HIGH COURT OF AUSTRALIA

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| | |
|---|---|
| File Number: | S94/2026 |
| File Title: | Brady v. NULIS Nominees (Australia) Limited (ACN 008 515 |
| Registry: | Sydney |
| Document filed: | Form 27A - Appellant's submissions |
| Filing party: | Appellant |
| Date filed: | 29 Oct 2026 |

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# Form 27A—Appellant's submissions

Note: See rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **SHEILA BRUCE BRADY**
Appellant

and

**NULIS NOMINEES (AUSTRALIA) LIMITED (ACN 008 515 633)**
**IN ITS CAPACITY AS TRUSTEE OF THE MLC SUPER FUND**
Respondent

## APPELLANT'S SUBMISSIONS

### Part I: Certification

1. This submission is in a form suitable for publication on the internet.

### Part II: Concise statement of the issues

2. The appellant contends that the appeal presents the following two issues:

    a. is the character of a fee charged pursuant to a remuneration charging clause in a superannuation trust deed to be determined by how the fee is labelled or described in a product disclosure statement (**PDS**) or by the purpose for which the fee may be charged under the Trust Deed and the use to which it is applied?

b. is a fee charged solely for the purpose of funding commissions to financial services licensees a fee for the administration and operation of a superannuation trust fund?

**Part III: Section 78B notice**

3. The appellant does not consider that any notice is required under s 78B of the *Judiciary Act 1903* (Cth).

**Part IV: Citations of the decisions below**

4. The reasons of the Full Court of the Federal Court of Australia (**Full Court**) are *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund* [2026] FCAFC 68 (**AJ**)[1] (CAB 389–438).[2]

5. The reasons of the primary judge (Markovic J) are *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund (No 4)* [2024] FCA 1374 (**PJ**) (CAB 5–346).

**Part V: Facts**

6. The MLC Super Fund is constituted by the MLC Super Fund **Trust Deed** dated 9 May 2016 (ABFM 17–165) between the respondent (**NULIS**) as Trustee and NAB as Principal Company: PJ [347] (CAB 130); AJ [157] (CAB 423).

7. Schedule 1 to the Trust Deed (ABFM 61–111) concerns the TUSS[3] Division, of which the appellant was and is a member (ABFM 5–16).

8. Clause 3.7 of Sch 1, under the heading "Remuneration", provides "The Trustee may charge for the administration and operation of this Division, a Member Package or a class of Members of a Member Package an amount the Trustee determines" (ABFM 70).

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[1] In this submission, all AJ citations are references to the majority (Hespe and Button JJ) unless stated otherwise.

[2] In this submission, CAB citations are references to pages in the Core Appeal Book filed 13 October 2026 (**CAB**), and ABFM citations are references to pages in the appellant's 'Book of Further Materials' filed pursuant to r 44.02.4(a) of the *High Court Rules 2004* (Cth) (**ABFM**).

[3] The Universal Superannuation Fund Scheme (**TUSS**): AJ [140], [157] (CAB 419, 423).

9. Mervyn Lawrence Brady brought a representative proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) on behalf of certain members of the MLC Super Fund who, during the period 1 July 2016 to 23 September 2020, were charged fees by NULIS to fund commissions paid to third-party financial services licensees: PJ [2]–[3] (CAB 15); AJ [1], [8] (Lee J) (CAB 392–393).[4] Mr Brady died shortly before the Full Court delivered judgment: AJ [139] (Lee J) (CAB 417). On 11 June 2026, the Full Court made orders that Mr Brady be substituted as the representative party by his spouse (the appellant) in her personal capacity as a group member in the proceeding (CAB 441).

10. There were "three primary types of commissions paid in respect of" TUSS products: (i) asset-based or trail commissions, funded by an "administration fee" charged to members' accounts; (ii) contribution-based commissions, funded by a "contribution fee" charged to members' accounts; and (iii) insurance commissions, funded by insurance premiums charged to members' accounts: PJ [83] (CAB 33); limb (a) of the definition of "Commissions" in Schedule A to the orders of the Federal Court of Australia dated 12 February 2025 (CAB 363).

11. It is common ground that unless cll 3.7 or 4.2[5] of Sch 1 to the Trust Deed conferred on NULIS the power to charge fees to fund the payment of these commissions, NULIS did not have the power to levy the fees to that extent: AJ [159] (CAB 423).

12. The primary judge found that NULIS was authorised to charge fees to fund these commissions pursuant to cl 3.7 or cl 4.2 of Sch 1 to the Trust Deed: PJ [389]–[413] for cl 4.2 (CAB 146–151); PJ [414]–[445] for cl 3.7 (CAB 151–159).

13. On appeal, the Full Court found that cl 4.2 did not authorise NULIS to charge fees to fund commissions, such that cl 3.7 was the only operative power of the trustee to charge fees: AJ [47]–[48], [55]–[63], [78], [91] (Lee J) (CAB 400–404, 406, 409); AJ [164] (CAB 425–426). NULIS has filed a Notice of Contention

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[4] Transcript 67:33–35 (Mr Thomas) (as at 31 December 2015, there were approximately 188,000 members in commission-paying retail products) (ABFM 535).

[5] Clause 4.2 of Sch 1, and the definition of "Member Package", are set out at AJ [35], [37] (Lee J) (CAB 398–399) and [160] (CAB 423–424).

(CAB 570–571) contending the Full Court erred in finding cl 4.2 was not a source of power. The appellant's response is in paragraphs 58 to 60 below.

14. Hespe and Button JJ found that cl 3.7 authorised NULIS to charge the fee disclosed as an "administration fee", part of which was used to pay commissions to third-party financial advisers, and did not address the other types of fees: AJ [164]–[205] (CAB 425–437). Lee J dissented: AJ [79]–[90] (CAB 406–409).

**Part VI**: **Argument**

***The proper construction of charging and remuneration clauses in trust deeds***

15. The question whether cl 3.7 authorises a fee is a question of construction: do the words "for the administration and operation of this Division" extend to a fee whose sole function is to fund commission payments to third-party financial advisers? The majority answered that question by looking to the label given to the fee in the PDS. That approach empties the limiting words of content for four reasons.

16. *First*, the proper construction of cl 3.7 requires substantive inquiry into the purpose of the fee, not merely its disclosed label: the orthodox equitable principles governing trustee remuneration clauses compel that conclusion.

17. *Second*, the six facts identified by Lee J — all of which the majority accepted — establish that the impugned fees were not fees for the administration and operation of the Division; the majority's treatment of those facts as carrying no "significance" cannot be sustained. The six facts are identified below.

18. *Third*, the majority's PDS-based approach is internally inconsistent: on that approach, contribution fees (disclosed as going "to your financial adviser") are plainly outside cl 3.7. The majority compounded that error by declining to address this type of fee on its merits.

19. *Fourth*, the majority's finding of abandonment in respect of contribution fees is contradicted by the record and left a substantial class of group member claims unresolved (but also binding on them).

***The substantive inquiry***

20. The principles governing the construction of trust deeds are settled[6] and not challenged in this appeal.[7]

21. There is also no dispute that NULIS' power under cl 3.7 was confined to charging fees "for the administration and operation of this Division": AJ [49] (Lee J) (CAB 401). The preposition "for" is purposive: any charge exacted from members must comply with the limitation in cl 3.7: AJ [49], [91] (Lee J) (CAB 401, 409). The clause requires a substantive connexion between the fee charged and NULIS' administration and operation of the TUSS Division.

***The six undisputed facts***

22. The six facts identified by Lee J established the impugned fees were not exacted for the trustee's administration and operation of the fund but for a different purpose altogether: AJ [67]–[77] (Lee J) (CAB 404–406). Each of the facts was found by the primary judge and not disturbed on appeal.[8] Each of the facts was also the subject of a post-hearing submission titled '**Supplementary Note** on Fees Not Being Within Clause 3.7' filed by Mr Brady pursuant to the Full Court's direction (ABFM 606–607).[9] The majority did not reject any of the six facts; their Honours accepted each one. The majority found only that these facts carried no "significance": AJ [189] (CAB 432). The six facts are as follows.

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[6] *Byrnes v Kendle* (2011) 243 CLR 253, [57]–[59] (Gummow and Hayne JJ), [102] (Heydon and Crennan JJ). See also footnote 22 below.

[7] To the extent the majority's invocation of a "practical, purposive and business-like" approach to construction (AJ [166], [196] (CAB 426, 434)) suggests that superannuation trust deeds attract a distinct, less textual approach to construction, that reasoning should not be accepted: see *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, [27] (French CJ, Gummow, Heydon, Crennan, and Bell JJ).

[8] AJ [145] ("No factual findings of the primary judge were challenged on the appeal") (CAB 420).

[9] Transcript 135:26–40 (Lee J) (ABFM 603). NULIS was permitted "to respond if necessary on those factual findings, ie, identify factual fidings that contradict, undercut, and not identified by [the appellant]": Transcript 136:1–3 (Mr Thomas) (ABFM 604). NULIS ultimately did not file any rejoinder (ABFM 611).

23. **Fact 1**:[10] the impugned fees existed only because commissions were being paid; the fees disappeared if commissions disappeared: AJ [67], [69] (Lee J) (CAB 404–405).

24. **Fact 2**:[11] the cessation of the impugned fees resulted in no change in the rights of a member or in the services provided by the trustee: AJ [67], [70] (Lee J) (CAB 404–405). Lee J emphasised that this fact "is of significance. A charge exacted for the trustee's administration and operation would ordinarily be expected to correspond to the performance of some administrative or operational function. Yet the evidence was that the fee could disappear without any corresponding diminution in trustee services": AJ [70] (CAB 405).

25. **Fact 3**:[12] the impugned fees could be "turned off" and rebated: AJ [71] (Lee J) (CAB 405). Lee J emphasised that "[t]his feature sits awkwardly with the idea that the fee remunerated the trustee for the exercise of its own functions. There is a need to approach the construction task with a degree of commercial commonsense. A charge that can be removed and rebated without the trustee ceasing or altering any administrative activity looks very much like a pass-through amount attached to an external commission arrangement than remuneration for trustee administration".

26. **Fact 4**:[13] for asset-based or trail commissions, a specific portion of the administration fee was to pay the commission (AJ [72] (Lee J) (CAB 405), [205]

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[10] Fact 1 was found by the primary judge: PJ [563] ("the Grandfathering Decision … had a direct effect on members. If the commissions were grandfathered, NULIS would continue to charge fees to members which were then to be applied to the payment of commissions") (CAB 203), [795] (CAB 282); see also PJ [331], [336] (CAB 126–128). Fact 1 was also accepted by NULIS: Transcript 47:46–48:1 (Mr Thomas) ("There was clear and economic equivalent connection [between the fees charged and the commissions paid], [NULIS is] not shying away from that") (ABFM 515–516); see also footnote 13 below.

[11] Fact 2 was accepted by the majority: AJ [188] (CAB 432).

[12] Fact 3 was found by the primary judge (PJ [677] (CAB 234)) and accepted by the majority (AJ [187] (CAB 432)). See also PJ [672] (CAB 230–232).

[13] Fact 4 was found by the primary judge: PJ [795] (for contribution fees) (CAB 282), [797] ("Based on Ms O'Neal's evidence NULIS in its capacity as trustee charged a fee for commission on the sale of a product and as a component of the administration fee") (emphasis added) (CAB 282); see also PJ [265] ("removal of fees or the portion of fees referable to the commissions paid to financial services licensees for all TUSS Commission Products"), [638], [675] (CAB 105, 221–222, 233). Fact 4 was also accepted by NULIS: Transcript 46:19–23 (Mr Thomas) ("there has never been a contest between the parties that,

(CAB 436–437)), and for contribution commissions, the entirety of the contribution fee was paid as a commission to the financial adviser (see paragraph 42 below). In respect of the former, it is irrelevant that the impugned charge took the form of a single administration fee, rather than a separately identified exaction: *contra* AJ [149], [181] (CAB 421, 430). The absence of a distinct charge does not determine the character of the exaction. The question remains whether, in substance, the fee was exacted for a purpose falling within the scope of the trustee's charging power. That question cannot be answered by reference to the form of the charge alone: AJ [83]–[85] (Lee J) (CAB 407–408).

27. **Fact 5**:[14] there was no legal requirement that advisers provide any ongoing services to members in exchange for the receipt of commissions: AJ [73] (Lee J) (CAB 405); PJ [85], [851]–[878] (CAB 34, 297–304). Lee J emphasised that this fact "militates against any suggestion that the fee was exacted in order to fund some continuing service delivered to the member. If there was no legal obligation of ongoing service, and if the trustee's own services did not change when the fee was 'turned off', the character of the fee is more readily seen for what it was": AJ [73] (Lee J) (CAB 405).

28. **Fact 6**:[15] NULIS never suggested that the payment of commissions was justified under cl 4.8 of the Trust Deed (ABFM 40) by way of indemnity;[16] that is, NULIS' case was *not* that the trustee was reimbursing itself for a trust liability incurred in administration: AJ [74] (Lee J) (CAB 405–406).

29. Lee J concluded that, taken together, these six facts reveal that the impugned fees functioned, in substance and operation, as a mechanism to fund commissions, not as remuneration for any work done in the trustee's administration and operation

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economically speaking, part of the administration fee in this particular case … formed part of a pool of funds from which NULIS paid out commissions in its corporate capacity") (ABFM 514).

[14] Fact 5 was admitted by NULIS in its Defence: Defence to 5FASOC, [51(l)(ii)], [51A(f)(ii)] (ABFM 433, 435). Fact 5 was also the agreed answer to Common Question 17 (CAB 355); AJ [86] (Lee J) (CAB 408).

[15] Fact 6 was not disputed by NULIS and accepted by the majority: recall AJ [159] (CAB 423).

[16] Clause 4.8(b), in the body of the Trust Deed, is an orthodox indemnity clause which protects the trustee against liabilities incurred while acting as trustee: AJ [39], [58] (Lee J) (CAB 399, 403).

of the fund: AJ [75] (Lee J) (CAB 406). They were "gratuitous" in the sense identified by this Court in *Lewski*.[17]

30. The majority did not reject the six facts identified by Lee J. They accepted them. For example, their Honours accepted that "members of at least some commission-paying products could, in effect, reduce the net administration fee charged". Their Honours also accepted that where a member's trail commission ceased and a rebate was given, "the services provided by NULIS to that member did not change. Nor did what NULIS have to do as trustee to administer and operate TUSS change" such that "the tasks performed by [NULIS] remain[ed] constant": AJ [187]–[189] (CAB 432). However, the majority held that these facts carried no "significance": AJ [189] (CAB 432). Their Honours' finding that these facts can be denied significance — so that a charge bearing no connexion to a trustee's administration and operation is nonetheless a charge "for" that administration and operation — is sought to be overturned by this appeal. The following matters support that outcome, in addition to Lee's J reasons.

31. *First*, the majority rejected the "suggestion that any remuneration NULIS paid to itself must have a direct connexion with the exercise by NULIS, as trustee, of some particular function in undertaking the administration of the trust": AJ [196] (CAB 434–435). That logic renders the limitation in cl 3.7 meaningless.

32. *Second*, the majority reasoned that cl 3.7 does "not require a direct nexus between the level of service provided to a particular member in the Division and the charging of a fee": AJ [190] (CAB 433). That is inconsistent with the orthodox equitable principle that when construing trustee remuneration clauses, there must be some nexus between the remuneration and the exertion of skill or effort by the trustee in administering the trust.[18] The authorities do not entertain the possibility that remuneration can be levied in exchange for the performance of no real work

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[17] *Australian Securities and Investments Commission v Lewski* (2018) 266 CLR 173 ('*Lewski*'), [26], [69] (Kiefel CJ, Bell, Gageler, Keane, and Edelman JJ).

[18] *Re Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* [1999] 2 Qd R 524, 526–527 (Williams J); *Re Cuesuper Pty Ltd* [2009] NSWSC 981, [17] (Palmer J); *Application by United Super Pty Ltd atf Construction and Building Unions Superannuation Fund* [2021] NSWSC 1679, [85] (Henry J); *Artcam Enterprises Pty Ltd v Campbell McLaren* [2023] VSC 196, [96] (Delany J).

by the trustee.[19] Construing the concept of remuneration in this manner accords with the natural meaning of the word, being to pay for services rendered or work done,[20] such that the concept connotes a connection between the payment received and the provision of work or services.[21]

33. *Third*, the majority reasoned that the fees charged need have no "direct connection" or "direct nexus" with any services provided by the trustee on the footing that NULIS is a for-profit commercial trustee entitled to receive a profit: AJ [167], [176], [179], [197] (CAB 426, 429, 435). The appellant has never contended that cl 3.7 is confined to cost recovery; remuneration ordinarily includes profit: AJ [50] (Lee J) (CAB 401). The question is not whether a charge may include profit, but whether the charge satisfies the requirements of being "for the administration and operation of this Division": AJ [49]–[50] (Lee J) (CAB 401). To equate all corporate profit with the impugned exaction is to read the limiting words out of cl 3.7.

34. *Fourth*, the majority (relatedly) reasoned that the fact for-profit superannuation trustees can take profit "tells against a narrow construction of cl 3.7 … that fastens on assessing exactly what [NULIS] did, and whether it applied funds exacted as administration fees for purposes that cannot be tied to some exertion on [NULIS'] part": AJ [196], [199] (CAB 434–435). That reasoning is contrary to orthodox equitable principle that remuneration and charging clauses are subject to strict construction.[22] Although the Trust Deed derogates from the self-dealing rule

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[19] The closest they come is to decipher a distinction between remuneration for work performed in a trustee's professional capacity and remuneration for "care and trouble"; the latter is carved out of the remuneration right unless there are very clear words to the contrary: *Saffron v Cowley* [2012] NSWSC 1108, [9]–[10] (White J).

[20] *Chalmers v Commonwealth* (1946) 73 CLR 19, 37 (Williams J).

[21] *Settlements Agents Supervisory Board v L J Hooker Settlements Pty Ltd* [2009] WASCA 89, [22] (Martin CJ, with whom Pullin JA and Newnes AJA agreed); *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* (2015) 239 FCR 461, [36] (Bromberg J).

[22] *Re Gee* [1948] Ch 284, 292 (Harman J) ("This type of clause has always received a strict interpretation from the courts"); *Simmons v Arthritis Queensland Ltd* [2023] QSC 251, [14(a)] (Freeburn J); J D Heydon and M J Leeming (eds), *Jacob's Law of Trusts in Australia* (LexisNexis, 8th ed, 2016), [17–39], citing *Breakspear v Ackland* [2009] Ch 32, [121] (Briggs J). As also noted in Donovan WM Waters, Mark R Gillen, and Lionel D Smith (eds), *Waters' Law of Trusts in Canada* (Thomson Carswell, 3rd ed, 2005), 1163, English and Canadian courts have also been strict in their construction of charging clauses (citing *Re Bryant Isard & Co.* 57 O.L.R. 471, [1925] 4 D.L.R. 157 (Ont. C.A.); *Stephen Miller*, [1918] 2

(cl 1.3(a)(2) (ABFM 34); cl 4.6(b) (ABFM 39–40); Sch 1 cl 1.3 (ABFM 69)), that does not permit self-dealing of an unlimited kind.[23] Regardless of how broadly or narrowly the words "administration" and "operation" are read, "they are not devoid of content and hence limitation. They refer to the trustee's own functions in administering and operating the Division. They do not naturally encompass any outgoing or commercial objective which the trustee may think beneficial to pursue": AJ [49] (Lee J) (CAB 401).

35. *Fifth*, the majority reasoned that the appellant "conflate[d]" fees and commissions (AJ [170], [180] (CAB 427, 429–430)) and impermissibly traced the "ultimate destination of the funds so received" (AJ [197] (CAB 435)). The appellant's case does not turn on the destination of the money after receipt. It concerns the anterior question of the basis on which the charge was exacted from members: AJ [66]–[67], [81], [84]–[85] (Lee J) (CAB 404, 407–408). None of the six facts requires any "tracing analysis": *contra* AJ [197] (CAB 435).

***The character of a fee charged by a superannuation trustee is not to be determined by a PDS***

36. The orthodox approach to the proper construction of charging and remuneration clauses in trust deeds was adopted by Lee J: his Honour correctly reasoned that the limiting words in cl 3.7 ("for the administration and operation of this Division") require inquiry into the substantive purpose and application of the impugned fee.

37. By contrast, the majority's approach proceeds on the footing that so long as the label given to a fee in disclosure documents to beneficiaries is one of "administration" or "operation", then they are authorised by cl 3.7. Specifically, Hespe and Button JJ reasoned that: (i) "[t]he question of whether NULIS was empowered by the trust deed to charge [the impugned] administration fees … must be addressed by reference to what it was that NULIS, in its capacity as

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W.W.R. 1042, 40 D.L.R.418 (B.C.C.A.), affirmed (1919), 59 S.C.R. 690, 49 D.L.R. 698 (S.C.C.)). The same is true in New Zealand: *Kinnon v Hong* [2023] NZHC 1988, [66]. By contrast, the primary judge held that "a broad construction [of cl 3.7] is appropriate": PJ [423] (CAB 153).

[23] Transcript 6:16–35 (Mr Walker; Lee J) (ABFM 474).

trustee, was in fact charging" (AJ [150] (CAB 421)); and (ii) "[w]hat NULIS, as trustee, was charging is to be identified by looking to the terms of the [PDSs]" (AJ [151] (CAB 421)).[24] Their Honours then considered what the PDSs disclosed regarding the charging of administration fees (but not contribution fees) (AJ [152]–[156] (CAB 421–423)) and concluded that "[i]n its trustee capacity, NULIS charged administration fees at a stated percentage rate, in accordance with the disclosures made in the PDSs" (AJ [171] (CAB 427)), and "[t]he fact of such commissions being paid, and the revenue acquired from charging administration fees being used, in part, to fund the payment of those commissions was disclosed in PDSs" (AJ [198] (CAB 435)).

38. Hence, "what was charged" (AJ [150], [180] (CAB 421, 429–430)) by NULIS was determined by the majority "by looking to the terms of the [PDSs]": AJ [151] (CAB 421).[25] This, in turn, meant their Honours placed no "significance" on the substantive purpose and application of the impugned fees: AJ [189] (CAB 432).

39. The disclaimer at AJ [151] (CAB 421) does not alter the operative reasoning of the majority. Their Honours fixed the character of the fee by its disclosed label rather than its substantive purpose: AJ [79]–[80], [83] (Lee J) (CAB 406–407). The majority's reasons elevate descriptions in PDSs to being determinative of whether limitations in charging and remuneration clauses are satisfied. The PDSs were used by their Honours not merely to identify, as a matter of fact, what fee was charged to members, but as part of the reasoning by which it was concluded that the character of the fee is to be determined at the point of disclosure.

40. On the majority's novel approach, it would be sufficient that a fee be *described*[26] and *disclosed*[27] as an "administration fee" for it to fall within the trustee's

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[24] See also Transcript 18:4–12 (Hespe J), 23:25–36 (Hespe J), 24:15–46 (Hespe J, Lee J), 105:22 – 106:20 (Button J) (ABFM 486, 491–492, 573–574).

[25] Indeed, such was the weight placed on the terms of the PDSs that the majority bemoaned the fact that neither party made submissions regarding the legislative context that governed the disclosure requirements applicable to PDSs issued by superannuation entities: AJ [174]–[175] (CAB 428).

[26] Compare *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, [63] (Kiefel CJ, Keane, and Edelman JJ) (a label is not determinative of, or even relevant to, the substantive characterisation of a fee).

[27] Disclosure cannot enlarge a trustee's remuneration and charging powers: AJ [83] (Lee J) (CAB 407). A PDS is also not a source of contractual terms: see *Aussiegolfa Pty Ltd (Trustee) v Commissioner of*

charging power, even if, in substance, the fee was exacted for a purpose manifestly unconnected with the administration and operation of the fund. The limitation expressed in cl 3.7 is, on that construction, rendered "illusory" such that the clause is effectively textually unlimited: AJ [53], [61], [80], [89] (Lee J) (CAB 402–403, 406–408).

***The contribution fees charged are inconsistent with the majority's reasoning***

41. If, contrary to the foregoing, the majority's approach is without error, then contribution fees cannot have been authorised under cl 3.7.

42. As noted above, contribution commissions were funded through a contribution fee (separate to the administration fee). This fee was not disclosed or described in the PDS as being for the administration or operation of the fund. Rather, the PDS stated that, "The Contribution fee is paid to your financial adviser" (ABFM 172).[28] In further contrast to the administration fee, the *whole* of the contribution fee was used to fund the commission: NULIS' own evidence was "the contribution fee and the contribution commission are one and the same": PJ [795] (CAB 282).

43. On the majority's analysis, this type of fee cannot satisfy the limitation in cl 3.7 and must be beyond power.

44. Rather than addressing this inconsistency in their reasoning, the majority compounded their error by holding (wrongly) that Mr Brady had abandoned in oral argument any complaint about contribution fees, and proceeded to not address the issue of contribution fees on its merits: AJ [142], [202]–[205] (CAB 419, 436–437).

45. The majority reached this finding on the basis that Mr Brady's Senior Counsel had answered "no" in response to a question from Button J, which the majority

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*Taxation* (2018) 264 FCR 587, [214]–[216] (Steward J); *Huntley Management Ltd v Timbercorp Securities Ltd* (2010) 187 FCR 151, [41]–[42] (Rares J).

[28] The Contribution Fees PDS (ABFM 166–262) was handed up on day 2 of the hearing before the Full Court (ABFM 605): Transcript 127:12–17 (Mr Walker) (ABFM 595); see also Supplementary Note, [7] (ABFM 607).

described as an "unqualified" abandonment of the appeal in relation to contribution fees: AJ [204] (CAB 436).

46. That was not the case. In commencing his oral address, Senior Counsel for Mr Brady identified contribution fees as one of the impugned fees and that their purpose was to fund contribution commissions: Transcript 14:41–15:13, 18:19–40 (ABFM 482–483, 486). The next day, during reply, Button J asked Senior Counsel about the compartmentalisation of the administration fee, to which Senior Counsel observed that such an exercise was not necessary for group members "who were actually charged a contribution fee so-called, which was wholly with respect to … such a pass-through obligation": Transcript 125:6–43 (ABFM 593).

47. Almost immediately thereafter, Senior Counsel sought to reiterate the "three variants" of fees, with the first identified being "the contribution-based commission". In the course of handing up a PDS identifying how the contribution fee was disclosed (ABFM 166–262), Button J asked, "Is this case concerned with the contribution commissions?", to which Senior Counsel responded, "No. I'm happy not to go to this. I was trying to answer your Honour's question about other kinds of---". Button J interjected to clarify that her Honour's "question wasn't so much about the contribution commissions, but the different ways in which the trail commissions … are accounted for". In response, Senior Counsel noted "This [the PDS just handed up] won't go to that. No. I'm obliged, your Honour. I don't want to pursue rabbits I don't have to. Suffice it to say, there are different kinds of fees. In some of them they were wholly devoted to funding a commission, in some only a component": Transcript 127:7–128:13 (ABFM 595–596).

48. The above passages make plain that at no point did Mr Brady abandon the contribution fee claim without qualification; the reference to the case not being about contribution fees was confined to Mr Brady's individual claim — he was charged administration fees but not contribution fees.

49. The following matters put it beyond doubt that contribution fees were never abandoned as part of the claim.

50. *First*, neither Lee J nor NULIS considered Mr Brady to have abandoned contribution fees. Lee J correctly identified that Mr Brady's submissions and argument were conducted on the footing that the impugned fees were linked, in substance and operation, to the continuation of the commission arrangements of the kind identified: AJ [90] (CAB 408–409). NULIS did not raise any complaint about the inclusion of contribution fees in the Supplementary Note, nor sought an opportunity to respond to the submission.[29]

51. *Second*, the finding of abandonment is contradicted by the contribution fees being expressly pleaded (as the majority accepted at AJ [202] (CAB 436)),[30] pressed in the further amended notice of appeal[31] and Mr Brady's written submissions in chief before the Full Court[32] (as the majority accepted at AJ [203] (CAB 436)), and included in the Supplementary Note filed at the Full Court's request.[33]

52. With respect to the Supplementary Note, the majority noted that "the inclusion of reference to contribution commissions in the post-hearing list of relevant facts filed by the Appellant [was] unexplained": AJ [204] (CAB 436). With respect, no explanation was needed; the claim had never been abandoned.[34]

53. *Third*, the fact that contribution fees was not abandoned is reinforced by Common Question 22, the answer to which was varied by order 1 of the Full Court, which is defined to include contribution fees. Common Question 22 reads, in part, as follows (CAB 356–357):

> Was the charging by NULIS of fees to the accounts of the Applicant, the Sample Group Member (and Group Members whose superannuation interest was held on the same product terms as the Applicant or Sample

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[29] See footnote 9 above. Instead, NULIS provided the Full Court with a copy of an aide-memoire it handed up during the hearing (ABFM 611, 636–639).
[30] 5FASOC [24], [29], [30(b)] (ABFM 341–342).
[31] See the defined term "fees for commissions" as incorporated in Grounds 1(a) and 1(b) (CAB 384).
[32] Mr Brady's appeal submissions in chief dated 30 January 2026 at [9], [14] (ABFM 457, 458).
[33] Supplementary Note, [7] (ABFM 607). Footnote 16 of the Supplementary Note (ABFM 607) also drew attention to the June 2016 Grandfathering Paper quoted at PJ [210(2)] and [210(4)] (CAB 81–83).
[34] To the extent the majority was confused by this "unexplained" inclusion (noting Lee J was not so confused), their Honours did not write to Mr Brady to seek an explanation or clarification.

Group Member) or the Legacy Product Holders for the purpose of funding Commissions:

(a) not authorised by the terms of the MLC Super Fund Trust Deed, and in particular Schedule 1 cl. 3.7 of the MLC Super Fund Trust Deed; …

54. As the majority recognised at AJ [202] (CAB 436), "Commissions" were defined in the Common Questions as (CAB 363) (emphasis added):

(a) commissions that were paid to the Applicant and Group Members' financial services licensees or their representatives funded by fees charged to the Applicant and Group Members' superannuation accounts (including by administration fees, **contribution fees** and insurance premiums); …

55. The majority answered Common Question 22, "No: the fees referred to were authorised to be charged by NULIS by cl 3.7 of Schedule 1 of the Trust Deed": AJ [207] (CAB 437); order 1 of the orders of the Full Court dated 21 May 2026 (CAB 439). That answer applies to contribution fees.

56. It follows that order 1 of the Full Court's orders does not reflect the reasons of the majority: the "fees referred to" in Common Question 22 include contribution fees which the majority did not address on their merits (AJ [205] (CAB 436–437)); and, if they had addressed these fees on their merits, would have concluded, based on their PDS-based approach, that they were not authorised by cl 3.7 (see paragraph 43 above).

57. The Full Court's determination affects, at the least, the more than 100,000 members of this Fund.[35] The majority's answer to Common Question 22 operates as a "statutory estoppel" binding every group member,[36] including those who paid contribution fees, notwithstanding that those claims were never decided on their merits. That consequence makes the majority's error one of practical as well as

[35] See footnote 4 above.

[36] *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212, [52] (French CJ, Kiefel, Keane, and Nettle JJ); *BHP Group Ltd v Impiombato* (2022) 276 CLR 611, [14] (Kiefel CJ and Gageler J).

legal significance: AJ [12]–[15], [92], [130]–[131], [135]–[138] (Lee J) (CAB 394–395, 409, 415–417).

***Notice of Contention***

58. By its Notice of Contention (CAB 570–571), NULIS contends that the Full Court (Hespe and Button JJ; Lee J agreeing) erred in finding that cl 4.2 of Sch 1 to the Trust Deed (ABFM 71–72) was not a source of power authorising NULIS to determine and charge fees, including the administration fees challenged by the appellant.

59. The Notice of Contention fails for the reasons given by the Full Court. Clause 4.2 imposed on NULIS a mandatory duty to administer Member Packages in accordance with their terms. A provision that creates a duty to administer cannot, without more, be construed as conferring a charging power separate from the specific remuneration clause in cl 3.7. The Full Court was correct to reject that construction: AJ [35]–[40], [47]–[63], [78], [91] (Lee J) (CAB 398–404, 406, 409); AJ [164] (Hespe and Button JJ) (CAB 425–426).

60. The cl 4.2 argument is also self-defeating. A fee charged solely to fund commissions to financial advisers cannot be said to be an act of administering Member Packages "in accordance with [their] terms". Those terms governed the member's rights and the trustee's obligations to the member; they did not confer on the trustee an entitlement to levy charges for the benefit of third-party financial advisers.

## Part VII: Orders sought

61. In accordance with the appellant's notice of appeal (CAB 567–569), the appellant seeks the following orders:

    (1) Appeal allowed.

    (2) Set aside orders 1 to 3 of the Full Court of the Federal Court of Australia made on 21 May 2026 and in lieu thereof order that:

(a) order 1 of the orders of the Federal Court of Australia dated 12 February 2025 be set aside;

(b) Schedule A to the orders of the Federal Court of Australia dated 12 February 2025 be varied so that the answer to Question 2(b)(ii) and Question 22 is "Yes"; and

(c) the respondent pay the appellant's costs of the proceedings in the Federal Court of Australia and the Full Court of the Federal Court of Australia.

(4) The matter be remitted to the Federal Court of Australia for determination of all questions concerning relief including pre-judgment interest.[37]

(5) The respondent pay the appellant's costs of and incidental to this appeal.

**Part VIII**: **Estimate of time**

62. The appellant estimates that it requires two hours for the presentation of its oral argument.

Dated: 29 October 2026

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[37] See Transcript 117:12–118:5 (ABFM 585–586).

## ANNEXURE TO APPELLANT'S SUBMISSIONS

An annexure to the appellant's submissions is not required.