

## **NOTICE OF FILING**

### **Details of Filing**

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File Title:	EDWARD THOMAS & ANOR v COMMONWEALTH FINANCIAL PLANNING LIMITED & ORS
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

### **Important Information**

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

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

**Defence to ~~Substituted Second~~ Third Further Amended Statement of Claim**

No VID 559 of 2020

**Federal Court of Australia  
District Registry: Victoria  
Division: General**

**Edward Thomas** and others

Applicants

**Commonwealth Financial Planning Limited** and others as listed in the Schedule  
**ACN 003 900 169**

Respondents

**Introduction**

In this pleading, save as expressly and specifically dealt with below, the Respondents adopt defined terms and headings used in the ~~Substituted Second~~ Third Further Amended Statement of Claim (**Statement of Claim**) for convenience only and without conveying any admission of their content, with the exception of the defined term for the Third Respondent, which is The Colonial Mutual Life Assurance Society Ltd (ACN 004 021 809) (referred to in this document as **CMLA**).

Unless otherwise indicated, headings used in the Statement of Claim are adopted for convenience only and without conveying any admission of their content.

**A. PARTIES**

1. In response to paragraph 1, the Respondents:

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Filed on behalf of (name & role of party)	Commonwealth Financial Planning Pty Limited (First Respondent), Financial Wisdom Limited (Second Respondent), Colonial Mutual Life Assurance Society Limited (Third Respondent) and AIA Australia Limited (Fourth Respondent)
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[Form approved 01/08/2011]

- (a) admit that the Applicants purport to bring the proceeding on behalf of those persons identified in paragraph 8 of the Statement of Claim;
- (b) refer to and repeat paragraphs 8 and 9 below; and
- (c) otherwise do not know and cannot admit the allegations in this paragraph.

### **The Respondents**

2. In response to paragraph 2, the Respondents:

- (a) admit the allegations in paragraphs 2(a) - (d);
- (b) say that:
  - (i) until about 30 November 2021, CFP provided financial advice through employed financial planners of the CBA Group to Australian customers of CFP under CFP's AFSL;
  - (ii) until about March 2020, CFP also appointed financial planning businesses (and individuals in those businesses) as authorised representatives to provide personal financial advice and related services to customers under CFP's AFSL;
- (c) from time to time, until the dates identified in (b) above, CFP and its authorised representatives carried on a financial services business to provide:
  - (i) financial product advice within the meaning of s 766B(1) of the Corporations Act;
  - (ii) personal advice within the meaning of s 766B(3) of the Corporations Act;
  - (iii) financial services to retail clients within the meaning of s 761G of the Corporations Act;
  - (iv) advice to which Division 2 of Part 7.7 A of the Corporations Act applied as of 1 July 2013; and
- (d) otherwise admit the allegations in paragraph 2(e).

3. In response to paragraph 3, the Respondents:

- (a) admit the allegations in paragraphs 3(a) - (c);
- (b) say that:
  - (i) FWL was a related body corporate of CBA at all material times;

- (ii) CBA ceased providing licensee services through FWL in around May 2020;
  - (iii) until about May 2020 FWL appointed financial planning businesses as authorised representatives to provide personal financial advice and related services to customers under FWL's AFSL;
  - (iv) FWL is the holder of AFSL No 231138;
  - (c) otherwise deny the allegations in paragraphs 3(d) and (e); and
  - (d) deny the allegations in paragraph 3(f), and say further that FWL did not:
    - (i) employ any financial providers; or
    - (ii) provide any financial advice about life insurance policies to clients.
4. In response to the allegations in paragraph 4, the Respondents:
- (a1) say that until on or about 24 June 2021, CMLA held AFSL No 235035;
  - (a) say that AIA Group Limited (**AIA**) agreed to purchase CMLA from CBA and that, from 1 November 2019:
    - (i) the economic interests associated with CMLA were transferred to AIA;
    - (ii) management control of CMLA was transferred to AIA; and
    - (iii) CMLA became a non-consolidated entity of the CBA Group;
  - (b) say that on 15 March 2021, the Federal Court of Australia confirmed a life insurance scheme pursuant to Part 9 of the *Life Insurance Act 1995* (Cth) (**Scheme**) which from 1 April 2021 provided that the Fourth Respondent, AIA Australia Limited (**AIAA**) was liable for and assumed certain liabilities of CMLA as specified in that Scheme;

#### **Particulars**

Orders of Allsop CJ in Federal Court of Australia Proceeding No: NSD1245/2020 approving the AIA Scheme on 15 March 2021. The approved terms of the AIA Scheme are Annexure A to those orders.

- (c) say that in the event that the Applicants establish any liability for conduct of CMLA as alleged in the Statement of Claim (which is denied), CMLA is not liable for that conduct, and instead AIAA is liable, because:
  - (i) pursuant to the terms of the Scheme, on and from 1 April 2021, AIAA became liable for and assumed certain liabilities as identified in the Scheme;

- (ii) the liabilities the subject of the allegations pleaded against CMLA in the Statement of Claim are liabilities of a kind to which the Scheme applies; and
  - (iii) consequently, any liability of CMLA as alleged in the Statement of Claim has been transferred to, and assumed by, AIAA;
- (c) otherwise admit the allegations in paragraph 4.
- 4A. The Respondents admit the allegations in paragraph 4A.
5. In response to paragraph 5, the Respondents:
- (a) deny the allegations in paragraph 5(a);
  - (b) refer to paragraphs 2(b) and (c) and 3(b), (c) and (d) above, and say that during the Relevant Period:
    - (i) until about May 2020 FWL appointed financial planning businesses (which may also have sub-authorised individuals in those businesses) as authorised representatives to provide personal financial advice and related services to customers under FWL's AFSL (**FWL Authorised Representatives**);
    - (ii) until about March 2020 CFP appointed financial planning businesses (and individuals in those businesses) as authorised representatives to provide personal financial advice and related services to customers under CFP's AFSL (**CFP Authorised Representatives**),
 (together, **Authorised Representatives**);
  - (c) deny the allegations in paragraph 5(b), and say that during the Relevant Period, CFP provided financial advice through employed financial planners of the CBA Group to Australian customers of CFP under the AFSL of CFP (**CFP Representatives**); and
  - (d) say further that in this Defence, they refer to the Authorised Representatives and the CFP Representatives together as the **Advisers**.
6. In response to the allegations in paragraph 6, the Respondents:
- (a) refer to and repeat paragraphs 2, 3, 5(a) ~~and~~ and 5(c) above;
  - (b) say that from about 7 February 2008 to about 20 May 2019 Joseph Vitale was a registered authorised representative authorised by written notice to provide financial product advice and related services to customers under FWL's AFSL in accordance with ss 916A or 916B of the Corporations Act;

- (c) say that from about 23 January 2008 up until about 20 May 2019 Joseph Vitale was an FWL Authorised Representative within the meaning of s 761A of the Corporations Act; and
- (d) otherwise deny the allegations in paragraph 6.

6A. In response to paragraph 6A, the Respondents:

- (a) refer to paragraphs 2(c) and 5(c) above, and say that some CFP Representatives were employed by CFP or a related body corporate of CFP;
- (b) say that from about 27 January 2014 to about 5 May 2017, Valerie Lumby was employed by Colonial Services Pty Limited as a financial planner;
- ~~(c1) say that from at least 1 October 2003 to about 12 March 2019 and from about 21 June 2019 to 29 January 2020, Jayne Firth was employed by Colonial Services Pty Limited as a financial planner;~~

(c1) say that Dennis Voo was employed by Colonial Services Pty Limited:

(i) from about 29 July 2014 to about 30 June 2016, as a servicing planner; and

(ii) from about 1 July 2016 to about 3 December 2019, as a financial planner;

- (c) say that they are not required to, cannot and do not, plead to the allegations in paragraph 6A(c) until the Applicants specify the precise nature of the acts in respect of which each of the CFP Representatives and/or CFP Authorised Representatives were allegedly acting on behalf of CFP; and
- (d) otherwise deny the allegations in paragraph 6A.

7. In response to paragraph 7, the Respondents:

- (a) not used;
- (b1) refer to and repeat paragraphs 19, 20, 48 – 56 and 71 – 81 below;
- (b) say that the conduct of Ms Lumby referred to in paragraph 18A below was within the scope of her authority as a CFP Representative;
- (c) say that the conduct of Mr Vitale referred to in paragraph 18B below was within the scope of his authority as an FWL Authorised Representative;
- (d1) say that the conduct of ~~Ms Firth~~ Mr Voo referred to in paragraph 18C below was within the scope of ~~her~~ his authority as a CFP Representative;
- (d) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern the conduct of Advisers in relation to the Group

Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

- (e) otherwise deny the allegations in paragraph 7.

### **The Applicants and Group Members**

8. In response to paragraph 8, the Respondents:

- (a) admit that the Applicants purport to bring the proceeding on behalf of those persons identified in the paragraph; and
- (b) say further that:
- (i) the First Applicant was the insured in relation to the relevant policies (01755981 and 01750849), and the policy owner was a superannuation trustee (initially, Colonial Mutual Superannuation Pty Ltd ATF Colonial Super Retirement Fund, and then Colonial First State Investments Limited ATF Colonial First State FirstChoice Superannuation Trust (the *FirstChoice Trust*));
- (ii) the Second Applicant was an insured in relation to the relevant policy (01553725), and the policy owner was a superannuation trustee (Mr SD & Mrs D Tyrrell ATF Tyrrell Superannuation Fund);
- (iii) the Third Applicant was an insured in relation to: ~~the relevant policy (01678032), and the policy owner was the Third Applicant;~~
- (A) the relevant policies 02714922 and 02714923, and the policy owner was the Third Applicant; and
- (B) the relevant policy 02714921, and the policy owner was a superannuation trustee (Colonial First State Investments Limited ATF the FirstChoice Trust);
- (iv) say further that to the extent that any Group Member was covered by a CBA Life Product by reason of their membership of a superannuation fund, those members were not the owners of the relevant product, and instead, the product was owned by the trustee of their superannuation fund; and
- (c) otherwise deny the allegations in paragraph 8.

9. In response to paragraph 9, the Respondents:

- (a) refer to and repeat paragraph 8 above; and

(b) otherwise deny the allegations in paragraph 9.

**B. ATTRIBUTION OF KNOWLEDGE AND ADMISSIONS**

10. The Respondents admit the allegations in paragraph 10.

11. The Respondents admit the allegations in paragraph 11.

12. The Respondents deny the allegations in paragraph 12 and say further that whether the knowledge of Mr Humphrey and/or Mr Ballantyne about any particular fact, matter, or circumstance would be attributed to CFP and/or FWL would depend on the particular fact, matter, or circumstance and the factual and legal context in which it arose. The Applicants do not plead what knowledge said to be possessed by Mr Humphrey and/or Mr Ballantyne is to be attributed to CFP and/or FWL.

13. In response to paragraph 13, the Respondents:

(a) admit that Messrs Humphrey and Ballantyne were authorised by CBA to provide written witness statements to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry; and

(b) otherwise deny the allegations in paragraph 13, and do not accept that the documents referred to in the particulars to paragraph 13 are admissible as evidence in this proceeding.

**C. CBA LIFE PRODUCTS**

14. The Respondents admit the allegations in paragraph 14.

15. The Respondents admit the allegations in paragraph 15.

16. In response to paragraph 16, the Respondents:

(a) say that for 'Outside Super' policies, the owner of the Total Care Plan Policy, Income Care Policy, Income Care Plus Policy or Income Care Platinum Policy could be the insured, a person other than the insured, two or more persons jointly, or a company that is not a superannuation fund trustee;

(b) say that for 'Inside Super' policies, the owner of the SMSF Plan Policy could be the trustee of a self-managed super fund;

(c) say that for 'Inside Super' policies, the owner of the Total Care Plan Super Policy could be, from time to time, Colonial Mutual Superannuation Pty Ltd, being the trustee of Colonial Super Retirement Fund, or Colonial First State Investments Limited, being the trustee of the FirstChoice Trust; and

(d) otherwise deny the allegations in paragraph 16.



17. The Respondents admit the allegations in paragraph 17.
18. In response to paragraph 18, the Respondents:
- (a) say that CMLA entered into Distribution Agreements with CFP and FWL that authorised CFP and FWL to submit applications on behalf of insureds or intending insureds for new policies from the range of CMLA policies including those which provided the types of cover specified in paragraph 15 of the Statement of Claim;
  - (b) say further that during the Relevant Period CMLA entered into similar Distribution Agreements with third party entities; and
  - (c) otherwise deny the allegations in paragraph 18.

**D. ADVICE TO OBTAIN, RENEW OR RETAIN CBA LIFE PRODUCTS**

- 18A. In response to paragraph 18A, the Respondents:
- (a) admit paragraph 18A(a), save to say that the advice was provided as early as on or about 8 December 2016;
  - (b) say that the advice provided by Ms Lumby to the First Applicant as referred to in paragraph 18A(a) of the Statement of Claim was recorded in:
    - (i) a file note prepared by Ms Lumby and countersigned by the First Applicant dated 8 December 2016 [CBG.516.001.0249]; and
    - (ii) the Statement of Advice dated 19 December 2016 [CBG.513.011.2526; CBG.500.001.0055];
  - (1b) say further that the advice was the subject of a request by the First Applicant that:
    - (i) it be given on an urgent basis as the First Applicant had been given notice that unless his premiums were funded by 19 December 2016 then his Total Care Plan Super policies owned by Colonial Mutual Superannuation Pty Ltd ATF Colonial Super Retirement Fund with policy numbers 01755981 and 01750849 in respect of which the First Applicant was the insured (**Thomas Policies**), would lapse;
    - (ii) relevantly, it be limited to a reduction in the premiums of his current insurance;
  - (c) in response to sub-paragraph (c):
    - (i) admit that the First Applicant accepted the advice recorded in the file note dated 8 December 2016 (in that he signed the file note);

- (ii) admit that the First Applicant retained the Thomas Policies;
  - (iii) otherwise does not know and cannot admit the allegations in that sub-paragraph;
- (d) will rely, at trial, on the full terms and effect of the documents referred to in sub-paragraph (b) and (1b) above and the following:
- (i) the "Financial Needs Analysis" for the First Applicant dated 8 December 2016 [CBG.516.001.0547];
  - (ii) the Financial Needs Analysis "Client Declaration" signed by the First Applicant on or around 8 December 2016 [CBG.516.001.0252];
  - (iii) the Financial Services Guide dated 1 July 2016 provided to the First Applicant on or around 8 December 2016 [CBA.600.013.4760; CBA.600.013.4772];
  - (iv) the "Client Receipt" signed by the First Applicant on or around 8 December 2016 [CBG.516.001.0251];
  - (v) the "FirstChoice - Adviser Service Fee, Licensee Service Fee and Adviser Trail Rebate Nomination Form" signed by the First Applicant on or around 12 December 2016 [CBG.513.011.1663];  
the CMLA Product Disclosure Statement dated 13 November 2016 [CML.506.001.0783];
  - (vi) the "Adviser Online Transaction Authority" Form signed by the First Applicant on or around 8 December 2016 [CBG.516.001.0518];
  - (vii) the "Wholesale Personal Super Switch Form" signed by the First Applicant on or around 8 December 2016 [CBG.516.001.0529];
  - (viii) the "Adviser Service Fee, Licensee Service Fee and Adviser Trail Rebate Nomination Form" signed by the First Applicant on or around 12 December 2016 [CBG.516.001.0537];
  - (ix) the "Adviser Nomination" Form signed by the First Applicant on or around 14 December 2016 [CBG.516.001.0544];
- (e) say that in the period 28 October 2014 to 8 February 2018 CMLA charged and received premiums for the Thomas Policies, which premiums were paid from the CFS FirstChoice Wholesale Personal Super Fund of which the First Applicant was a member;

- (f) say that CMLA sent re-rate letters to the First Applicant in respect of the Thomas Policies:
  - (i) on 7 October 2016, notifying the First Applicant that the annual premium payable from the premium anniversary date was \$5,012.13;
  - (ii) on 8 December 2016, notifying the First Applicant that the annual premium payable from the premium anniversary date was \$5,752.03; and
  - (iii) on 6 October 2017, notifying the First Applicant that the annual premium payable from the premium anniversary date was \$4,893.13;
- (g) otherwise deny the allegations in paragraph 18A.

18B. In response to paragraph 18B, the Respondents:

- (a) admit paragraph 18B(a);
- (b) say that the advice provided by Mr Vitale in respect of the Total Care Plan policy owned by Sean and Diana Tyrrell as trustees for the Tyrrell Superannuation Fund with policy number 01553725 in respect of which the Second Applicant was the insured (**Tyrrell Policy**), as referred to in paragraph 18B(a) of the Statement of Claim, was recorded in the documents at subparagraphs (iii) to (v) of subparagraph (d) below;
- (c) do not know and cannot admit the allegation in paragraph 18B(c) that the Second Applicant accepted the advice referenced in paragraph 18B(b);
- (d) will rely, at trial, on the full terms and effect of the Tyrrell Policy and the following:
  - (i) the "Financial Needs Analysis" Client Declaration signed by Sean and Diana Tyrrell as trustees for the Tyrrell Superannuation Fund or around 11 June 2010 [CAL.500.006.0212];
  - (ii) the FWL Financial Services Guide dated February 2009 [CBG.589.001.0001];
  - (iii) the Statement of Advice provided by Mr Vitale to Sean and Diana Tyrrell as trustees for the Tyrrell Superannuation Fund dated 22 June 2010 [CBG.519.001.0207];
  - (iv) letter from Mr Vitale addressed to Diana and Sean Tyrrell dated 6 November 2014 [CBG.519.001.0379];

- (v) the CMLA Product Disclosure Statement and Policy dated 11 May 2014 [CBG.501.017.5572];
  - (vi) the Update to the CMLA Product Disclosure Statement and Policy dated 25 June 2014 [CML.507.001.0038];
  - (vii) file notes made by Mr Vitale recording a conversation with Diana Tyrrell dated 8 September 2016 [CBG.519.001.0545; CBG.519.001.0593];
  - (viii) email from Mr Vitale addressed to Diana and Sean Tyrrell dated 8 September 2016 [CBG.519.001.0540];
  - (ix) the Financial Services Guide (Part 1) dated 1 July 2014 [CBG.527.001.0088];
  - (x) the Joe Vitale Financial Services Financial Services Guide (Part 2) dated 1 July 2014 [CBG.527.001.0056];
  - (xi) the Joe Vitale Financial Services Financial Services Guide (Part 2) dated 1 January 2016 [CBG.527.001.0074];
  - (xii) email from Mr Vitale addressed to Diana Tyrrell dated 12 January 2017 [CBG.519.001.0568];
- (e) say that in the period 4 December 2015 to 1 September 2020, CMLA charged and received premiums for the Tyrrell Policy, which premiums were paid from the Tyrrell Superannuation Fund;
- (f) say that CMLA sent the following correspondence to Diana and Sean Tyrrell as trustees for the Tyrell Superannuation Fund in respect of the Tyrrell Policy:
- (i) on 7 August 2015, a re-rate letter giving notice that the annual premium payable from the premium anniversary date was \$1,082.98;
  - (ii) on 12 August 2016, a renewal letter giving notice that the annual premium payable from the anniversary date was \$1,213.10;
  - (iii) on 11 August 2017, a renewal letter giving notice that the annual premium payable from the policy anniversary date was \$1,377.10;
  - (iv) on 10 August 2018, a re-rate letter giving notice that the annual premium payable from the policy anniversary date was \$1,569.06;
  - (v) on 9 August 2019, a re-rate letter giving notice that the annual premium payable from the policy anniversary date was \$1,785.81; and

(g) otherwise deny the allegations in paragraph 18B.

18C. In response to paragraph 18C, and assuming that 'Denis Voo' is intended to read 'Dennis Voo' (being the person referred to in paragraph 6A(c1) above), the Respondents:

(a) admit paragraph 18C(b), that the Third Applicant received personal advice from Mr Voo as recorded in:

(i) a Statement of Advice dated 10 December 2018 [CBG.685.001.0501];

(ii) a file note prepared by Mr Voo on 15 December 2018 [CBG.685.001.0538]; and

(iii) the CMLA Product Disclosure Statement dated 23 September 2018 [CML.509.001.0001];

~~(b) deny paragraph 18C(c), and say that:~~

~~(i) the advice provided by Ms Firth on 2 February 2018 was recorded in the Record of Advice – No Change File Note dated 2 February 2018 [CBG.572.001.0379], which referred back to the Statement of Advice dated 31 March 2017 [CBG.572.001.0290];~~

~~(ii) expressly excluded an insurance review, including of the Total Care Plan policy owned by the Third Applicant with policy number 01678032 in respect of which the Third Applicant was the insured (**Angelilli Policy**);~~

(b) say that the personal advice included a statement that the Third Applicant declined an analysis of her life, TPD and trauma insurance needs and recorded that she instead stated that she wished to obtain \$500,000 life and TPD cover and \$75,000 trauma cover;

~~(c) deny sub-paragraph 18C(d), and refer to subparagraph (b) above;~~

(c) admit that the Third Applicant obtained the policies pleaded in paragraph 18C(c) of the Statement of Claim (**Galarza Policies**);

(d) admit that the Third Applicant, by signing the 'Agreement to Proceed' [CBG.685.001.0601], agreed to proceed in full with the personal advice recorded in the Statement of Advice dated 10 December 2018, but otherwise do not know and cannot admit the allegations in paragraph 18C(d);

~~(e)~~(e) will rely, at trial, on the full terms and effect of the documents referred to in sub-paragraphs ~~(b)~~ (a), (c) and (d) above and the following:

- (i) ~~the Financial Needs Analysis dated 22 February 2017 [CBG.572.001.0217]; the Financial Services Guide (Part 1) dated 1 January 2018 [CBG.523.001.1132]~~
  - (ii) ~~the Diary Note prepared by Ms Firth on 22 February 2017 [CBG.572.001.0270]; the Financial Services Guide (Part 2) dated 1 January 2018 [CBG.523.001.1140];~~
  - (iii) ~~the Financial Services Guide (Part 1) dated 1 January 2017 [CBA.600.013.4802]; the File Note prepared by Mr Voo on 19 February 2018 [CBG.685.001.0623];~~
  - (iv) ~~the Financial Services Guide (Part 2) dated 1 January 2017 [CBA.600.013.4810]; the Financial Services Guide (Part 1) dated 1 November 2018 [CBG.585.001.0053];~~
  - (v) ~~the CMLA Product Disclosure Statement dated 13 November 2016 [CML.506.001.0783]; the Financial Services Guide (Part 2) dated 1 November 2018 [CBG.585.001.0069];~~
  - (vi) ~~the Financial Services Guide Receipt signed by the Third Applicant on or around 22 February 2017 [CBG.572.001.0214]; the File Note prepared by Mr Voo on 9 November 2018 [CBG.685.001.0644];~~
  - (vii) ~~the Agreement to Proceed signed by the Third Applicant on or around 5 April 2017 [CBG.572.001.0288]; the Financial Needs Analysis dated 9 November 2018 [CBG.685.001.0105]; and~~
  - (viii) ~~the Financial Needs Analysis – Update Form dated 2 February 2018 [CBG.572.001.0382]; the Strategy Working Document prepared by Mr Voo on 10 December 2018 [CBG.685.001.0588];~~
  - (ix) ~~the Financial Services Guide dated 1 January 2018 [CBG.585.001.0235];~~
  - (x) ~~the CMLA Product Disclosure Statement dated 9 June 2017 [CML.506.001.1442];~~
- (e)(f) say that in the period 21 March 2015 to 21 March 2020, CMLA charged and received premiums for the Angelilli Policy Galarza Policies;
- (i) in the period 20 December 2018 to 20 February 2023, for policies 02714922 and 02714923; and

(ii) in the period 20 December 2018 to 3 March 2023, for policy 02714921, which premiums were paid from the FirstChoice Trust of which the Third Applicant was a member;

(f)(g) say that CMLA sent the following correspondence to the Third Applicant:

- (i) on 28 April 2017, a renewal letter giving notice that the annual premium payable from the policy anniversary date was \$3,235.72; on 29 November 2019, renewal letters giving notice that the annual premium from the policy anniversary date would be \$2,842.10, \$353.88, and \$1,169.40 for policies 02714921, 02714922, and 02714923, respectively (CML.529.001.0118; CML.529.001.0124; CML.529.001.0128); and
- (ii) on 27 April 2018, a re-rate letter giving notice that the annual premium payable from the policy anniversary date was \$3,908.11; on 2 December 2020, renewal letters giving notice that the annual premium from the policy anniversary date would be \$2,902.50, \$361.56, and \$1,194.84, respectively (CML.529.001.0019; CML.529.001.0027; CML.529.001.0035);
- (iii) on 26 April 2019, a re-rate letter giving notice that the annual premium payable from the policy anniversary date was \$4,495.60
- (iv) on 29 April 2020, a re-rate letter giving notice that the annual premium payable from the policy anniversary date was \$5,192.29;

(g)(h) say that ~~on 28 April 2021~~, the Fourth Respondent sent the following correspondence to the Third Applicant; ~~a re-rate letter giving notice that the annual premium payable from the policy anniversary date was \$4,568.07; and~~

(i) on 15 October 2021, re-rate letters giving notice that the annual premium payable from the policy anniversary date:

(A) for policy 02714921, would include an increase of 15% for Life and TPD Cover [CML.529.001.0065]; and

(B) for policy 02714923, would include an increase of 15% for Life and TPD Cover [CML.529.001.0067];

(ii) on 1 December 2021, renewal letters giving notice that the annual premium from the policy anniversary date would be \$3,198.63, \$369.24, and \$1,403.28 for policies 02714921, 02714922, and

02714923, respectively [CML.529.001.0001; CML.529.001.0007; CML.529.001.0013];

(iii) on 14 October 2022, re-rate letters giving notice that the annual premium payable from the policy anniversary date:

(A) for policy 02714921, would include an increase of 15% for Life, Income Protection Cover and TPD Cover [CML.529.001.0057];

(B) for policy 02714922, would include an increase of 15% for Income Protection Cover [CML.529.001.0059]; and

(C) for policy 02714923, would include an increase of 15% for TPD Cover and Trauma Cover [CML.529.001.0061];

(iv) on 30 November 2022, renewal letters giving notice that the annual premium from the policy anniversary date would be \$3,743.46, \$433.44, and \$1,647.12 for policies 02714921, 02714922, and 02714923, respectively [CML.529.001.0132; CML.529.001.0138; CML.529.001.0144]; and

~~(h)~~(i) otherwise deny the allegations in paragraph 18C.

19. In response to paragraph 19, the Respondents:

(a) refer to and repeat paragraphs 18A, 18B and 18C above;

(b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(c) otherwise deny the allegations in paragraph 19.

20. In response to paragraph 20, the Respondents:

(a) refer to and repeat paragraphs 18A, 18B and 18C above;

(b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(c) otherwise deny the allegations in paragraph 20.

21. In response to paragraph 21, the Respondents:

(a) refer to and repeat paragraphs 18A, 18B and 18C above;



- (b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (c) otherwise do not know and cannot admit the allegations in paragraph 21.

22. In response to paragraph 22, the Respondents:

- (a) refer to and repeat paragraphs 18A(e), 18B(e) and ~~18C(e)~~ 18C(g) above;
- (b) say that in the period 28 October 2014 to 8 February 2018 CMLA charged and received premiums on the Thomas Policies which premiums were paid from the CFS FirstChoice Wholesale Personal Super Fund of which the First Applicant was a member;
- (c) say that in the period 4 December 2015 to 1 September 2020 CMLA charged and received premiums on the Tyrrell Policy which premiums were paid from the Tyrrell Superannuation Fund;
- (d) ~~say that in the period 21 March 2015 to 21 March 2020, CMLA charged and received premiums on the Angelilli Policy;~~ say that CMLA charged and received premiums for the Galarza Policies:
  - (i) in the period 20 December 2018 to 20 February 2023, for policies 02714922 and 02714923; and
  - (ii) in the period 20 December 2018 to 3 March 2023, for policy 02714921, which premiums were paid from the FirstChoice Trust of which the Third Applicant was a member;
- (d1) say that, for the period 20 December 2018 to 19 December 2019, CMLA charged and received premiums in the amount of \$2,781.72 for policy 02714921, \$346.20 for policy 02714922 and \$1,144.08 for policy 02714923;
- (e) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the ~~Applicant's~~ Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (f) otherwise deny the allegations in paragraph 22.

23. In response to paragraph 23, the Respondents:

- (a) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the

Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(b) otherwise deny the allegations in paragraph 23.

24. In response to paragraph 24, the Respondents:

(a) refer to and repeat paragraph 23 above;

(b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised;

(c) say that whether a product existed that was substantially equivalent or better for a particular Group Member and whether the Group Member should have been advised to acquire that product would depend, amongst other things, on the needs, objectives and circumstances of the individual Group Member at a particular point in time, what other financial products they held, and what was disclosed by the Group Member to any person providing him or her financial advice; and

(d) otherwise deny the allegations in paragraph 24.

25. In response to paragraph 25, the Respondents:

(a) refer to and repeat paragraphs 22, 23 and 24 above;

(b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(c) otherwise deny the allegations in paragraph 25.

## **E. APPROVED PRODUCT LISTS**

26. In response to paragraph 26, the Respondents:

(a) admit that during the Relevant Period CFP and FWL issued one or more Insurance APL;

(b) say that FWL maintained its own Insurance APL for use by FWL Authorised Representatives;

- (c) say that CFP maintained Insurance APLs whereby access to products depended on, among other things, whether the Adviser was a CFP Representative or a CFP Authorised Representative;
- (d) say that Advisers were authorised to recommend the products listed on the relevant Insurance APLs, or other products within the scope of the Approved Product List Policy, save for those FWL Authorised Representatives who offered advice under a flat fee model who were not authorised to recommend certain products;

**Particulars**

CFP and FWL Policy Framework for Managing Licensee Approved Product Lists, Strategic Asset Allocation, Model Portfolios and Managed Accounts (APL Policy) – March 2014 (CBG.512.009.1797); APL Policy – June 2015 (CBG.512.018.0417); APL Policy - March 2016 (CBG.501.011.3275); APL Policy - December 2017 (CBG.512.049.1371); APL Policy – March 2018 (CBG.501.005.1326); APL Policy – March 2018 (CBG.501.005.1326); FWL APL Policy - February 2020 (CBG.501.001.6960); CFP APL Policy - February 2020 (CBG.501.001.6050); CFP APL Policy May 2020 (CBG.501.001.1751).

- (e) say that for certain products listed on the CFP Insurance APLs, accreditation was required to be completed prior to providing advice recommending those products; and

**Particulars**

CFP Licensee Standard, Education & Registrations, 29 June 2015 (CBG.523.001.0478); 10 July 2017 (CBG.523.001.2434); FWL Licensee Standard, Adviser Education & Registrations, 4 July 2015 (CBG.504.001.4519); 28 September 2015 (CBG.504.001.4504); 3 July 2017 (CBG.504.001.4487); Pathways & FWL Licensee Standard, Expertise and CPD, 3 July 2017 (CBG.504.001.4546); 31 March 2019 (CBG.504.001.4662); 20 May 2019 (CBG.504.001.4476); CFP Professional Standards, Education and professional associations professional standard, 28 July 2020 (CBG.523.001.3394); CFP Professional Standards, Expertise and CPD professional standard, 28 July 2020 (CBG.523.001.3537).

- (f) otherwise deny the allegations in paragraph 26.

27. In response to paragraph 27, the Respondents:

- (a) say that some Commlnsure Protection products were on the Insurance APLs issued by CFP and FWL during some or all of the Relevant Period, until they were closed to new business from 31 March 2020; and
- (b) otherwise deny the allegations in paragraph 27.

### **Particulars**

The Respondents repeat and rely on the Particulars at paragraph 26 of the Statement of Claim.

28. In response to paragraph 28, the Respondents:

- (a) admit that approval was required for an Adviser to recommend a product that was not on the Insurance APLs;
- (b) say that in order to recommend a product not on the Insurance APLs, an Adviser was required to follow a non-APL approval process, which required consideration of whether the customer's needs and objectives could not be met using the products on the APL, or if an existing non-APL product better met the customer's needs and objectives; and
- (c) otherwise deny the allegations in paragraph 28.

## **F. COMMISSIONS AND INCENTIVES**

### **CFP and FWL Authorised Representatives (other than Employed Advisers)**

29. The Respondents admit paragraph 29 and say further that:

- (a) during the Relevant Period CMLA had in place agreements with CFP and FWL (**Distribution Agreements**) pursuant to which CMLA agreed to credit the relevant licensee with:
  - (i) initial commission on the completion of: applications introduced by the licensee for new policies; and applications for increases or alterations to an existing policy forming part of the in force portfolio of CMLA's policies which would be treated as new business;
  - (ii) asset and renewal commission in relation to the licensee's in force portfolio of CMLA policies;

on the basis set out in the Commission Schedule to the relevant agreement which detailed the commission payable on the products sold in the Commlnsure Protection product range;

- (b) commission would be allocated to a commission account that CMLA maintained for each of CFP and FWL and payments would be made at least monthly when the account was in credit.

**Particulars**

Distributor Agreement between FWL and CMLA dated 29 February 2012 [CBA.600.005.2575]; Addendum to Distribution Agreement between FWL and CMLA dated 16 January 2013 [CAL.500.004.0345]; Amendment to Distributor Agreement between FWL and CMLA [CBA.600.005.2674]; Distributor Agreement between CFP and CMLA dated December 2010 [CBG.506.011.6624].

30. In response to paragraph 30, the Respondents:

- (a) refer to and repeat paragraph 29 above;
- (b) say that:
- (i) initial commission was payable on completion of a new business policy and was payable on the basic annual premium, being the first year's premium excluding stamp duty and frequency loadings;
  - (ii) renewal commission was payable when each premium payment was actually received from the first policy anniversary;
  - (iii) where syndicate plan options were selected, the initial commission rates, and the change in future premium rates, would be the amounts set out in a table within the relevant Commission Schedule; and
- (c) admit the allegations in paragraph 30 in so far as they apply to commission paid by CMLA to CFP or FWL; and
- (d) otherwise deny the allegations in paragraph 30.

**Particulars**

Distributor Agreement between FWL and CMLA dated 29 February 2012 [CBA.600.005.2575]; Amendment to Distributor Agreement between FWL and CMLA [CBA.600.005.2674]; CMLA Commission Schedule – FWL dated November 2005 [CML.500.001.0301]; CMLA Commission Schedule – CFP dated November 2006 [CML.500.001.0310]; CMLA Commission Schedule – FWL dated January 2014 [CML.500.001.0134]; CMLA Commission Schedule – CFP & Pathways dated August 2014 [CBG.501.015.1899]; CMLA Commission Schedule – FWL dated November 2018 [CML.500.001.0061]; CMLA Commission Schedule – CFP dated November 2018

[CML.500.001.0081]; CMLA Commission Schedule – CFP Pathways dated January 2018 [CML.500.001.0041]; CFP & FWL & IFA RPAY Commission and GST 2014-08 to 2020-08 [CML.506.001.0642].

31. In response to paragraph 31, the Respondents:
- (a) refer to and repeat paragraphs 29 and 30 above;
  - (b) say further that Commissions were paid by CMLA to each of CFP and FWL, who, from time to time, would pass on part of the commissions to the Authorised Representatives; and
  - (c) otherwise deny the allegations in paragraph 31.
32. In response to paragraph 32, the Respondents:
- (a) refer to and repeat paragraphs 29 to 31 above;
  - (b) say that by reason of the Tyrrell Policy:
    - (i) FWL received Commissions from CMLA; and
    - (ii) Joe Vitale Financial Services Pty Limited received Commissions from FWL in accordance with the authorised representative agreement between FWL and Joe Vitale Financial Services Pty Limited (ABN 14005088237);

#### **Particulars**

Authorised Representative Agreement between Financial Wisdom Limited and Joe Vitale Financial Services P/L dated 23 January 2008 [CBG.514.001.0127], as amended from time to time.

- (c) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (d) otherwise deny the allegations in paragraph 32.
33. In response to paragraph 33, the Respondents:
- (a) refer to and repeat paragraphs 39 – 42 below; and
  - (b) otherwise deny the allegations in paragraph 33.

#### **CFP Employee Advisers**

34. The Respondents deny paragraph 34 and say further that:

- (a) [not used]
- (b) until 30 June 2019, the overall remuneration structure for the CFP Representatives contained, among other things, the variable remuneration plan (**VRP**);
- (c) the VRP was based on a balanced scorecard of key performance indicators and the relevant employee's display of appropriate behaviours and values, and approach to risk management;
- (d) under the VRP, the upfront commissions paid to CFP in relation to an in force insurance policy were relevant to determining a planner's eligibility for a bonus, and the amount of any bonus payable; and
- (e) the VRP contained a 'gate opener', because a prerequisite to eligibility for payment under the VRP primarily related to risk management and behaviours.

#### **Particulars**

CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2014 to 30 June 2015 [CAL.500.006.0174]; CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2015 to 30 June 2016 [CAL.500.004.0307]; CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2016 to 30 June 2017 [CAL.500.004.0268]; CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2017 to 30 June 2018 [CAL.500.004.0256]; CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2018 to 30 June 2019 [CAL.500.004.0277].

35. In response to paragraph 35, the Respondents:

- (a) refer to and repeat paragraph 34 above;
- (b) [not used]
- (b) will rely, at trial, on the full terms and effect of the CFP Adviser Variable Remuneration Plan, Summary and Business Rules in place during the Relevant Period; and

#### **Particulars**

CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2014 to 30 June 2015 [CAL.500.006.0174]; CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2015 to 30 June 2016 [CAL.500.004.0307]; CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2016 to 30

June 2017 [CAL.500.004.0268]; CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2017 to 30 June 2018 [CAL.500.004.0256]; CFP Adviser Variable Remuneration Plan, Summary and Business Rules effective 1 July 2018 to 30 June 2019 [CAL.500.004.0277].

(c) otherwise deny the allegations in paragraph 35.

36. In answer to paragraph 36, the Respondents:

(a) [not used]

(b) admit that under the VRP, the CFP Representatives were eligible for a quarterly bonus payment if they satisfied certain criteria including that the CFP Representative generated total advice revenue in excess of his/her year to date TRT, a figure which was calculated as 1.45 times the advisor's base remuneration; and

(c) otherwise deny the allegations in paragraph 36.

37. In response to paragraph 37, the Respondents:

(a) refer to and repeat paragraphs 34 and 35 above;

(b) [not used]

(c) admit that the revenue which contributed to the calculation of the CFP Representative's total advice revenue included the Commissions received by CFP when a new life insurance policy sold to a client by a CFP Representative came into force; and

(d) otherwise deny the allegations in paragraph 37.

38. In response to paragraph 38, the Respondents:

(a) refer to and repeat paragraphs 34 and 35 above;

(b) [not used]

(c) will rely, at trial, on the full terms and effect of the CFP Adviser Variable Remuneration Plan, Summary and business Rules in place during the Relevant Period; and

(d) otherwise deny the allegations in paragraph 38.

### **FWL Incentive Payments**

39. The Respondents admit the allegations in paragraph 39.

40. The Respondents:



- (a) say that the allegations in paragraph 40 are not relevant to the Applicants' or the Group Members' pleaded claims; and
- (b) otherwise admit the allegations in paragraph 40.

41. The Respondents admit the allegations in paragraph 41.

42. The Respondents admit the allegations in paragraph 42.

**G. CFP AND FWL RESPONSIBILITY FOR THE CONDUCT OF THEIR AUTHORISED REPRESENTATIVES**

43. In response to paragraphs 43 to 45, the Respondents:

- (a) say that the provision of advice by Ms Lumby in relation to the Thomas Policies, Mr Vitale in relation to the Tyrrell Policy and ~~Ms Firth~~ Mr Voo in relation to the ~~Angelilli Policy~~ Galarza Policies as pleaded in paragraphs 18A, 18B and 18C above was conduct:
  - (i) that related to the provision of a financial service within the meaning of s 917A(1)(a) of the Corporations Act; and
  - (ii) on which the Applicants could reasonably be expected to rely;
- (b) do not know and cannot admit whether the Applicants in fact relied on the financial service provided by Ms Lumby in relation to the Thomas Policies, Mr Vitale in relation to the Tyrrell Policy and ~~Ms Firth~~ Mr Voo in relation to the ~~Angelilli Policy~~ Galarza Policies;
- (c) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (d) otherwise deny the allegations in paragraphs 43 – 45.

44. Not used.

45. Not used.

46. In response to paragraphs 46 and 47, the Respondents:

- (a) refer to and repeat paragraph 43 above;
- (b) say that if Ms Lumby's advice as pleaded in paragraph 18A was in fact relied on reasonably and in good faith by the First Applicant:
  - (i) CFP was responsible to the First Applicant for Ms Lumby's conduct;

- (ii) the First Applicant has the same remedies against CFP that he has against Ms Lumby (if any);
- (c) say that if Mr Vitale's advice as pleaded in paragraph 18B was in fact relied on reasonably and in good faith by the Second Applicant:
  - (i) FWL was responsible to the Second Applicant for his conduct;
  - (ii) the Second Applicant has the same remedies against FWL that she has against Mr Vitale (if any);
- (d) say that if ~~Ms Firth's~~ Mr Voo's advice as pleaded in paragraph 18C was in fact relied on reasonably and in good faith by the Third Applicant:
  - (i) CFP was responsible to the Third Applicant for ~~Ms Firth's~~ Mr Voo's conduct;
  - (ii) the Third Applicant has the same remedies against CFP that she has against ~~Ms Firth~~ Mr Voo (if any);
- (e) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (f) otherwise deny the allegations in paragraphs 46 and 47.

47. Not used.

## **H. FIDUCIARY OBLIGATIONS AND BREACH**

47A. In response to paragraph 47A, the Respondents:

- (a) refer to and repeat paragraphs 18A and 18C above;
- (b) do not know and cannot admit the allegation in sub-paragraph (c);
- (c) say that they are not required to, cannot and do not, plead to the allegations in paragraph 47A so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (d) otherwise deny the allegations in paragraph 47A.

47B. In response to paragraph 47B, the Respondents:

- (a) say that sub-paragraphs (a)-(c) when read with the chapeau is vague, embarrassing and liable to be struck out;

- (b) assume that “the Authorised Representatives within the FWL network” is a reference to the FWL Authorised Representatives and pleads to the balance of the Statement of Claim on that basis;
- (c) refer to and repeat paragraph 18B above;
- (d) say that they are not required to, cannot and do not, plead to the allegations in paragraph 47B so far as they concern Group Members (including in relation to the other Authorised Representatives within the FWL network) until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (e) otherwise deny the allegations in paragraph 47B.

48. In response to paragraph 48 , the Respondents:

- (a) refer to and repeat paragraphs 18A, 18B, 18C, 19, 20, 47A and 47B above;
- (b) deny that CFP and the Authorised Representatives within the FWL network owed any fiduciary duties to the Applicants or Group Members;
- (c) deny that a fiduciary duty arose per se between each Adviser and their client Group Member and say that whether a fiduciary duty arose between an Adviser and their client Group Member and the scope of any such duty, would depend, inter alia, on:
  - (i) the particular task the Adviser had agreed to undertake, including what requests for advice were or were not made of the Adviser in respect of the particular task;
  - (ii) whether the Adviser's interest in the relevant task had been disclosed to the client Group Member;
  - (iii) the contractual relationship and whether the conduct was otherwise authorised by law;
  - (iv) the individual circumstances of the client Group Member; and
- ~~(c1) further or alternatively, say in respect of the Third Applicant, if (which is denied) fiduciary duties arose, then they did not extend to policy number 01678032, which was expressly excluded from the scope of the advice; and~~
- (d) otherwise deny the allegations in paragraph 48.

49. The Respondents deny the allegations in paragraph 49, and refer to and repeat paragraphs 18A, 18B, 18C and 48 above.

50. In response to paragraph 50, the Respondents:
- (a) admit that CFP received the amounts for 2014, 2015, 2016 and 2017 as recorded in the table at subparagraph 50(a);
  - (b) deny that CFP received the amount for 2018 as recorded in the table at subparagraph 50(a), and say that the amount received for the half year to 30 June 2018 was \$1,846,062;
  - (c) admit that FWL received the amounts as recorded in the table at subparagraph 50(b);
  - (d) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (e) otherwise deny the allegations in paragraph 50.

51. In response to paragraph 51, the Respondents say that:

- (a) [not used]
- (b) by reason of the Thomas Policies as pleaded in paragraph 18A:
  - (i) say that CFP became eligible to receive Commissions in accordance with the Distribution Agreement between CFP and CMLA;

**Particulars**

The Respondents repeat the Particulars at subparagraph 29(b).

- (ii) deny that Ms Lumby became eligible for variable remuneration under the VRP;
- (iii) say that CMLA charged and received premiums on the Thomas Policies;
- (c) by reason of the Second Applicant retaining the Tyrrell Policy as pleaded in paragraph 18B:
  - (i) say that FWL became eligible to receive Commissions in accordance with the Distribution Agreement between FWL and CMLA , and Addendum to Distribution Agreement between FWL and CMLA;

**Particulars**

The Respondents repeat the Particulars at subparagraph 29(b).

- (ii) say that Joe Vitale Financial Services Pty Limited became eligible to receive part of the Commissions in accordance with the authorised representative agreement between FWL and Joe Vitale Financial Services Pty Limited (ABN 14005088237);

**Particulars**

The Respondents repeat the Particulars at subparagraph 32(b).

- (iii) say that CMLA charged and received premiums on the Tyrrell Policy;
- (d) by reason of the ~~Angelilli~~ Galarza Policies as pleaded in paragraph 18C:
  - (i) say that CFP became eligible to receive Commissions in accordance with the Distribution Agreement between CFP and CMLA;

**Particulars**

The Respondents repeat the particulars at subparagraph 29(b).

- (ii) ~~say that Ms Firth was eligible for variable remuneration under the VRP for the financial years 2014/15 to 2018/19; [Not used]~~
- (iii) say that CMLA charged and received premiums on the ~~Angelilli~~ Galarza Policies;
- (d1) say that Mr Voo was eligible for variable remuneration under the VRP for the financial years 2016/17 to 2018/19;
- (e) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (f) otherwise deny the allegations in paragraph 51.

52. In response to paragraph 52, the Respondents:

- (a) refer to and repeat paragraphs 23, 18A, 18B, 18C, 48 and 49 to 51 above;
- (b) say that, in the case of the First Applicant, CFP and Ms Lumby disclosed to the First Applicant the benefits to be received in relation to the Thomas Policies and consent was provided to those benefits being received, including through the materials pleaded in paragraph 18A(d) above;
- (c) say that, in the case of the Second Applicant, FWL and Mr Vitale disclosed to the Second Applicant the benefits to be received in relation to the Tyrrell

Policy and consent was provided to those benefits being received, including through the materials pleaded in paragraph 18B(d) above;

(d) say that, in the case of the Third Applicant:

(i) ~~refer to and repeat paragraph 48(c1) above; [Not used]~~

(ii) ~~further or alternatively~~, CFP and Mr Voo Ms Firth disclosed to the Third Applicant the benefits to be received in relation to the ~~Angelilli Policy~~ Galarza Policies and consent was provided to those benefits being received, in particular, through the materials pleaded in paragraph 18C(d) and (e) above;

(e) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly particularised; and

(f) otherwise deny the allegations in paragraph 52.

53. In response to paragraph 53, the Respondents:

(a) refer to and repeat paragraphs 18A, 18B, 18C, 19, 20, 48 and 52 above; and

(b) otherwise deny the allegations in paragraph 53.

54. In response to paragraph 54, the Respondents:

(a) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(b) otherwise deny the allegations in paragraph 54.

55. In response to paragraph 55, the Respondents:

(a) refer to and repeat paragraphs 18A, 18B, 18C and 51 above;

(b) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(c) otherwise deny the allegations in paragraph 55.

56. In response to paragraph 56, the Respondents:

(a) refer to and repeat paragraphs 48, 52, 53, 54 and 55 above;

- (b) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (c) otherwise deny the allegations in paragraph 56.

57. In response to paragraph 57, the Respondents:

- (a) refer to and repeat paragraphs 43 to 46 and 56 above;
- (b) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
- (c) otherwise deny the allegations in paragraph 57.

58. In response to paragraph 58, the Respondents:

- (a) refer to and repeat paragraphs 18A, 18B, 18C, 52 and 56 above;
- (b) ~~say that the Third Applicant did not obtain, renew or otherwise retain CBA Life Products through her superannuation fund as a member; [Not used]~~
- (c) say that the First and Second Applicants have not suffered loss or damage that may be claimed against the Respondents as the premiums for the Thomas Policies and the Tyrrell Policy were paid from their respective superannuation funds and they have no present or immediate right to payment from those funds;
- (c1) say that the Third Applicant has not suffered loss or damage in respect of policy 02714921 that may be claimed against the Respondents as the premiums for that policy were paid from her superannuation fund and she has no present or immediate right to payment from those funds;
- (d) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised;
- (e) say further that to the extent the premium for any Group Member's insurance policy was paid from the Group Member's superannuation fund, that Group Member has no present or immediate right to payment from their superannuation fund and has not suffered any relevant loss or damage that may be claimed against the Respondents; and

(f) otherwise deny the allegations in paragraph 58.

59. In response to paragraph 59, the Respondents:

(a) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded particularised; and

(b) otherwise deny the allegations in paragraph 59.

#### **I. KNOWING RECEIPT BY COMMINSURE**

60. The Respondents deny the allegations in paragraph 60.

61. The Respondents deny the allegations in paragraph 61, and refer to and repeat paragraph 60 above.

62. The Respondents deny the allegations in paragraph 62.

63. The Respondents deny the allegations in paragraph 63 and refer to and repeat paragraphs 60 and 61 above.

64. The Respondents deny the allegations in paragraph 64 and refer to and repeat paragraphs 60, 61, 63 and 64 above.

#### **J. FUTURE OF FINANCIAL ADVICE**

65. In answer to paragraph 65, the Respondents:

(a) admit that each of the CBA Life Products was a financial product within the meaning of s 764A(1) of the Corporations Act; and

(b) otherwise deny the allegations in paragraph 65.

66. In response to paragraph 66, the Respondents:

(a) refer to and repeat paragraphs 18A, 18B, 18C and 19 above;

(b) [not used]

(c) say that the advice received by the First Applicant as pleaded in paragraph 18A(b) above was financial product advice within the meaning of s 766B(1) of the Corporations Act;

(d) say that the advice received by the Second Applicant as pleaded in paragraph 18B(b) above was financial product advice within the meaning of s 766B(1) of the Corporations Act;



- (e2) say that the advice received by the Third Applicant as pleaded in paragraph 18C(a)(b) above was financial product advice within the meaning of s 766B(1) of the Corporations Act;
  - (e) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (f) otherwise do not know and cannot admit the allegations in paragraph 66.
67. In response to paragraph 67, the Respondents:
- (a) refer to and repeat paragraph 66 above;
  - (b) admit that each of the advices referred to in paragraphs 66(c), 66(d) and 66(e2) above was personal advice within the meaning of s 766B(3) of the Corporations Act;
  - (c) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (d) otherwise do not know and cannot admit the allegations in paragraph 67.
68. In response to paragraph 68, the Respondents:
- (a) refer to and repeat paragraph 66 above;
  - (b) admit that by providing the advice referred to in paragraph 66(c) to the First Applicant, Ms Lumby provided a financial service to the First Applicant within the meaning of s 766A(1) of the Corporations Act;
  - (c) admit that by providing the advice referred to in paragraph 66(d) to the Second Applicant, Mr Vitale provided a financial service to the Second Applicant within the meaning of s 766A(1) of the Corporations Act;
  - (d) admit that by providing the advice referred to in paragraph 66(e2) to the Third Applicant, ~~Ms Firth~~ Mr Voo provided a financial service to the Third Applicant within the meaning of s 766A(1) of the Corporations Act;
  - (e) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(f) otherwise do not know and cannot admit the allegations in paragraph 68.

69. In response to paragraph 69, the Respondents:

(a) refer to and repeat paragraph 68 above;

(b) admit that the financial services provided to the Applicants as pleaded in paragraphs 68(b), 68(c) and 68(d) were provided to them as retail clients within the meaning of s 761G of the Corporations Act;

(c) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(d) otherwise do not know and cannot admit the allegations in paragraph 69.

70. In response to paragraph 70, the Respondents:

(a) refer to and repeat paragraphs 18A, 18B and 18C above;

(b) [not used]

(c) admit that in so far as the provision of financial services to the First Applicant as pleaded in paragraph 18A(b) above was financial product advice within the meaning of s 766B(1), Ms Lumby was a provider of those financial services within the meaning of s 961(2) of the Corporations Act;

(d) admit that in so far as the provision of financial services to the Second Applicant as pleaded in paragraph 18B(b) above was financial product advice within the meaning of s 766B(1), Mr Vitale was a provider of those financial services within the meaning of s 961(2) of the Corporations Act;

(e) admit that in so far as the provision of financial services to the Third Applicant as pleaded in paragraph 18C(a)(b) above was financial product advice within the meaning of s 766B(1), ~~Ms Firth~~ Mr Voo was a provider of those financial services within the meaning of s 961(2) of the Corporations Act;

(f) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(g) otherwise do not know and cannot admit the allegations in paragraph 70.

## **Best interests**

71. In response to paragraph 71, the Respondents:
- (a) refer to and repeat paragraphs 18A, 18B, 18C and 65 to 70 above;
  - (b) admit that section 961B(1) of the Corporations Act applied in relation to the advice Ms Lumby provided to the First Applicant as pleaded in paragraph 18A(b) above;
  - (c) admit that section 961B(1) of the Corporations Act applied in relation to the advice Mr Vitale provided to the Second Applicant as pleaded in paragraph 18B(b) above;
  - (d) admit that section 961B(1) of the Corporations Act applied in relation to the advice ~~Ms Firth~~ Mr Voo provided to the Third Applicant as pleaded in paragraph 18C(a)(b) above;
  - (e) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (f) otherwise do not know and cannot admit the allegations in paragraph 71.
72. In response to paragraph 72, the Respondents:
- (a) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (b) otherwise deny the allegations in paragraph 72.
73. In response to paragraph 73, the Respondents:
- (a) refer to and repeat paragraph 51 above;
  - (b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (c) otherwise deny the allegations in paragraph 73.

74. In response to paragraph 74, the Respondents:

- (1a) refer to and repeat paragraph 18A(b1) above and deny that the First Applicant requested that Ms Lumby investigate, consider and/or assess alternative life insurance products, or that she otherwise undertook to do so;
- ~~(1b) say that Ms Firth did not provide the Third Applicant with any advice concerning a CBA Life Product on 2 February 2018;~~
- (a) further or alternatively, deny that in providing the advice to the First, Second and Third Applicants as pleaded in paragraphs 18A(b), 18B(b) and 18C(a)(b) above, Ms Lumby, Mr Vitale and ~~Ms Firth~~ Mr Voo failed to act in the best interests of the First, Second and Third Applicants respectively;
- (b) say that in providing the advice pleaded in paragraphs 18A(b), 18B(b) and 18BC(a)(b) above, each of Ms Lumby, Mr Vitale and ~~Ms Firth~~ Mr Voo acted in the best interests of the First, Second and Third Applicants respectively, consistently with the duty in s 961B(1) of the Corporations Act, and did each of the things in s 961B(2) of the Corporations Act where relevant and applicable;

#### Particulars

- (i) Ms Lumby, Mr Vitale and ~~Ms Firth~~ Mr Voo identified the objectives, financial situations and needs of the Applicants that were disclosed by the Applicants through instructions, the subject matter of the advice that had been sought and the Applicants' objectives, financial situation and needs relevant to the advice.
  - (ii) Ms Lumby, Mr Vitale and ~~Ms Firth~~ Mr Voo based all judgments in advising the Applicants on the relevant circumstances of the Applicants.
  - (iii) Mr Vitale and Mr Voo conducted a reasonable investigation into financial products that might achieve, respectively, the Second and Third Applicants' Applicant's objectives and needs as relevant to the advice on the subject matter and an assessment of the information gathered in the investigation.
  - (iv) Ms Lumby, Mr Vitale and ~~Ms Firth~~ Mr Voo had the expertise required to provide the advice.
- (c) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the

Applicants' claim and after the claims of the Group Members are properly pleaded particularised; and

(d) otherwise deny the allegations in paragraph 74.

75. In response to paragraph 75, the Respondents:

(a) refer to and repeat paragraphs 71 to 74 above;

(b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

(c) otherwise deny the allegations in paragraph 75.

#### **Client priority**

76. In response to paragraph 76, the Respondents:

(a) refer to and repeat paragraph 49 above;

(b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded particularised; and

(c) otherwise deny the allegations in paragraph 76.

77. In response to paragraph 77, the Respondents:

(a) refer to and repeat paragraph 76 above;

(b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded particularised; and

(c) otherwise deny the allegations in paragraph 77.

78. In response to paragraph 78, the Respondents:

(a) refer to and repeat paragraph 54 above;

(b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and

- (c) otherwise deny the allegations in paragraph 78.
79. In response to paragraph 79, the Respondents:
- (a) refer to and repeat paragraph 51 above;
  - (b) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded particularised; and
  - (c) otherwise deny the allegations in paragraph 79.
80. In response to paragraph 80, the Respondents:
- (a) refer to and repeat paragraphs 49, 52 and 74 above;
  - (b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (c) otherwise deny the allegations in paragraph 80.
81. In response to paragraph 81, the Respondents:
- (a) refer to and repeat paragraphs 77 to 80 above;
  - (b) say that they are not required to, cannot and do not, plead to the allegations in the Statement of Claim in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (c) otherwise deny the allegations in paragraph 81.

**Reasonable steps to ensure compliance**

82. In response to paragraph 82, the Respondents:
- (a) refer to and repeat paragraphs 2 to 6;
  - (b) admit that CFP and FWL were under an obligation to take reasonable steps to ensure that the Advisers complied with ss 961B and 916J of the Corporations Act; and
  - (c) otherwise deny the allegations in paragraph 82.
83. The Respondents admit paragraph 83.
84. In response to paragraph 84, the Respondents:

- (a) say that CFP and FWL maintained policies on conflicted remuneration and provided training and formal communications to advisers on the topic;
- (b) say that from time to time CFP and FWL issued Licensee Standards relating to the duty of an Adviser to act in the client's best interests, which expressly set out the adviser's obligations when providing personal advice;
- (c) say that from time to time CFP and FWL issued Licensee Standards relating to conflicts of interest including alternative remuneration, which gave express guidance as to how Advisers should manage the conflict between the interests of the client and those of the Adviser, requiring preference to be given to the client's interests;
- (d) say that CFP required new CFP Representatives to undergo induction training, which required them to pre-read the Licensee Standards ahead of face-to-face training on various matters, including the best interests duty;
- (e) say that CFP required the CFP Representatives to undergo training on a biannual basis in the form of a 'Conflicts learning module', which covered avoiding conflicts of interest;
- (f) say that FWL Authorised Representatives were required by FWL to undergo training modules on conflicted remuneration;
- (g) say that CFP and FWL had in place a number of other supervision and monitoring arrangements during the course of the Relevant Period in relation to the conduct of the Advisers; and
- (h) otherwise deny the allegations in paragraph 84.

85. In response to paragraph 85, the Respondents:

- (a) refer to and repeat paragraphs 83 and 84 above;
- (b) say that CFP and FWL had in place processes and systems to supervise and monitor the Advisers, including, among other things:
  - (i) Quality Advice Assurance processes, such as file reviews and adviser debriefs;
  - (ii) Practice Development Managers conducting support activities for FWL Authorised Representatives including file health checks, completion of biannual Practice Supervision Checklist, and coaching and training support;

- (iii) Instance, Issue, Incident & Breach processes to identify, analyse, record, manage, notify, escalate and rectify, among other things, Adviser related conduct. For example, actual or suspected failures to meet Licensee Standards;
- (iv) Wealth Management paraplanning team conducting pre-vetting processes prior to the provision of advice by certain Advisers or for certain types of advice including advice on insurance policies held by self-managed super funds;
- (v) processes to identify and monitor investments in non-APL products;
- (c) say that from time to time CFP and FWL issued Licensee Standards and general guidance on, amongst other things, adviser supervision, conflicted remuneration provisions and best interests obligations;
- (d) say that from time to time CFP and FWL gave guidance on, among other things, specific issues relating to conflicted remuneration and non-monetary benefits;
- (e) say that from time to time CFP and FWL sent formal communications, including emails regarding conflicted remuneration obligations, to the Advisers;
- (f) say that CFP and FWL undertook steps to supervise and monitor Advisers, including by, among other things, utilising:
  - (i) an Adviser Early Warning System that was used to identify trends in adviser advice behaviour in order to identify potential areas of concern for the relevant licensee;
  - (ii) attestations, whereby Authorised Representatives were required to attest that they had, among other things:
    - (A) recorded conflicts of interest on the Conflicts Interest Register;
    - (B) maintained client files to demonstrate their advice had been given in client's best interests; and
    - (C) read and understood applicable Licensee Standards in relation to the advice they provided;
- (g) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and



- (h) otherwise deny the allegations in paragraph 85.
- 86. The Respondents deny the allegations in paragraph 86 and refer to and repeat paragraph 85 above.
- 87. The Respondents deny the allegations in paragraph 87 and refer to and repeat paragraphs 75 and 81 above.
- 88. In response to paragraph 88, the Respondents:
  - (a) refer to and repeat paragraphs 58, 75, 81 and 86 above;
  - (b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (c) otherwise deny the allegations in paragraph 88.
- 89. In response to paragraph 89, the Respondents:
  - (a) refer to and repeat paragraphs 65 to 88 above;
  - (b) say that they are not required to, cannot and do not, plead to the allegations in so far as they concern Group Members until after the initial trial of the Applicants' claim and after the claims of the Group Members are properly pleaded and particularised; and
  - (c) otherwise deny the allegations in paragraph 89.

**K. Transfer from Commlnsure to AIAA**

- 89A. The Respondents admit paragraph 89A.
- 89B. In response to paragraph 89B, the Respondents:
  - (a) deny that CMLA is liable as alleged in the Statement of Claim for the relief claimed in the Amended Originating Application or at all;
  - (b) refer to and repeat paragraphs 4 and 4A above; and
  - (c) otherwise admit the allegations in paragraph 89B.

**L. RELIEF**

- 90. In response to paragraph 90, and assuming that 'Further Amended Originating Application' is intended to read 'Amended Originating Application', the Respondents:
  - (a) do not plead to the paragraph as it contains no allegations against them;

- (b) deny any entitlement of the Applicants and Group Members to the relief sought in the Originating Application or at all; and
- (c) say further that the Group Members' claims for breach of fiduciary duty and breach of ss 961B and 961J of the Corporations Act are highly individualised, and unsuitable to be determined in representative proceedings.

Date: ~~11 February 2022~~ 17 November 2023



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Signed by Kim Andrew Reid  
Lawyer for the Respondents

This pleading was prepared by Kim Andrew Reid, lawyer, and settled by Elizabeth Collins SC, Peter Kulevski, and Sera Mirzabegian SC, and Alicia Lyons of counsel.

## Schedule

Federal Court of Australia  
District Registry: Victoria  
Division: General

### Applicants

Second Applicant: Diana Tyrrell

Third Applicant: ~~Carmel Angelilli~~ Notre Dame Saez Gomez Galarza

### Respondents

Second Respondent: Financial Wisdom Limited (ACN 006 646 108)

Third Respondent: The Colonial Mutual Life Assurance Society Limited (ACN 004 021 809)

Fourth Respondent: AIA Australia Limited (ACN 004 837 861)

### **Certificate of lawyer**

I Kim Andrew Reid certify to the Court that, in relation to the defence filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (d) each denial in the pleading; and
- (e) each non admission in the pleading.

Date: 17 November 2023



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Signed by Kim Andrew Reid  
Lawyer for the Respondents