or the *Corporations Act*.

111 It is agreed that the deficiencies in the procedures and processes relevant to the RBB Breaches ceased by no later than 31 October 2018. The rectification work undertaken by MLCL is summarised in the affidavit of Mr Griffin, and was directed at seeking to correct the deficiencies that had been identified. The rectification work included an enhanced Quality Assurance Framework for claim consultants and the development of a Quality Assurance Framework for rehabilitation specialists to assess the application of the RBB during the performance review process. MLCL has sought to address the key problems that led to the RBB MD Conduct.

112 Mr Griffin also gives direct evidence concerning the company's wider culture of compliance. As part of its commitment to striving for high standards of customer service, compliance and risk management, MLCL has invested over \$640 million in further uplifting systems and controls across the business. While this investment cannot detract from the seriousness of the

RBB MD Conduct, it is relevant that MLCL has taken significant steps to improve its processes and controls and remedy deficiencies as they arise.

113 Having regard to the above, I am satisfied that the proposed penalty of \$10 million is appropriate in the circumstances. In particular, I am satisfied that it is sufficient to achieve the objects of specific and general deterrence.

Adverse publicity order and costs

114 I am satisfied that the Court has power to impose, and that it is appropriate to impose, the adverse publicity order, for the reasons set out in the Joint Submissions. The costs order proposed by the parties is also appropriate.

Conclusion

115 I will therefore make declarations and orders substantially in the terms proposed by the parties.

I certify that the preceding one hundred and fifteen (115) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:



Dated: 26 May 2023



AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

MLC Limited (ACN 000 000 402)
Defendant

AMENDED STATEMENT OF AGREED FACTS AND ADMISSIONS

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A. Introduction

1. This Statement of Agreed Facts and Admissions (SAFA) is made for the purposes of s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**), jointly by the plaintiff (ASIC) and the defendant (MLCL).
2. The SAFA relates to Proceeding No VID681 of 2021 commenced by ASIC against MLCL on 18 November 2021 (**Proceeding**). The facts agreed, and the admissions made, are solely for the purpose of the Proceeding and do not constitute any admission outside of the Proceeding.
3. By its originating process and concise statement filed on 18 November 2021, ASIC alleges that MLCL contravened s 912A(1)(a) and 1041H of the *Corporations Act 2001* (Cth) (**CA**), ss 12DA, 12DB(1) and 12DI(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASICA**) and s 13 of the *Insurance Contracts Act 1984* (Cth) (**ICA**) by engaging in certain conduct in its capacity as a financial services licensee. The conduct is alleged to have occurred in the period 1999 to 9 November 2020 (**Relevant Period**).
4. In broad terms, the conduct pressed by ASIC now relates to three “events” that MLCL self-reported to ASIC pursuant to s 912D(1) of the CA. Those events concerned the non-payment of a (vocational) rehabilitation bonus benefit (**RBB**) to eligible customers, the suitability of, and delay in updating, definitions of severe rheumatoid arthritis (**SRA**) in policies and the use of mail suppression (**MS**) flags for mandatory customer correspondence.

5. ASIC and MLCL have reached agreement as to the terms upon which they seek a resolution of the Proceeding, recognising that the grant of relief is in the discretion of the Court. In particular, the parties have reached agreement as to proposed declarations of contravention in the form of Annexure A (**Agreed Proposed Declarations**) and are agreed that, pursuant to s 12GBA(1) of the ASICA, MLCL should pay to the Commonwealth of Australia a pecuniary penalty of \$10 million, in addition to paying ASIC's costs of and incidental to the proceeding, and publishing a written adverse publicity misconduct notice in the form annexed to the Agreed Proposed Declarations.
6. MLCL admits contraventions in respect of three categories of conduct the subject of the Proceeding (together, the **Breaches**):
 - (a) the "**RBB Breach**", concerning the non-provision of the RBB, on top of monthly income protection benefits which MLCL was providing to 119 customers (**RBB Impacted Customers**) (Part C below);
 - (b) the "**SRA Breach**", which concerned MLCL's lack of adequate processes for reviewing and, if appropriate, promptly updating, medical definitions for critical illnesses including SRA for certain policies (Part D below); and
 - (c) the "**MS Breach**", which concerned MLCL's failure to adequately train staff as regards the removal of a MS 'flag' and appropriately monitor staff use of the MS flag, resulting in some customers not receiving communications from MLCL concerning their policies (Part E below).
7. For the purpose of the Proceeding only, MLCL admits that it contravened:
 - (a) for the RBB Breach:
 - (1) ss 12DA(1) and 12DB(1)(a), (e) and (i) of the ASICA, and s 1041H of the CA by engaging in the RBB MD Conduct (as defined in paragraph 34 below) as regards the RBB Impacted Customers;
 - (2) s 13 of the ICA by engaging in the RBB MD Conduct as regards the RBB Impacted Customers; and

- (3) s 912A(1)(a) of the CA by engaging in the RBB MD Conduct and by not having appropriate processes and procedures to ensure that it would pay the RBB to the RBB Impacted Customers in the period 18 November 2015 to 31 October 2018;
 - (b) for the SRA Breach: s 912A(1)(a) of the CA, by not having adequate processes in place to review and, if appropriate promptly update, medical definitions for critical illnesses in SRA Policies (as defined in paragraph 21 below) in circumstances where it had received expert medical evidence or opinion concerning the currency of medical definitions which ought to have prompted it to review the relevant medical definitions; and
 - (c) for the MS Breach: s 912A(1)(a) of the CA, by failing to adequately train relevant staff regarding the removal of the Mail Suppression Flag (as defined in paragraph 82 below) and by failing to appropriately monitor staff use of the Mail Suppression Flag from 18 November 2015 to March 2018.
8. The parties also agree that it is appropriate that:
- (a) MLCL pay a pecuniary penalty fixed in the amount of \$10 million in respect of the RBB MD Conduct, subject to approval by the Court;
 - (b) MLCL pay ASIC's costs of and incidental to the proceeding as agreed, and if not, as taxed; and
 - (c) MLCL publish a written notice in the form annexed to the Agreed Proposed Declarations in respect of the RBB MD Conduct.

B. Parties and Background Facts to the Breaches

i) ASIC

- 9. ASIC is a body corporate which was established by s 7 of the ASICA and continues by operation of s 261 of that Act.
- 10. ASIC may sue by reason of s 8(1)(d) of the ASICA.

ii) *MLCL*

11. MLCL is a body corporate incorporated according to law and able to be sued in its own name.
12. MLCL at all material times held an Australian Financial Services Licence (AFSL) No. 230694.
13. In the period from about June 2000 to October 2016, MLCL was a wholly owned subsidiary of National Australia Bank Limited (NAB), an entity listed on the Australian Stock Exchange. The NAB group's net assets for the financial year ended 30 September 2016 was \$51,315 million. The NAB group's total comprehensive income for the financial year ended 30 September 2016 was \$1,316 million.
14. On 3 October 2016, NAB sold 80% of its shares in MLCL to Nippon Life Insurance Company (NLIC). The NLIC consolidated net assets for the financial year ended 31 March 2021 was ¥8,816,569 million.
15. MLCL:
 - (a) is and was throughout the Relevant Period a major provider or issuer, in Australia, of life insurance products to consumers which it offers under its AFSL;
 - (b) reported the following net assets for each of the following financial year periods:
 - (1) for the financial year ended 30 September 2016, \$1,973.6 million;
 - (2) for the financial year ended 30 September 2017, \$2,001.8 million;
 - (3) for the three-month period ended 31 December 2017, \$1,001.8 million;
 - (4) for the financial year ended 31 December 2018, \$2,030.7 million;
 - (5) for the financial year ended 31 December 2019, \$2,131.6 million;
 - (6) for the financial year ended 31 December 2020, \$2,788.0 million;
 - (7) for the financial year ended 31 December 2021, \$2,820.9 million;

(c) reported the following net profit or loss for each of the following financial year periods:

- (1) for the financial year ended 30 September 2016, \$263.5 million (profit);
- (2) for the financial year ended 30 September 2017, \$76.6 million (profit);
- (3) for the three-month period ended 31 December 2017, \$13.1 million (profit);
- (4) for the financial year ended 31 December 2018, \$70.8 million (profit);
- (5) for the financial year ended 31 December 2019, \$173.9 million (loss);
- (6) for the financial year ended 31 December 2020, \$236.3 million (loss);
- (7) for the financial year ended 31 December 2021, \$32.9 million (profit);

16. Included as a bundle attached to this statement are documents provided by MLCL and referred to by their document numbers starting with “MLC”.

iii) Relevant Period and Penalty Period

17. Facts set out below are identified with reference to the following periods:

- (a) the Relevant Period, being 1999 to 9 November 2020 inclusive; and
- (b) 18 November 2015 to 18 November 2021 (**Penalty Period**).

iv) Relevant Policies

18. Throughout the Relevant Period, MLCL sold, relevantly, life insurance policies providing coverage for income protection, critical illnesses and other personal risks.

19. In the period from 1999, National Australia Financial Management Limited (**NAFM**) and Norwich Union Life Australia Limited (**Norwich**) sold similar products. On 1 October 2006 and 2 October 2010, the life insurance businesses of each of NAFM and Norwich respectively were amalgamated with the life insurance business of MLCL.

MLCL thereby assumed all contractual liabilities of NAFM and Norwich under the policies issued by those entities, and assessed claims under them.

20. The policies sold by MLCL, NAFM and Norwich which are relevant to the RBB and SRA Breaches are:

(a) Personal Protection Portfolio Income Protection Plus insurance (RBB);

This insurance was issued between 1 October 1995 and 18 November 2011. RBB was an ancillary feature of policies sold or upgraded from 1 October 2001 to 18 November 2011. 90 of the 119 RBB Impacted Customers held a Personal Protection Portfolio policy, having taken out a policy, or received upgraded cover including the RBB feature from November 1998 to 27 October 2012.

(b) Personal Protection Portfolio Critical Illness Plus insurance (SRA);

This insurance was issued between 1 October 1995 and October 2011. Critical illness cover for SRA was available under policies sold or upgraded from November 2006 to October 2011. All 9 'SRA Impacted Customers' (as defined in paragraph 75 below) held a Personal Protection Portfolio policy with SRA cover, having taken out a policy, or received upgraded cover from 31 May 1995 to 26 September 2010.

(c) Protection*first* Income Protection Gold (RBB);

This insurance was issued from January 1985 to 31 October 2012. This product range has also been known as 'Norwich Union Life' and 'Aviva Protection' at various times during this period. MLCL was first responsible for these policies from 2 October 2010. RBB was an ancillary feature of policies sold or upgraded from 1 August 1996 to 4 February 2012. 15 of the 119 RBB Impacted Customers held a Protection*first* policy, having taken out a policy including the RBB feature from 1 August 1996 to 4 February 2012;

(d) MLC Insurance Income Protection (including Platinum and Special Risk) (RBB);

These insurances were issued from 5 September 2011 to 1 October 2021. RBB was an ancillary feature of these policies from their commencement. 10 of the 119

RBB Impacted Customers held an MLC Insurance policy, having taken out a policy from 21 February 2013 to 2 February 2016.

- (e) MLC Insurance Critical Illness Plus Insurance (SRA);

This insurance was issued from 5 September 2011. Critical illness cover for SRA was available under this policy from its commencement. None of the 9 ‘SRA Impacted Customers’ held an MLC Insurance policy, although MLCL makes admissions regarding its conduct in relation to this policy (see Part D-2 below).

- (f) NAFM Protection Plan Income Protection Plus (RBB).

This insurance was issued between 25 November 1996 and 1 August 2002. MLCL was first responsible for these policies from 1 October 2006. RBB was an ancillary feature of policies sold or upgraded from 25 November 1996 to 1 August 2002. One of the 119 RBB Impacted Customers held a Protection Plan policy including the RBB feature.

21. The income protection policies relevant to the RBB Breach and held by the RBB Impacted Customers discussed in sub-paragraphs 20(a), 20(c), 20(d) and 20(f) above are referred to as the **RBB Policies** in this SAFA. The policies relevant to the SRA Breach discussed at sub-paragraphs 20(b) and 20(e) are referred to as the **SRA Policies**. Specific iterations of SRA Policies relevant to the SRA Impacted Customers are listed in Annexure B. As the MS Breach related to the administration of policies and impacted different policy types indiscriminately, there are no policies specific to that breach.

C. RBB Breach

C-1 Facts Relevant to Liability

- i) RBB Policies*

22. During the Relevant Period, MLCL, NAFM and Norwich issued income protection insurance policies which provided for the payment of an additional benefit (the RBB) to a customer if the customer was participating in an approved vocational rehabilitation program, subject to the terms and conditions of the relevant policy.

23. The table in Annexure C extracts the terms in the RBB Policies which provided for the payment of the RBB (**RBB Terms**) that ASIC relies upon in the Proceeding.
24. The RBB Terms varied in detail, but broadly provided to the effect that if a customer was receiving a monthly income protection benefit and participated in a rehabilitation program approved by MLCL, an additional 50% of the monthly benefit would be paid to the customer each month for a period up to a maximum of either 6 or 12 months.
25. Some of the RBB Policies also provided to the effect that MLCL would review the benefit (as defined) “regularly” and may “require further proof” of the insured’s disability from time to time.
26. Over the Penalty Period, typical stages of a claim by a customer under their RBB Policy were broadly as follows:
 - (a) **Claim for benefits by customer:** A customer claimed payment of income protection benefits under their policy. This was typically done by completing and submitting MLCL’s standard income protection “claim form”, although in the period from 2016 onwards claims could also be made by telephone. The claim form sought information in relation to the customer’s sickness or disability relating to their absence from work but did not address eligibility for RBB. The form did, however, ask general questions about whether the customer had taken part in a rehabilitation programme and whether participating in vocational rehabilitation might assist in the customer returning to work.
 - (b) **Initial assessment:** The customer’s claim was assessed and managed by a Claims Consultant. It was the responsibility of the Claims Consultant to determine what benefits a customer was entitled to receive, and to ensure such benefits were paid. On occasion, Claims Consultants asked customers for further information about their eligibility for certain benefits under their policy.
 - (c) **Claim referral:** Where MLCL considered that a customer might benefit from vocational rehabilitation, the Claims Consultant referred the claim to a Rehabilitation Consultant. From 2012 to mid-2018 the referral occurred by an internal referral form. Until 2017 Claims Consultants and Rehabilitation Consultants were in separate teams.

- (d) **Rehabilitation recommendation:** The Rehabilitation Consultant was responsible for reviewing a customer's needs and determining the customer's suitability for rehabilitation (and if so the rehabilitation type or means). The Rehabilitation Consultant assessed and made a recommendation to the Claims Consultant whether a customer might benefit from participation in an approved vocational rehabilitation program. The usual practice was for the Rehabilitation Consultant to review the claim file and speak with the customer to gain any necessary additional information to assess the customer's suitability for rehabilitation. In this process, from time to time, Rehabilitation Consultants asked customers or their doctors for further information. If the Rehabilitation Consultant determined that a customer would benefit from participation in an approved rehabilitation program, they recommended and subsequently identified a suitable external provider (approved by MLCL) to provide the rehabilitation to the customer. The Rehabilitation Consultant then reported to the Claims Consultant by an internal review template known as a "Rehab Referral/Review", which was a record of the Rehabilitation Consultant's recommendation and determination in relation to the customer's suitability for rehabilitation.
- (e) **Engagement of rehabilitation provider:** The Claims Consultant was responsible for reviewing the Rehabilitation Consultant's recommendation and approving the recommendation subject to the Rehabilitation Consultant confirming arrangements with a suitably approved provider. Following a meeting between the external provider and the customer, the external provider would provide their recommendations to the Rehabilitation Consultant on the customer's need for ongoing rehabilitation. The Rehabilitation Consultant would approve the rehabilitation program recommended by the external provider. The Rehabilitation Consultant would confirm the engagement of the external provider with both the external provider and the Claims Consultant. The Rehabilitation Consultant or the Claims Consultant would notify the customer of this outcome. The Claim Consultant's confirmation that the customer's participation in an approved vocational rehabilitation program could commence would trigger eligibility for the RBB.
- (f) **External provider reporting:** The Rehabilitation Consultant monitored the attendance and progress of the customer by reviewing reports from the external

rehabilitation service provider on the customer's progress and need for ongoing recovery support.

- (g) **Payment of benefits:** The Claims Consultant was responsible for ensuring that a customer received all available benefits under their policy, including the RBB. Eligibility for benefits under a policy was typically assessed and paid on a monthly basis.
27. In the period 18 November 2015 to no later than on or around 31 October 2018, MLCL did not:
- (a) provide any RBB-specific education or training. However, new starters in the Retail Claims Team (of which Claims Consultants were a part) were provided an explanation of the RBB in general terms – that it was a 50% monthly top-up benefit, it was something that MLCL looked at on a case-by-case basis, and that it depended on participation in a recognised and approved rehabilitation program. While the RBB was touched on in this way, it was not a large emphasis of the training. Further, informal training was provided to Rehabilitation Consultants from time to time and the Wellness Team (of which Rehabilitation Consultants were a part) had access to a “cheat sheet” on RBB;
 - (b) include any reference to the RBB in either the claims forms, internal referral forms, or internal review templates referred to above at paragraph 26, which were used by the Claims Consultants and Rehabilitation Consultants;
 - (c) have any Guiding Principle (being an internal policy) specific to RBB. However, MLCL introduced a Rehabilitation Services – Guiding Principle for both the Retail Claims and Wellness Teams from 21 December 2017. Among other things, the Guiding Principle outlines the role of rehabilitation and the rehabilitation-specific benefits (including the RBB) for eligible customers; nor
 - (d) have a system for prompting customers to provide information to MLCL to assess their eligibility for the RBB save that, as noted above, claim forms did ask questions about rehabilitation.

28. Also in this period, there was a breakdown in the processes between the Claims Consultants and the Rehabilitation Consultants in determining which customers would be eligible for the RBB.
- ii) *Failure to Provide RBB to 119 RBB Impacted Customers*
29. Between 18 November 2015 and 31 October 2018, there were 119 customers (the RBB Impacted Customers) who were eligible for the RBB but were not paid it within a reasonable period of time after proof of satisfactory participation by the RBB Impacted Customer in an approved rehabilitation program. The RBB Impacted Customers were eligible for the RBB by reason of them each having:
- (a) made a claim for indemnity (income protection) under their RBB Policy;
 - (b) been in receipt of income protection benefits under their policy;
 - (c) participated in an approved rehabilitation program; and
 - (d) provided information to MLCL by which it knew or should have known that the customer was eligible for the RBB.
30. The failure to pay the RBB to the RBB Impacted Customers occurred as a result of MLCL not having appropriate processes and procedures to ensure that it would pay the RBB to the 119 RBB Impacted Customers in the period 18 November 2015 to 31 October 2018, as set out in paragraphs 27 – 28 above.
31. MLCL remediated all RBB Impacted Customers by paying them their RBB with interest. All payments had been made by 25 October 2018.
32. For the Penalty Period, MLCL paid \$2,297,748.29 (including interest) in remediation to the RBB Impacted Customers.
33. To illustrate the process discussed at paragraph 26 above as it applied to customers during the Penalty Period, three examples of RBB Impacted Customers are set out in the table below.

R005 (Policy No: 8313617)	
Claim for benefits by customer	On around 27 October 2014, R005 made a claim under his Protection <i>First</i> Income Protection Gold policy [MLC.0173.0003.0001 at .0001], on the basis of major depressive disorder and poly-substance abuse [see, e.g., MLC.0190.0001.0977 at .0977].
MLCL initial assessment	<p>On 11 November 2014, a Claims Consultant at MLCL discussed R005's claim with R005's nominated authority and requested additional information regarding R005's medical history, which was provided [MLC.0173.0003.0001 at .0002-3].</p> <p>On around 7 January 2015, R005's claim was accepted and MLCL commenced paying R005 income protection benefits, which it continued to pay whilst he remained disabled within the meaning of the RBB Policy [MLC.0173.0001.0072].</p>
Claims referral and rehabilitation recommendation	<p>On 31 August 2016, a Claims Rehabilitation Consultant at MLCL referred R005 for an initial needs assessment and case conference with MB Tailored Solutions Pty Ltd (MB Tailored), a vocational rehabilitation service provider [MLC.0190.0001.0973; MLC.0190.0001.0977].</p> <p>On around 20 September 2016, the assessment took place. On around 28 September 2016, an Initial Needs Assessment Report in respect of R005's claim was produced by MB Tailored [MLC.0190.0001.0968].</p> <p>On 7 October 2016, a Claims Rehabilitation Consultant at MLCL received an email from MB Tailored advising that they would contact the customer's psychologist or son in the following week to commence the rehabilitation program [MLC.0173.0003.0001 at .0185].</p>

	On or around 8 November 2016, R005 commenced a MLCL-approved rehabilitation program with MB Tailored [MLC.0173.0003.0001 at .0195].
External provider reporting	Over the course of R005's participation in rehabilitation, MB Tailored corresponded with a Claims Rehabilitation Consultant at MLCL [see, e.g., MLC.0173.0012.8296]. These communications were copied to a Claims Consultant at MLCL, who occasionally communicated directly with MB Tailored [see, e.g., MLC.0173.0013.3329].
RBB payment	MLCL did not pay the RBB to R005 upon him being eligible to receive the benefit. On around 5 July 2018 [MLC.0047.0003.0780], MLCL paid R005 his RBB entitlement (and interest) for the period 07/10/2016 to 23/05/2018 [MLC.0054.0002.0032].

R019 (Policy No: 16380042)	
Claim for benefits by customer	On around 5 August 2015, R019 made a claim under his Personal Protection Portfolio – Income Protection Plus policy [MLC.0178.0001.0417 at .0559], on the basis of a rectal cancer diagnosis in June 2015 [see, e.g., MLC.0178.0001.1040 at .1114].
MLCL initial assessment	On around 13 August 2015, a Claims Consultant at MLCL conducted an initial assessment of R019's claim, which included reviewing the information provided in support [MLC.0178.0001.0417 at .0555]. On around 27 August 2015, R019 provided additional information to MLCL regarding his hospital admission details [MLC.0178.0001.0417 at .0550].

	<p>On or around 10 September 2015, MLCL accepted R019’s claim [MLC.0178.0001.1927] and commenced paying R019 income protection benefits, which it continued to pay whilst he remained disabled within the meaning of the RBB Policy.</p>
<p>Claims referral and rehabilitation recommendation</p>	<p>On 30 March 2016, a Senior Claims Consultant at MLCL contacted a Rehabilitation Consultant at MLCL requesting that R019 be referred to an occupational therapist for rehabilitation [MLC.0190.0001.2939].</p> <p>Banyan, a third-party employment benefits solutions provider, prepared a File Review Report in respect of R019’s claim dated 22 January 2016, which stated [MLC.0178.0001.2146 at .2147]:</p> <p style="padding-left: 40px;"><i>“CC [Claims Consultant] and Coach to review other relevant clauses, specifically rehabilitation expense benefit and rehabilitation bonus benefit.”</i></p> <p>The report was provided to MLCL.</p> <p>On around 29 April 2016, R019 was referred by MLCL to IPAR Rehabilitation Pty Ltd (IPAR), an external rehabilitation services provider [MLC.0190.0001.3019].</p> <p>On around 19 July 2016, R019 commenced rehabilitation under an MLCL-approved rehabilitation program with IPAR [MLC.0178.0001.0316 at .0317].</p> <p>On around 25 September 2018, R019’s participation in the MLCL-approved rehabilitation program ceased [MLC.0178.0001.1040 at .1277].</p>
<p>External provider reporting</p>	<p>Over the course of R019’s participation in rehabilitation, IPAR corresponded with MLCL in respect of R019’s rehabilitation progress [see, e.g., MLC.0178.0001.0316].</p> <p>A Senior Claims Consultant at MLCL communicated with a Rehabilitation Consultant at MLCL with respect</p>

	to R019’s rehabilitation progress [see, e.g., MLC.0178.0001.0247]. A Senior Claims Consultant at MLCL was also occasionally copied to communications between a Rehabilitation Consultant at MLCL and IPAR [see, e.g., MLC.0178.0001.0316].
RBB payment	MLCL did not pay the RBB to R019 upon him being eligible to receive the benefit. On around 5 July 2018 [MLC.0178.0001.1987], MLCL paid R019 his RBB entitlement (with interest) for the period 20/07/2016 to 20/07/2017 [MLC.0054.0002.0032].

R066 (Policy No: 92025696)	
Claim for benefits by customer	In around early February 2015, R066 made a claim under her MLC Insurance Income Protection Plus policy [MLC.0865.0001.1029 at .1029], on the basis of injuries sustained in a motor vehicle accident in November 2014 [see, e.g., MLC.0865.0001.0546 at .0546].
MLCL initial assessment	On 3 March 2015, a Claims Consultant at MLCL called R066 to seek additional information regarding her medical condition [MLC.0865.0001.1029 at .1030]. On around 5 March 2015, MLCL accepted R066’s claim [MLC.0865.0001.0025] and commenced paying R066 income protection benefits, which it continued to pay whilst she remained disabled within the meaning of the RBB Policy.
Claims referral and rehabilitation recommendation	On 4 June 2015, a Claims Consultant at MLCL prepared an “Ongoing Assessment File Note” on R066’s file which noted that [MLC.0865.0001.1029 at .1045]: <i>“It is [...] recommended that file be referred to internal rehab to consider voc ax to help client</i>

	<p><i>identify what jobs she could do with the restrictions she has.”</i></p> <p>On 19 June 2015, a Claims Rehabilitation Consultant at MLCL sent an email to Recovre, a third-party rehabilitation services provider, referring R066 for a rehabilitation review [MLC.0865.0001.0833; MLC.0865.0001.0525].</p> <p>On around 6 July 2015, Recovre prepared a vocational assessment report of R066 [MLC.0865.0001.0859].</p> <p>On around 19 July 2015, R066 commenced rehabilitation with Recovre under an MLCL-approved rehabilitation program [MLC.0865.0001.0243].</p> <p>R066’s participation in the MLCL-approved rehabilitation program ceased on around 7 October 2015 [MLC.0865.0001.0507].</p> <p>On around 9 May 2017, R066 recommenced rehabilitation with Recovre [MLC.0865.0001.1029 at .1153]. This ceased on around 12 March 2018 [MLC.0865.0002.0001 at .0118].</p> <p>On around 24 May 2018, R066 recommenced rehabilitation with Recovre [MLC.0865.0002.0001 at .0111]. This ceased some time prior to 17 August 2018 [MLC.0865.0002.0001 at .0078].</p> <p>On around 17 August 2018, R066 recommenced rehabilitation with Recovre [MLC.0865.0002.0001 at .0078].</p> <p>On around 28 September 2018, R066’s participation in rehabilitation with Recovre ceased [MLC.0865.0002.0001 at .0078].</p>
External provider reporting	Over the course of R066’s participation in rehabilitation, Recovre corresponded with a Claims Rehabilitation Consultant at MLCL in respect of R066’s rehabilitation

	<p>progress [see, e.g., MLC.0865.0001.0530; MLC.0865.0001.0394]. Recovre also produced Progress Reports addressed to a Rehabilitation Consultant at MLCL [see, e.g., MLC.0865.0001.0560].</p> <p>MLCL provided updates to R066's claims consultant regarding R066's rehabilitation activities [see, e.g., MLC.0865.0001.1029 at .1065].</p>
Eligibility for RBB	<p>MLCL did not pay the RBB to R066 upon her being eligible to receive the benefit.</p> <p>On around 5 July 2018 [MLC.0865.0001.0224], MLCL paid R066 her RBB entitlement (with interest) for the periods 16/07/2015 to 07/10/2015, 09/05/2017 to 22/09/2017, 05/02/2018 to 12/03/2018, and 24/05/2018 to 15/07/2018 [MLC.0054.0002.0032].</p>

C-2 Formal Admissions

i) *Contraventions of ss 12DA(1) and 12DB(1)(a), (e) and (i) of the ASICA and 1041H of the CA*

34. MLCL admits that:

- (a) it is and was at all material times a provider or issuer, in Australia, of life insurance products to consumers in Australia which it offers under its AFSL;
- (b) each of the RBB Policies:
 - (1) was a *'financial product'* within the meaning of one or more of ss 763A(1)(b) (read with s 763C) and 764A(1)(d) to (f) of the CA, and s 12BAA(1)(b) of the ASICA;
 - (2) formed part of a contract of insurance for the purposes of s 10(2) of the ICA, which contract included an implied term requiring the insurer to act in respect of any matter arising under or in relation to the contract of insurance with the utmost good faith (s 13(1) of the ICA);

- (c) in the period up to 31 October 2018, each RBB Impacted Customer:
 - (1) held a RBB Policy which contained a RBB Term by which MLCL promised to pay the RBB to the customer if the customer was eligible, subject to the terms and conditions of the RBB Policy;
 - (2) made a claim for indemnity under their respective RBB Policy and was in receipt of income protection benefits;
 - (3) participated in an approved rehabilitation program by reason of which each RBB Impacted Customer was eligible for the RBB;
- (d) between 18 November 2015 and 31 October 2018, each RBB Impacted Customer (or their agent or doctor) provided information to MLCL by which MLCL knew or should have known that each RBB Impacted Customer was eligible for the RBB, however, MLCL did not pay the RBB to each RBB Impacted Customer within a reasonable period of time after proof of satisfactory participation by the RBB Impacted Customer in an approved rehabilitation program;
- (e) MLCL's conduct in the issue of the RBB policies to RBB Impacted Customers and the conduct in sub-paragraph (d) was conduct in relation to 'financial services', and conduct in connection with the supply or possible supply of 'financial services' within the meaning of s 766A of the CA and ss 12BAB(1)(b) and (g) of the ASICA;
- (f) by the conduct in sub-paragraphs (c) and (d) above, MLCL represented to each of the 119 RBB Impacted Customers that they were not eligible for RBB (**Representation**);
- (g) the Representation was made in trade or commerce and, by reason of the conduct in paragraphs 29 – 30 above constituted:
 - (1) a false or misleading representation to each RBB Impacted Customer that services were of a particular standard, had benefits, or contained conditions or rights, in connection with the supply or possible supply of financial services, in contravention of ss 12DB(1)(a), (e) and (i) of the ASICA; and

- (2) misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in relation to financial services, in contravention of s 12DA(1) of the ASICA and s 1041H of the CA,

(the **RBB MD Conduct**).

ii) Contraventions of s 13 of the ICA

- 35. MLCL admits that, by engaging in the RBB MD Conduct, it breached the requirements of s 13 of the ICA in relation to the RBB Impacted Customers in the period 18 November 2015 to 31 October 2018 in that it failed to act towards each RBB Impacted Customer, in respect of each matter under or in relation to that customer's RBB Policy, with the utmost good faith.

iii) Contraventions of s 912A(1)(a) of the CA

- 36. MLCL admits that it failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the CA, by reason of:

- (a) MLCL engaging in the RBB MD Conduct; and
- (b) in the period 18 November 2015 to 31 October 2018, not having appropriate processes and procedures to ensure that it would pay the RBB to the RBB Impacted Customers.

C-3 Facts Relevant to Relief

- 37. In around early September 2016, MLCL first became aware of the possible failure to assess the RBB correctly following investigation into a customer complaint. The customer was eligible to receive but was not paid the RBB until remediation after her complaint in around December 2016.
- 38. On 1 October 2016, MLCL raised an "event" relating to RBB in NAB's "Risksmart Event Management" system. That system was used by MLCL when under NAB ownership to record incidents or matters that could have either a financial or non-financial impact on MLCL, or that could comprise a breach of the law, standard or

processes. Two days later, on 3 October 2016, MLCL separated from NAB with completion of the sale by NAB of about 80% of its shares in MLCL to NLIC.

39. On 1 December 2016, MLCL recorded an “Event” in its (newly-established) Governance Risk and Compliance Service Portal. That portal was MLCL’s equivalent of NAB’s “Risksmart Events Management” system.
40. On 19 December 2017, the event was escalated to MLCL’s Breach Review Committee. The Breach Review Committee is an internal group that determines whether, in MLCL’s view, an event comprises a regulatory breach needing to be reported to a regulator, e.g. pursuant to s 912D of the CA.
41. On 7 February 2018, the Breach Review Committee considered the event to be a reportable breach and a breach report was filed with ASIC on 21 February 2018 (**RBB Breach Report**). Thereafter, MLCL commenced a review process for identifying potentially impacted RBB customers.
42. On 31 October 2018, MLCL lodged a Regulatory Breach Closure Notice (**Closure Notice**) in respect of the RBB Breach Report with ASIC. The Closure Notice reported that RBB had not been paid in relation to 324 claims when it should have been, and that MLCL paid \$6,365,401.95 (comprising unpaid RBB plus interest) to 297 customers in respect of those claims. MLCL has since confirmed that the remediation paid to 297 customers, was \$6,387,440.95, in respect of 305 claims. For the Penalty Period, MLCL paid \$3,152,778.38 (including interest) in remediation to 201 customers.
43. The RBB Breach concerns 119 customers - the RBB Impacted Customers. The RBB Impacted Customers comprise 8 customers who participated in an approved rehabilitation program prior to the Penalty Period and 111 (of the 201) customers within the Penalty Period. MLCL admits that its conduct as regards the RBB Impacted Customers was unsatisfactory and in breach of the law in the manner set out in Part C-2 above.
44. Annexure D summarises the time taken to remediate the RBB Impacted Customers after they were eligible to be paid the RBB.
45. The parties otherwise refer to Part F below which sets out further facts relevant to the question of relief.

D. SRA Breach

D-1 Facts Relevant to Liability

i) *SRA Policies and Definition of SRA*

46. MLCL provided insurance coverage for customers who suffered “critical illness” under certain policies. Critical illness cover was provided under, among others, MLCL’s MLC Insurance and Personal Protection Portfolio products (together, the **SRA Policies**).
47. The SRA Policies are identified in the table in Annexure B with “Yes” in the “SRA” column.
48. SRA was included as a “critical condition” capable of constituting a “critical illness” under the SRA Policies. The SRA Policies defined SRA by reference to symptoms and diagnosis.
49. From 2011, the definitions for SRA in the SRA Policies were generally as follows (the **SRA Definitions**):

The unequivocal diagnosis of severe rheumatoid arthritis by a Rheumatologist.

The diagnosis must be supported by, and evidence, all of the following criteria:

- at least a six-week history of severe rheumatoid arthritis, which involves three or more of the following joint areas:
 - proximal interphalangeal joints in the hands;
 - metacarpophalangeal joints in the hands;
 - metatarsophalangeal joints in the foot, wrist, elbow, knee, or ankle
- simultaneous bilateral and symmetrical joint soft tissue swelling or fluid (not bony overgrowth alone)
- typical rheumatoid joint deformity; and
- at least two of the following criteria:
 - morning stiffness
 - rheumatoid nodules
 - erosions seen on x-ray imaging;
 - the presence of either a positive rheumatoid factor or the serological markers consistent with the diagnosis of Severe Rheumatoid Arthritis

ii) *Processes to Review and Update Medical Definitions*

50. Medical diagnosis standards and treatments for critical illnesses change with time.

51. Medical definitions for critical illness cover in insurance policies may therefore become outdated, and not provide a benefit to people who are considered or would be diagnosed by the medical profession to be sufferers of a critical illness.
52. From 27 February 2015 until 30 June 2017, MLCL did not have a formal documented process to review and if appropriate promptly update, medical definitions for critical illnesses in SRA Policies, in circumstances where it received expert medical evidence or opinion concerning the currency of medical definitions which ought to have prompted it to review the relevant medical definitions.
53. In this period, critical illness definitions were reviewed on an 'as needs' basis (e.g. upon the Claims Team identifying an issue with a definition through the claims process) and definitions for key critical illnesses (heart attack, stroke and cancer) were reviewed against other life insurers in the market on an annual basis.

iii) Process of Review Undertaken for the definition of SRA

54. Over 2013 and 2014, the Claims Team responsible for assessing critical illness claims (including claims made in respect of SRA) started to see an increase in the number of SRA claims being declined.
55. In March 2014, a customer requested that MLCL review a claim decision for a critical illness benefit for SRA under the customer's SRA Policy as her condition had significantly deteriorated and she now met the 2011 SRA definition. The claim was assessed by MLCL in 2009 and 2012 against the SRA definition in place in 2007, being the date the customer's condition first arose.
56. By 2014, largely as a result of that claim for SRA being denied (but in respect of which MLCL made an ex gratia payment in October 2014, and paid the balance of the benefit in May 2015 on receipt of further medical evidence confirming that the customer met the 2011 SRA definition), the Claims Team had cause to question whether the SRA Definitions set too high a bar having regard to then current medical diagnostic standards and treatments for rheumatoid arthritis.

57. In July 2014, the issue of whether the SRA Definitions set too high a bar was brought to the attention of MLCL's Product Manager for MLCI policies and in about October 2014 he escalated the matter to MLCL's General Manager – Claims.
58. In January 2015, MLCL engaged Professor Lesley Barnsley, Head of the Department of Rheumatology at Concord Hospital, to review the currency of the SRA Definition in a MLC Insurance (MLCI) policy and a proposed upgraded definition of SRA (**First Proposed Definition**).
59. On 27 February 2015, Professor Barnsley provided his report to MLCL (**Barnsley Report**). Professor Barnsley advised to the effect that the First Proposed Definition was considerably in excess of current accepted definitions of rheumatoid arthritis which had become more liberal over time in that fewer joints and fewer other criteria were required to make a diagnosis of rheumatoid arthritis. This reflected the fact that SRA was being treated more aggressively far more early with expected long-term benefits in terms of pain prevention, joint damage and loss of function. He advised that the First Proposed Definition involved a large number of joints being symptomatic, considerably more than were required for diagnosis. Professor Barnsley advised on amendments to the First Proposed Definition to achieve consistency in severity and suggested aligning the definition with that used by the Pharmaceutical Benefits Scheme (**PBS**). Professor Barnsley described the PBS definition as requiring 20 small or 4 large joints exhibiting tenderness and swelling as indicative of failure to respond to conventional treatment.
60. In March 2015, MLCL's Product Manager for MLCI policies met with Professor Barnsley to discuss current treatments for SRA. MLCL sought to ascertain the new criteria for a new definition of SRA and checked definitions used by competitors but found that in 2015 none had a more contemporary definition that could be used as a benchmark.
61. From October 2015, MLCL's Product Team (among others) was involved with preparations for the sale of NAB's majority shareholding in MLCL to NLIC, which completed around 3 October 2016. No Product Disclosure Statements (PDS) or Supplementary Product Disclosure Statements (SPDs) with product enhancements were issued during this period.

62. In April 2016, MLCL's Product Manager for MLCI policies consulted with MLC's Chief Medical Officer about an update to the SRA Definitions. He advised that the existing definitions were not "serviceable in the Western World". On 15 June 2016, he proposed new wording to replace the SRA Definitions (**Second Proposed Definition**). The Second Proposed Definition adopted a requirement of "tenderness and swelling in either 20 small or 4 large joints" (as had been earlier recommended by Professor Barnsley in the Barnsley Report).
63. In May 2016, MLCL instigated an informal process for assessing potential declinatures of claims for SRA. This informal process involved the assessment of potential declinatures by MLCL's Claims Product and Distribution Consultant, in consultation with medical staff, against criteria that were less onerous than those set out in the SRA Definitions at the time. This informal process was documented by MLCL in August 2016. While the documentation did not specify alternative criteria for meeting SRA, MLCL's Claims Product and Distribution Consultant was responsible for assessing potential declinatures, again with medical or other senior assistance if required.
64. In September 2016, MLCL engaged Dr Loretta Reiter to provide a further opinion concerning the adequacy of the SRA Definition in PPP policies. Dr Reiter produced a report dated 12 September 2016 (**Reiter Report**), which identified a guideline for determining whether a patient suffered from SRA that was employed by the American College of Rheumatology.
65. MLCL continued to consider its SRA Definitions from late 2016 (including at the time of its separation from NAB in October 2016) to mid-2017. Among other things, it considered the Reiter Report and again consulted with Professor Barnsley. Also in this period, MLCL commissioned a Claims Assurance Review (**CAR**) at the request of ASIC. The CAR involved, among other things, an independent expert dated 30 November 2016 reviewing past claims decisions. The expert advised, among other things, that there should be regular reviews of critical illness definitions as part of the policy upgrade process, at least every three years, to ensure they provide the cover they represent to customers and to ensure the currency of definitions taking into account relevant medical, scientific and technological advances. Also at this time, MLCL worked on the implementation of arrangements to comply with the Life Insurance Code of Practice which it became bound by from 1 July 2017.

66. As part of its consideration of updating the SRA Definitions, MLCL had to consider and decide upon a definition which was fair to customers who may suffer rheumatoid arthritis, and could be passed on to existing and prospective customers but was premium neutral. This meant that MLCL had to consider whether claims arising under the proposed new definition would exceed projected claims for SRA and, therefore, whether it would impact the pricing for policyholders (existing and new). At around this time (the first half of 2017), and as part of its consideration of neutral pricing and its obligations as a ‘life company’ under the *Life Insurance Act 1995* (Cth), MLCL considered the requirements of prudential standard LPS320 and obtained written actuarial advice about the proposed new definition, which it received on 1 June 2017.
67. On 30 June 2017, MLCL determined the wording it would adopt for the definition of SRA in the SRA Policies (**Upgraded Definition**). The Upgraded Definition retained the previous criteria in the SRA Definitions, but added provision for alternative requirements to be satisfied:

Or if the above criteria is not met we will also consider under the following definition:

The diagnosis must be supported and evidenced by all of the following criteria:

- a. diagnosis of Rheumatoid Arthritis as specified by the American College of Rheumatology and European League Against Rheumatism: 2010 Rheumatoid Arthritis Classification Criteria; and
- b. symptoms and signs of persistent inflammation (arthralgia, swelling, tenderness) in at least 20 joints or 4 large joints (ankles, knees, hips, elbows, shoulders); and
- c. the Insured person has failed at least 6 months of intensive treatment with two conventional disease modifying antirheumatic drugs (DMARDS). This excludes corticosteroids and non-steroidal anti-inflammatories; and
- d. the disease must be progressive and non-responsive to all conventional therapy.

Conventional therapy includes those medications available through the Australian Pharmaceutical Benefits Scheme excluding those on the “specialized drugs” list for Rheumatoid Arthritis.

Degenerative osteoarthritis and all other arthritides are excluded.

68. On 30 June 2017, MLCL issued product disclosure statements for the SRA Policies with the Upgraded Definition.

D-2 Formal Admissions

69. MLCL admits that:

- (a) it is and was at all material times a provider or issuer, in Australia, of insurance products to consumers in Australia which it offers under its AFSL;
- (b) each of the SRA Policies was a *'financial product'* within the meaning or one of more of ss 763A(1)(b) (read with s 763C) and 764A(1)(d) to (f) of the CA;
- (c) its conduct in considering amendments to the SRA Definitions and finalising and implementing the Upgraded Definition constituted dealing in a financial product within the meaning of s 766C(1)(d) of the CA, and therefore the provision of *'financial services'* within the meaning of s 766A of the CA;
- (d) on 30 June 2017, MLCL updated its definition of SRA in the SRA Policies for SRA diagnosed after 30 June 2017;
- (e) in the period 27 February 2015 to 30 June 2017, MLCL did not have adequate processes to review and, if appropriate promptly update, medical definitions for critical illnesses in SRA Policies, in circumstances where it had received expert medical evidence or opinion concerning the currency of medical definitions which ought to have prompted it to review the relevant medical definitions; and
- (f) by reason of the foregoing, between 27 February 2015 to 30 June 2017, MLCL failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the CA.

D-3 Facts Relevant to Relief

- 70. The Upgraded Definition was initially applied prospectively from 30 June 2017 in the SRA Policies. However, in about April 2019, it was applied retrospectively to customers whose condition was diagnosed or claim for SRA was declined after 1 January 2014.
- 71. MLCL commenced implementing its SRA remediation policy on 1 November 2018 (**SRA Remediation Policy**). The SRA Remediation Policy sought to remediate customers in respect of *'impacted benefits'*, which included critical illness benefits potentially payable for SRA related claims. MLCL proposed to remediate three categories of potentially impacted customers:

- (a) existing customers who then held a SRA Policy and had one of the impacted benefits;
 - (b) customers who previously held a SRA Policy with one of the impacted benefits and whose policy had lapsed; and
 - (c) existing customers who held a SRA Policy and the impacted benefit had lapsed.
72. In about April 2019, MLCL wrote to all existing and previous customers who held or had held, among others, a SRA Policy to advise of the new effective date (being 1 January 2014) for the Upgraded Definition. The Upgraded Definition applied to 124,670 customers who held an SRA Policy. MLCL asked the customers to consider whether they had had a claimable event in the period from 1 January 2014 to 16 April 2019 and, if so, to contact MLCL's Claims Customer Care Team.
73. At around the same time, MLCL made telephone contact with all customers whose SRA claim had been declined or who had withdrawn a SRA claim during the period 1 January 2014 to 16 April 2019 (24 customers in total) and invited them to resubmit their claim. MLCL then assessed all re-submitted claims against the upgraded definition of SRA.
74. In respect of SRA claims that had become payable as a result of the backdating of the effective date of the Upgraded Definition, MLCL's policy provided that the customer would be accorded the more favourable of the following options:
- (a) back-dating the claim, refunding premium paid, and paying interest on the sum insured; or
 - (b) paying the sum insured as at the date the insured first met the policy terms allowing for payment, namely 16 April 2019.
75. As a result, MLCL identified 9 impacted customers who met the backdated definition of SRA under the SRA Policies (**SRA Impacted Customers**). The details of the SRA Impacted Customers are set out in the table in Annexure E.
76. MLCL has paid the SRA Impacted Customers the total sum of \$1,777,797.28 (including interest and refunded premiums) by way of remediation.

77. The implementation of the SRA Remediation Policy was completed by 26 July 2019, once all potentially impacted customers had been contacted and their claims reassessed, and a breach closure notice was sent to ASIC.
78. The parties otherwise refer to Part F below which sets out further facts relevant to the question of relief.

E. MS Breach

E-1 Facts Relevant to Liability

i) Eclipse system for automated communications

79. During the Relevant Period, MLCL and Norwich used an information technology platform called ‘*Eclipse*’ to store customer and policy data to assist with the administration of insurance policies. Norwich used Eclipse to administer its retail life insurance policies from 16 February 2002 until October 2010, at which time Norwich was amalgamated into MLCL. From October 2010, MLCL continued to use Eclipse to administer retail policies previously issued by Norwich, as well as new policies issued by MLCL from that date. Eclipse was decommissioned on 26 April 2020.
80. Among other things, Eclipse:
- (a) stored customer and policy information (including customers’ personal information and contact details; the product type, policy commencement date, cover type, and sum insured for any policies held by the customer; and the premiums paid and payable by the customer); and
 - (b) generated written communications to customers, which related to the administration of their policy (for example, policy schedules and premium notices).
81. Norwich and MLCL were each under a legal obligation to provide to customers certain communications, such as Annual Renewal Notices. Eclipse was used to generate these (and other) communications by batch, in bulk. For example, Eclipse ran a daily batch which identified all customers who had a policy anniversary in 35 days’ time and automatically generated an Annual Renewal Notice for those customers. Once the batch of communications was run, the communications were electronically sent to an external mailing house for printing and sending to the customer.

82. From 2002, Eclipse included a function – called the MS (mail suppression) ‘flag’ (**Mail Suppression Flag**) – which could be applied by Norwich or MLCL to a given customer’s profile to stop batch-triggered policy communication/s for that customer. In relation to batch-triggered communications, the Mail Suppression Flag could be applied at the customer level, to prevent any written communication being issued to a customer in respect of all policies held by that customer. It ensured that any communications which had not been generated, including batch-triggered ones, would not be issued. The Mail Suppression Flag could also be applied at the correspondence level to prevent a specific written communication being sent to a customer, however batch-triggered communications were not usually prevented from being sent by applying the flag at the correspondence level.
83. The Mail Suppression Flag was primarily used by the “Customer Maintenance Insurance Team” (**CMI Team**), though there was no restriction on access for users of Eclipse. Relevantly, anyone with access to Eclipse could apply the Mail Suppression Flag at the customer level.
84. From time to time, MLCL or Norwich (as the case may be) applied the Mail Suppression Flag at a customer level, to customer profiles. This was done when a particular course of action had been agreed with a customer, which would be contradicted by the sending of system-generated correspondence that was automatically issued. The Mail Suppression Flag was applied primarily by the CMI Team when a customer activated the “economiser option”, or, where a policy anniversary needed to be “undone”.
85. The economiser option enabled a customer to freeze certain premium payments (and reduce the sum insured). If this option had been agreed with a customer, the Mail Suppression Flag was applied to ensure the customer did not receive an Annual Renewal Notice which set out the incorrect sum insured and premium amount. A policy anniversary needed to be “undone” in order to enable certain backdated manual alterations to policies which had been agreed between MLCL and a customer (such as a decrease in a sum insured).
86. From the beginning of the Penalty Period until April 2017, the Mail Suppression Flag had to be manually switched off by MLCL staff when the reason for suppression of

communications ended. Otherwise, the customer would not receive ‘batch-triggered’ communications suppressed by the Mail Suppression Flag relating to their policy.

ii) Inadequate Training and Monitoring of MLCL staff

87. Prior to identification of the MS Breach, training for the Mail Suppression Flag was only provided to members of the CMI Team, and not all staff who had access to Eclipse and who may therefore have used the Mail Suppression Flag.
88. From at least late 2012, when personnel in the CMI Team were trained in how to use Eclipse, they were shown the Mail Suppression Flag and advised that it was only to be used for the “economiser option” and “undo policy anniversary” processes. They were advised not to apply the Mail Suppression Flag under any other circumstances, and without first obtaining training on these two processes. The training for these processes was only provided to certain personnel and not all staff performed them.
89. Between 18 November 2015 and March 2018, MLCL failed to adequately train relevant staff to remove the Mail Suppression Flag after the reasons for the suppression ended. MLCL also failed to appropriately monitor the use of the Mail Suppression Flag. Prior to the identification of the MS Breach:
 - (a) there were no documented processes for how to apply and remove the Mail Suppression Flag appropriately;
 - (b) there was no monitoring in place to ensure that the Mail Suppression Flag was being applied and removed appropriately; and
 - (c) there were no limitations within Eclipse for how long the Mail Suppression Flag could be applied.

iii) Failures to Properly Administer Eclipse Resulting in MS Breach

90. As a result of the limitations in training and monitoring identified in paragraphs 87 to 89 above, between 18 November 2015 and March 2018 MLCL failed to remove the Mail Suppression Flag within a reasonable time after the reason for the mail suppression ended from the profiles of 282 customers, affecting 374 policies (**MS Impacted Customers**). Within this period, MLCL did, however, implement rectification work after first

becoming aware of the potential MS Breach in June 2016 (see, further, paragraph 97 below).

91. As a consequence, the MS Impacted Customers did not receive communications from MLCL that MLCL was under a legal obligation to provide. Those communications, one or more of which was not received by each MS Impacted Customer, included:
- (a) First Notice of Premium Due – which provided notice of the premiums due by the customer, including an increase or variation in premium;
 - (b) Overdue Notices and Dishonour Notices – both of which contained notice of a proposed cancellation of the policy;
 - (c) Confirmation of Cancellation letters – which were issued where policies were cancelled for non-payment of premiums, at the request of a customer, or at the natural expiry of the policy;
 - (d) Annual Renewal Notices; and
 - (e) Exit Statements – provided on termination or expiry of a policy held within a superannuation fund.

E-2 Formal Admissions

92. MLCL admits that:
- (a) it is and was at all material times a provider or issuer, in Australia, of insurance products to consumers in Australia which it offers under its AFSL;
 - (b) each of the policies administered on Eclipse was a *‘financial product’* within the meaning or one of more of ss 763A(1)(b) (read with s 763C) and 764A(1)(d) to (f) of the CA;
 - (c) its conduct set out in this Part E constituted dealing in a financial product within the meaning of s 766C(1) of the CA, and therefore the provision of *‘financial services’*, or was conduct in relation to the provision of *‘financial services’*, within the meaning of s 766A of the CA;

- (d) it did not, between 18 November 2015 and March 2018 (**MS Breach Contravention Period**):
- (1) adequately train relevant MLCL staff to remove the Mail Suppression Flag after the reasons for the suppression ended; nor
 - (2) appropriately monitor relevant MLCL staff's use of the Mail Suppression Flag;
- (e) accordingly, in the MS Breach Contravention Period and in relation to the MS Impacted Customers, MLCL failed to remove the Mail Suppression Flag within a reasonable time after the reason for the mail suppression ended;
- (f) by reason of the matters referred to in sub-paragraph (d) above, MLCL failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the CA.

E-3 Facts Relevant to Relief

93. As stated in sub-paragraph 92(e) above, in the MS Breach Contravention Period, for the MS Impacted Customers, MLCL failed to remove the Mail Suppression Flag within a reasonable time after the reason for the mail suppression ended.
94. The following four categories of MS Impacted Customers were affected by the MS Breach:
- (a) those who had policies cancelled for non-payment of premiums despite not receiving Overdue / Dishonour Notices (6 MS Impacted Customers in respect of 6 insurance policies);

As part of MLCL's remediation of these customers, customers were advised of what had occurred and asked whether they wanted to continue with their policy (subject to paying the outstanding premiums). Customers were told to contact MLCL if they believed they had suffered an event or injury which would have met the terms of their cancelled policy.

- (b) those who had policies properly cancelled but who did not receive Confirmation of Cancellation Notices (1 MS Impacted Customer in respect of one insurance policy).

As part of its remediation process, MLCL wrote to those customers confirming the policy cancellation (and the reasons for it, e.g. non-payment of premium, customer request etc). Further time was provided in the case of non-payment if such customers wished to reinstate their policy.

- (c) those who were charged increased premiums despite not receiving an Annual Renewal Notice notifying them of such prior to it being imposed (275 MS Impacted Customers in respect of 366 policies).

As part of MLCL's remediation process, customers were refunded un-notified premium increases with interest.

- (d) those who closed their accounts with a superannuation provider through which they had cover, but did not receive an Exit Statement: (3 MS Impacted Customers in respect of 3 policies).

95. In June 2016, MLCL became aware that the Mail Suppression Flag was not always being removed when the reason for mail suppression ended. MLCL accordingly stopped using the Flag save in exceptional circumstances with managerial approval. 737 customers were affected in relation to 1,081 policies in the Relevant Period. The 737 customers included 400 customers (for 562 Norwich policies) where correspondence was held as a result of the Mail Suppression Flag being applied by Norwich.

96. MLCL has paid 658 impacted customers (including customers outside of the Penalty Period) \$3,720,644.82 (including interest). The amount paid (which included partial refunds of premium) included \$347,527.10 (including interest) in relation to 267 customers (370 policies) financially affected by the conduct in paragraph 94 above on or after 18 November 2015.

97. MLCL took the following steps to improve its processes and controls:

- (a) limited use of the Mail Suppression Flag to the CMI Team;
- (b) from April 2017, mandated training on Mail Suppression Flag use for that team;

- (c) required that all use of the Mail Suppression Flag be documented;
 - (d) from February 2017, implemented the generation of a monthly report on Mail Suppression Flag use which was reviewed to ensure appropriate use and, if necessary, removal; and
 - (e) in March 2018, updated Eclipse to ensure that the Mail Suppression Flag could only be applied for a maximum of 30 days before automatic removal.
98. On 26 April 2020, Eclipse was decommissioned by MLCL.
99. The parties otherwise refer to Part F below which sets out further facts relevant to the question of relief.

F. Further Facts Relevant to Relief

100. Further to the facts relevant to relief noted in Parts C-3, D-3 and E-3 above:
- (a) MLCL has cooperated with ASIC in respect of its investigation into the Breaches, including by voluntarily providing documents to ASIC on occasion in response to requests by ASIC.
 - (b) MLCL made an early admission in its Concise Statement in Response dated 21 March 2022 in relation to the MS Breach and sought an early order for the mediation of the Proceeding. An agreed resolution of the proceedings was reached by the parties prior to the filing of evidence and thereby saved ASIC cost that would otherwise have been expended in the prosecution of the matter.

Annexure A – Agreed Proposed Declarations

DEFINITIONS:

In these declarations and orders, terms have the following meanings:

- (a) **AFSL** means Australian Financial Services Licence.
- (b) **ASIC Act** means the *Australian Securities and Investments Commission Act 2001* (Cth) as in force during the relevant period.
- (c) **Corporations Act** means the *Corporations Act 2001* (Cth) as in force during the relevant period.
- (d) **Insurance Contracts Act** means *Insurance Contracts Act 1984* (Cth) as in force during the relevant period.
- (e) **MLCL** means the defendant, MLC Limited (ACN 000 000 402).
- (f) **SRA** means severe rheumatoid arthritis.
- (g) **MS Breach** means the Mail Suppression breach.

DECLARATIONS

Contraventions of ss 12DA(1) and 12DB(1)(a), (e) and (i) of ASIC Act and of s 1041H of the Corporations Act (RBB Breach)

1. The Court declares that:
 - (a) In the period up to 31 October 2018:
 - (i) MLCL provided income protection cover to customers under policies of insurance (**RBB Policies**) which contained a term (**RBB Term**) by which MLCL promised to pay a sum of money to the customer described as a “Rehabilitation Bonus Benefit” (**RBB**) if the customer was eligible;
 - (ii) 119 customers made a claim to MLCL for indemnity under their respective RBB Policy and were in receipt of income protection benefits (each a **RBB Impacted Customer**);

- (iii) each RBB Impacted Customer participated in an approved rehabilitation program, by reason of which each RBB Impacted Customer was eligible for the RBB;
 - (iv) Between 18 November 2015 and 31 October 2018 each RBB Impacted Customer (or their agent or doctor) provided information to MLCL by which it knew or should have known that each RBB Impacted Customer was eligible for the RBB; and
 - (v) MLCL did not pay the RBB to each RBB Impacted Customer within a reasonable period of time after proof of satisfactory participation by the RBB Impacted Customer in an approved rehabilitation program.
- (b) By the above conduct in paragraphs 1(a)(i) - (v), MLCL represented to each of the 119 RBB Impacted Customers that the RBB Impacted Customers were not eligible for RBB (the **Representation**).
- (c) The Representation was made in trade or commerce and constituted:
- (i) a false or misleading representation, that services were of a particular standard, had benefits, or contained conditions or rights, in connection with the supply or possible supply of financial services, in contravention of ss 12DB(1)(a), (e) and (i) of the ASIC Act; and
 - (ii) misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in relation to financial services, in contravention of s 12DA(1) of the ASIC Act and s 1041H of the Corporations Act.

Contraventions of s 13 of the Insurance Contracts Act (RBB Breach)

2. The Court declares that MLCL breached the requirements of s 13 of the Insurance Contracts Act in relation to the 119 RBB Impacted Customers in the period 18 November 2015 to 31 October 2018 in that it failed to act towards each RBB Impacted Customer, in respect of each matter arising under or in relation to that customer's RBB Policy, with the utmost good faith, by reason of engaging in the conduct the subject of declaration 1 above.

Contraventions of s 912A(1)(a) of the Corporations Act (RBB Breach)

3. The Court declares that, by reason of:

- (a) MLCL engaging in the conduct the subject of declaration 1 above; and
- (b) MLCL not having appropriate processes and procedures to ensure that it would pay the RBB to the 119 RBB Impacted Customers in the period 18 November 2015 to 31 October 2018,

MLCL thereby failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

Contraventions of s 912A(1)(a) of the Corporations Act (SRA Breach)

- 4. The Court declares that:
 - (a) On 30 June 2017, MLCL updated its definition of SRA in MLCL Insurance and Personal Protection Portfolio policies for SRA (**SRA Policies**) diagnosed after 30 June 2017.
 - (b) In the period 27 February 2015 to 30 June 2017, MLCL did not have adequate processes to review and if appropriate promptly update, medical definitions for critical illnesses in SRA Policies, in circumstances where it had received expert medical evidence or opinion concerning the currency of medical definitions which ought to have prompted it to review the relevant medical definitions.
 - (c) By reason of the foregoing, between 27 February 2015 to 30 June 2017, MLCL failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

Contraventions of s 912A(1)(a) of the Corporations Act (MS Breach)

- 5. The Court declares that:
 - (a) Between 18 November 2015 to March 2018:
 - (i) MLCL had a policy administration system called Eclipse which provided for, amongst other things, communications to insureds under MS Policies;
 - (ii) Eclipse was configured to enable MLCL to suppress the automated communications to insureds by manually applying the “mail suppression flag” (**Flag**) to the insured in Eclipse;
 - (iii) however, MLCL did not:

- A. adequately train relevant MLCL staff to remove the Flag after the reasons for the suppression ended; nor
 - B. appropriately monitor relevant MLCL staff's use of the Flag.
- (b) Accordingly, in the period 18 November 2015 to March 2018 and in relation to 282 life insureds (374 policies), MLCL failed to remove the Flag within a reasonable time after the reason for the mail suppression ended.
- (c) By reason of the matters in paragraph 5 (a)(iii) above, MLCL failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

Annexure B – SRA Policies

#	Date	Relevant Policy	Doc ID	SRA Product
1.	16 May 2014	PPP	MLC.0048.0001.4690	Yes – Critical Illness Plus insurance
2.	3 Oct 2016	PPP	MLC.0048.0001.5152	Yes – Critical Illness Plus insurance
3.	30 Jun 2017	PPP	MLC.0038.0003.6130	Yes – Critical Illness Plus insurance
4.	9 Oct 2017	PPP	MLC.0127.0001.2244	Yes – Critical Illness Plus insurance
5.	3 Oct 2016	MLCI	MLC.0038.0003.3449	Yes – Critical Illness Plus insurance
6.	30 Jun 2017	MLCI	MLC.0038.0003.3730	Yes – Critical Illness Plus insurance
7.	9 Oct 2017	MLCI	MLC.0038.0003.4011	Yes – Critical Illness Plus insurance

Annexure C – RBB Terms

Terms under which a RBB Impacted customer's eligibility for the RBB was assessed	Product under which RBB was offered	Period in which RBB Terms were offered to new customers or existing customers as an upgrade
<p>Rehabilitation Bonus</p> <p>National Income ProtectionX National Income Protection PlusX National Business ExpensesX</p> <p>If you are receiving a Monthly Benefit and the Life Insured participates in a Commonwealth or State Government rehabilitation program approved by us, an additional 50% of the Monthly Benefit will be paid for each month (accruing on a daily basis) the Life Insured participates in the approved program for up to a maximum of six (6) months. The Rehabilitation Bonus will only be paid if payment of the benefit is not regulated under the National Health Act 1953 or by the Health Insurance Act 1973.</p>	NAFM Protection Plan Income Protection Plus insurance	25 November 1996 to 1 August 2002
<p>Rehabilitation Bonus</p> <p><i>If the Life Insured is receiving Benefits for Rehabilitation, we will pay an additional Benefit for up to a maximum of 12 months.</i></p> <p><i>The additional amount we will pay each month will be 50% of the Monthly benefit for Rehabilitation.</i></p> <p>[...]</p>	Personal Protection Portfolio Income Protection Plus insurance	21 November 2005 to 18 November 2011
<p>[...] Rehabilitation Income Benefit</p> <p><i>When you are Totally Disabled and you choose to engage in Rehabilitative Employment, we will increase the Monthly Claim by 50%. This benefit will be paid while</i></p>	Protectionfirst Income Protection Gold insurance	1 August 1996 to 31 October 2012

Terms under which a RBB Impacted customer's eligibility for the RBB was assessed	Product under which RBB was offered	Period in which RBB Terms were offered to new customers or existing customers as an upgrade
<i>Rehabilitative Employment continues, and for up to 12 Months for any one period of Total Disability.</i>		
<p>Rehabilitation Bonus [...]</p> <p><i>If You are receiving Disability Benefits while the Life Insured is undergoing Rehabilitation, we will pay You an additional benefit for up to a maximum of 12 months. The additional benefit we will pay each month will be 50% of the Disability Benefit being paid.</i></p>	<p>MLC Insurance</p> <ul style="list-style-type: none"> - Income Protection Platinum insurance; - Income Protection insurance; - Income Protection (Special Risk) insurance. 	5 September 2011 to 1 October 2021

Annexure D – RBB Impacted Customers

Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R001	11/12/2017	05/09/2017	11/12/2017 - 30/06/2018	\$9,332.74	05/07/2018
R002	23/01/2018	16/02/2018	23/01/2018 – 14/03/2018	\$19,500.48	05/07/2018
R003	01/05/2014	24/11/2015	(01/05/2014 – 23/09/2014) and (09/07/2015 – 25/11/2015)	\$14,897.37	05/07/2018
R004	08/11/2017	16/06/2017	08/11/2017 – 11/05/2018	\$11,077.24	05/07/2018
R005	07/10/2016	08/11/2016	07/10/2016 – 23/05/2018	\$94,553.40	05/07/2018
R006	27/01/2016	26/11/2015	27/01/2016 – 24/06/2016	\$33,617.26	05/07/2018

Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R007	31/05/2016	02/06/2016	31/05/2016 – 17/05/2017	\$40,383.91	05/07/2018
R008	22/01/2016	08/01/2016	22/01/2016 – 17/05/2016	\$12,684.54	05/07/2018
R009	01/02/2018	28/02/2018	01/02/2018 – 04/05/2018	\$15,424.53	05/07/2018
R010	30/09/2016	06/04/2017	30/09/2016 – 01/02/2017	\$22,163.56	05/07/2018
R011	16/09/2016	30/02/2017	16/09/2016 – 28/05/2017	\$13,813.80	05/07/2018
R012	29/05/2017	07/06/2017	29/05/2017 – 14/09/2017	\$14,360.54	05/07/2018
R013	13/07/2016	13/07/2016	13/07/2016 – 12/01/2017	\$5,577.57	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R014	22/08/2016	12/09/2016	(22/08/2016 – 11/07/2017) (06/11/2017 – 15/01/2018)	\$19,199.18	05/07/2018
R015	20/12/2016	05/10/2017	(20/12/2016 – 03/02/2017) (03/03/2017 – 16/03/2018)	\$4,702.30	05/07/2018
R016	03/05/2012	04/06/2019	03/05/2012 – 10/06/2012	\$3,175.57	05/07/2018
R017	07/11/2014	04/02/2016	07/11/2014 – 06/11/2015	\$31,835.97	05/07/2018
R018	14/01/2016	10/02/2016	(14/01/2016 – 01/07/2016) and (17/08/2016 – 07/12/2016)	\$14,806.07	05/07/2018
R019	20/07/2016	15/06/2016	20/07/2016 – 20/07/2017	\$53,026.16	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R020	14/08/2017	07/07/2017	14/08/2017 – 22/09/2017	\$4,004.00	05/07/2018
R021	23/04/2018	19/10/2018	23/04/2018 – 31/05/2018	\$1,940.33	05/07/2018
R022	12/05/2018	19/05/2020	12/05/2018 – 30/06/2018	\$7,030.47	05/07/2018
R023	04/01/2016	08/02/2016	04/01/2016 – 08/06/2016	\$20,503.66	05/07/2018
R024	16/08/2016	13/02/2017	16/08/2016 – 30/11/2017	\$27,892.47	05/07/2018
R025	26/02/2016	02/11/2016	26/02/2016 – 25/02/2017	\$23,583.86	05/07/2018
R026	29/10/2015	13/01/2016	29/10/2015 – 18/02/2016	\$11,222.32	05/07/2018
R027	13/09/2017	20/02/2018	13/09/2017 – 13/10/2017	\$1,496.51	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R028	15/09/2017	22/03/2018	15/09/2017 – 27/03/2018	\$14,929.90	05/07/2018
R029	23/05/2015	14/03/2016	23/05/2015 – 05/07/2016	\$55,127.74	05/07/2018
R030	14/11/2016	04/01/2017	14/11/2016 – 13/11/2017	\$17,641.41	05/07/2018
R031	15/06/2017	29/05/2017	15/06/2017 – 06/10/2017	\$4,535.88	05/07/2018
R032	26/11/2015	18/11/2015	(26/11/2015 – 15/12/2015) and (12/01/2016 – 01/02/2016) and (18/02/2016 – 08/03/2016)	\$3,772.16	05/07/2018
R033	02/02/2017	25/11/2016	02/02/2017 – 02/02/2018	\$34,413.40	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R034	05/07/2016	07/11/2016	05/07/2016 – 04/07/2017	\$21,736.16	05/07/2018
R035	25/07/2017	25/07/2017	25/07/2017 – 19/10/2017	\$9,216.95	05/07/2018
R036	29/09/2016	07/12/2016	29/09/2016 – 29/11/2016	\$3,440.15	05/07/2018
R037	15/08/2017	22/06/2017	15/08/2017 – 05/10/2017	\$3,370.40	05/07/2018
R038	14/12/2015	31/10/2016	14/12/2015 – 03/08/2016	\$15,046.25	05/07/2018
R039	26/08/2015	14/06/2017	(26/08/2015 – 04/02/2016) and (20/04/2018 – 30/06/2018)	\$9,180.59	05/07/2018
R040	25/07/2016	02/06/2016	25/07/2016 – 25/07/2017	\$116,207.34	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R041	01/09/2015	26/02/2018	01/09/2015 – 01/09/2016	\$29,951.65	05/07/2018
R042	02/06/2016	06/06/2016	02/06/2016 – 30/08/2016	\$10,083.69	05/07/2018
R043	16/09/2017	20/04/2017	16/09/2017 – 20/10/2017	\$1,855.25	05/07/2018
R044	20/04/2017	08/02/2017	20/04/2017 – 20/03/2018	\$52,667.62	05/07/2018
R045	19/10/2016	12/07/2017	19/10/2016 – 11/08/2017	\$28,135.58	05/07/2018
R046	11/01/2018	04/12/2017	11/01/2018 – 12/06/2018	\$7,557.34	05/07/2018
R047	16/10/2017	01/05/2018	16/10/2017 – 23/02/2018	\$9,192.97	05/07/2018
R048	18/10/2017	14/03/2019	18/10/2017 – 30/06/2018	\$6,157.87	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R049	05/02/2016	11/04/2016	05/02/2016 – 12/12/2016	\$32,608.26	05/07/2018
R050	11/07/2013	29/01/2016	11/07/2013 – 02/05/2014	\$30,218.69	05/07/2018
R051	13/10/2016	23/04/2017	13/10/2016 – 12/10/2017	\$35,121.07	05/07/2018
R052	05/08/2013	18/05/2017	(05/08/2013 – 19/11/2013) and (04/04/2017 – 25/05/2017)	\$37,118.80	05/07/2018
R053	01/02/2018	13/02/2018	01/02/2018 – 23/06/2018	\$5,132.87	05/07/2018
R054	15/09/2017	09/08/2017	15/09/2017 – 27/03/2018	\$17,169.12	05/07/2018
R055	17/03/2017	09/03/2017	17/03/2017 – 19/09/2017	\$14,849.76	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R056	20/11/2017	29/05/2018	20/11/2017 – 30/06/2018	\$7,411.83	05/07/2018
R057	20/03/2018	23/03/2018	20/03/2018 – 23/05/2018	\$4,948.71	05/07/2018
R058	14/08/2015	16/01/2016	14/08/2015 – 13/08/2016	\$32,903.24	05/07/2018
R059	21/06/2016	04/04/2017	(21/06/2016 – 11/04/2017) and (28/06/2017 – 04/09/2017)	\$28,398.60	05/07/2018
R060	19/06/2014	24/11/2015	19/06/2014 – 18/06/2015	\$39,178.51	05/07/2018
R061	15/09/2015	18/01/2016	15/09/2015 – 18/12/2015	\$4,897.17	05/07/2018
R062	05/07/2017	23/11/2017	05/07/2017 – 29/05/2018	\$12,694.05	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R063	16/03/2016	16/03/2016	16/03/2016 – 27/03/2017	\$36,651.01	05/07/2018
R064	15/09/2014	09/02/2018	(15/09/2014 – 10/06/2015) and (24/08/2015 – 27/11/2015)	\$42,431.69	05/07/2018
R065	12/08/2014	01/12/2018	(12/08/2014 – 30/11/2014) and 29/11/2017 – 03/05/2018	\$18,520.30	05/07/2018
R066	16/07/2015	23/07/2015	(16/07/2015 – 07/10/2015) and (09/05/2017 – 22/09/2017) and (05/02/2018 – 12/03/2018) (24/05/2018 – 15/07/2018)	\$12,750.17	05/07/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R067	22/06/2017	23/10/2017	22/06/2017 – 22/06/2018	\$20,728.01	05/07/2018
R068	22/12/2016	02/02/2017	22/12/2016 – 10/05/2017 09/06/2017 – 21/11/2017	\$70,951.29	05/07/2018
R069	04/08/2017	04/08/2017	04/08/2017 – 06/11/2017	\$8,469.98	02/07/2018
R070	31/03/2017	02/07/2017	31/03/2017 – 19/07/2017	\$5,703.07	05/07/2018
R071	21/02/2018	20/12/2017	21/02/2018 – 23/04/2018	\$4,893.79	05/07/2018
R072	22/12/2016	03/02/2017	22/12/2016 – 21/06/2017	\$15,047.13	05/07/2018
R073	22/12/2016	09/09/2016	22/12/2016 – 06/04/2017	\$12,737.67	20/08/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R074	01/10/2017	15/11/2017	01/10/2017 – 31/12/2017	\$11,133.99	20/08/2018
R075	28/03/2017	23/03/2017	28/03/2017 – 28/07/2017	\$10,096.00	20/08/2018
R076	17/11/2016	25/04/2017	17/11/2016 – 20/06/2017	\$17,881.21	20/08/2018
R077	28/02/2017	27/03/2017	28/02/2017 – 13/04/2017	\$11,472.75	20/08/2018
R078	18/09/2017	07/11/2017	18/09/2017 – 28/02/2018	\$13,043.68	20/08/2018
R079	05/09/2017	04/09/2017	05/09/2017 – 31/10/2017	\$8,822.86	20/08/2018
R080	01/05/2017	23/03/2017	01/05/2017 – 30/06/2017	\$2,500.00	20/08/2018
R081	15/12/2014	21/11/2016	15/12/2014 – 14/12/2015	\$23,315.00	20/08/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R082	08/04/2016	02/02/2016	08/04/2016 – 22/07/2016	\$7,000.00	20/08/2018
R083	08/05/2017	21/03/2017	08/05/2017 – 31/12/2017	\$8,874.13	20/08/2018
R084	22/02/2017	09/02/2017	22/02/2017 – 30/05/2017	\$15,515.89	15/10/2018
R085	20/06/2016	11/03/2016	20/06/2016 – 30/11/2016	\$4,576.72	15/10/2018
R086	10/12/2015	19/01/2016	10/12/2015 – 21/12/2015	\$275.32	27/08/2018
R087	06/07/2016	18/07/2016	06/07/2016 – 07/12/2016	\$9,863.25	27/08/2018
R088	23/06/2016	10/10/2016	23/06/2016 – 25/04/2017	\$27,774.45	17/10/2018
R089	24/11/2014	13/11/2014	24/11/2017 – 23/11/2015	\$14,542.89	25/10/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R090	15/05/2017	22/01/2017	(15/05/2017 – 09/06/2017) and (06/12/2016 – 06/04/2017) and (10/05/2017 – 19/06/2017)	\$8,611.57	27/08/2018
R091	27/01/2017	16/01/2017	27/01/2017 – 06/04/2017	\$4,386.62	17/10/2018
R092	12/05/2015	09/12/2015	(12/05/2015 – 21/05/2015) and (02/04/2016 – 01/05/2016) and (24/06/2016 – 05/03/2017)	\$21,340.70	27/08/2018
R093	18/07/2017	24/05/2017	18/07/2017 – 29/10/2017	\$2,734.70	15/10/2018
R094	24/10/2017	10/12/2017	24/10/2017 – 13/12/2017	\$7,487.40	16/10/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R095	01/11/2016	28/11/2016	01/11/2016 – 04/04/2017	\$26,060.00	18/10/2018
R096	24/04/2017	19/04/2017	24/04/2017 – 11/06/2017	\$3,015.88	27/08/2018
R097	23/11/2015	09/03/2016	23/11/2015 – 17/04/2016	\$7,665.00	27/08/2018
R098	30/06/2015	23/11/2015	30/06/2015 – 14/01/2016	\$7,074.46	27/08/2018
R099	19/08/2015	17/05/2017	19/08/2015 – 23/09/2015	\$2,516.85	27/08/2018
R100	21/03/2014	23/03/2016	21/03/2014 – 09/07/2014	\$4,667.02	29/08/2018
R101	14/12/2015	03/03/2016	14/12/2015 – 03/04/2016	\$7,941.63	27/08/2018
R102	02/12/2016	20/09/2016	02/12/2016 – 23/12/2016	\$907.87	27/08/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R103	18/08/2016	04/06/2016	(18/08/2016 – 21/03/2017) and (19/09/2016 – 22/03/2017)	\$14,094.32	20/08/2018
R104	20/06/2016	28/06/2016	20/06/2016 – 19/10/2016	\$3,019.84	27/08/2018
R105	30/09/2016	27/10/2016	30/09/2016 – 14/07/2017	\$6,740.84	27/08/2018
R106	05/06/2017	29/08/2017	05/06/2017 – 04/01/2018	\$14,018.41	27/08/2018
R107	01/02/2017	15/03/2017	01/02/2017 – 29/06/2017	\$16,896.90	29/07/2018
R108	16/10/2015	14/01/2016	16/10/2015 – 31/05/2016	\$5,146.33	27/08/2018
R109	24/02/2017	01/07/2017	24/02/2017 – 04/08/2017	\$8,061.23	29/08/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R110	03/01/2015	20/02/2015	03/01/2015 – 02/01/2016	\$21,574.91	30/08/2018
R111	31/05/2016	25/07/2016	31/05/2016 – 30/08/2016	\$2,184.02	30/08/2018
R112	07/09/2015	01/08/2016	07/09/2015 – 09/12/2015	\$10,389.61	27/08/2018
R113	26/04/2017	24/05/2017	26/04/2017 – 31/12/2017	\$22,439.94	27/08/2018
R114	27/11/2014	20/11/2014	(27/11/2014 – 09/06/2015) and (04/12/2016 – 22/05/2017)	\$20,233.63	27/08/2018
R115	07/02/2013	04/02/2016	(07/02/2013 – 06/03/2013) and (24/02/2013 – 07/06/2013) and (16/12/2015 – 28/09/2016)	\$25,251.69	27/08/2018

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Customer Name	Date MLCL accepts, for the purposes of this Proceeding, Customer was first eligible for RBB	Date Sufficient Material provided to MLCL of a Customer's potential entitlement to RBB	Period Customer was eligible for the RBB	Amount of RBB paid in remediation (excluding interest)	Date remediated
R116	24/10/2016	23/01/2017	24/10/2016 – 27/01/2017	\$5,436.33	27/08/2018
R117	05/09/2014	18/01/2016	05/09/2014 – 17/03/2015	\$17,615.70	27/08/2018
R118	05/08/2005	07/06/2016	05/08/2005 – 29/03/2006	\$37,525.58	27/08/2018
R119	07/04/2017	08/05/2017	07/04/2017 – 05/05/2017	\$3,688.60	27/08/2018

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Annexure E – SRA Impacted Customers

Insured Name	Date policy started	Date critical illness claim made	Date(s) assessed for SRA	SRA remediation amount	Date remediated
S1	22 September 2010	16 December 2019	19 May 2020 (accepted)	\$509,355.50 (CI payment) \$15,453.00 (Premium refund)	28 May 2020 (CI payment) 21 June 2020 (Premium refund)
S2	9 February 2001	7 May 2019	8 August 2019 (accepted)	\$50,000.00 (CI payment) \$1,764.44 (Premium refund)	12 August 2019
S3	25 January 2007	~31 October 2012 ~23 May 2019	~13 December 2012 (denied) 4 July 2019 (accepted)	\$148,568.00 (CI payment) \$3,491.41 (Premium refund) \$26,672.07 (Interest payment) \$5,000.00 (Financial Planning benefit)	22 July 2019 (CI payment) 22 July 2019 (Premium refund) 10 December 2019 (Interest payment) 23 December 2019 (Financial planning benefit)
S4	15 November 1999	25 July 2016 (pre-assessment) ~7 November 2019	4 August 2016 (pre-assessment) (denied) 14 February 2020 (accepted)	\$195,690.00	24 February 2020
S5	7 April 2004	29 May 2019	19 June 2020 (accepted)	\$75,916.00 (CI payment) \$7,520.16 (Premium refund)	29 June 2020 8 July 2020 (Premium refund)

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Insured Name	Date policy started	Date critical illness claim made	Date(s) assessed for SRA	SRA remediation amount	Date remediated
S6	~4 April 2001	~11 July 2013 19 March 2014 ~3 June 2019	9 September 2013 (denied) 1 April 2014 (denied) 25 October 2019 (accepted)	\$155,401.00 (CI payment) \$2,082.58 (Premium refund) \$33,864.15 (Interest payment)	28 October 2019 (CI payment) 17 November 2019 (Premium refund) 18 December 2019 (Interest payment)
S7	2 December 2005	~25 May 2019	~7 October 2019 (accepted)	\$280,292.00 (CI payment) \$33,114.40 (Premium refund)	8 October 2019 (CI payment) 26 October 2019 (Premium refund)
S8	~23 September 2003	~9 October 2018	15 February 2019 (accepted)	\$141,088.00 (CI payment) \$12,765.00 (Premium refund)	21 February 2019 (CI payment) 6 March 2019 (Premium refund)
S9	31 May 1995	~15 September 2015 28 August 2018 (re-assessment)	16 June 2016 (denied) ~13 September 2018 (re-assessment) (accepted)	\$160,000 (Ex-gratia) \$90,398 (CI payment) \$5,453.83 (Premium refund) \$5,907.74 (Interest payment)	6 October 2016 (Ex-gratia) 13 September 2018 (CI payment)