

Form 2 (version 3)

Rule 6.2

FURTHER AMENDED COMMERCIAL LIST STATEMENT

(filed pursuant to leave granted by The Honourable Justice Einstein on 6 May 2009)

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity Division
List	Commercial List
Registry	Sydney Registry
Case number	50092 of 2005

TITLE OF PROCEEDINGS

Plaintiff	Jeffrey Alan Kernahan
First defendant	ACN 003 135 475 Pty Ltd (formerly known as LifeTrack Management Ltd (ACN 003 135 475)) (in its own capacity and as trustee of the LifeTrack Superannuation Fund, the AM Pooled Superannuation Trust, the AM Pooled Superannuation Trust No 1, the AM Pooled Superannuation Trust No 5)
Number of defendants	4

FILING DETAILS / ADDRESS FOR SERVICE

Filed for	Plaintiff
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VENUE

Listed for directions at Sydney on ~~20 August 2008~~ 16 October 2009

A. NATURE OF THE DISPUTE

1. The plaintiff sues on his own behalf and on behalf of persons whose claims give rise to a substantial common issue of law and fact (**group members**) being persons who invested monies with public offer superannuation funds or a pooled superannuation trust of which the first defendant (**LML**) was the trustee.
2. The plaintiff and group members:
 - a. during the period 9 June 1999 to 28 September 2001 (**Relevant Period**);
 - b. invested and maintained their investment in one or a combination of sub-funds which invested exclusively in endowment life insurance policies (**traded policies**) which had been sold by the original policy holder (**Traded Policies Funds**);
 - c. invested and thereafter maintained their investment in Traded Policies Funds in reliance upon contravening conduct of LML and/or the second defendant, the parent company of LML (**AMCL**), being contravening conduct which commenced in 1996 and in which the third and fourth defendants also engaged or further or alternatively, were involved;
 - d. by and/or because of the contravening conduct of LML, ~~and/or~~ AMCL, the third and/or fourth defendants have suffered loss.

B. ISSUES LIKELY TO ARISE

It is anticipated that the following issues are likely to arise in this proceeding:

1. Whether LML, ~~and/or~~ AMCL, the third and/or fourth defendants engaged in conduct in contravention of a statutory norm prohibiting misleading and deceptive conduct.
2. Whether LML issued regulated documents or authorised the issue of regulated documents ~~engaged in conduct in~~ contravention of section 162 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS**).

3. Whether the investments of the plaintiff and/or group members in Traded Policies Funds and the maintenance of those investments in Traded Policies Funds was causally connected to any of the contravening conduct.
4. Whether the third and/or fourth defendant was a person involved in the contravention of a statutory norm prohibiting misleading and deceptive conduct by LML and/or AMCL.
5. Whether the plaintiff and/or group members suffered loss and damage by and/or because of the contravening conduct.
6. The quantification of statutory compensation.

C. PLAINTIFF'S CONTENTIONS

A. Preliminary

1. This is a representative proceeding in accordance with Rule 7.4 of the *Uniform Civil Procedure Rules 2005* and the plaintiff sues for his own benefit and for the benefit of group members who are listed in Schedule A.
2. The plaintiff and those of the group members who are listed in Schedule A in bold type (**Paulwen clients**) were, during the Relevant Period, clients of Paulwen Holdings Pty Ltd (**Paulwen**) trading as "Financial Structures" being a corporation which was an investment adviser holding a licence under Part 7.3 of the *Corporations Law* or Part 7.3 of the *Corporations Act 2001 (Cth)*.
3. LML was:
 - a. at all material times a public company named LifeTrack Management Ltd ACN 003 135 475;
 - b. at all material times the trustee of a public offer superannuation fund as defined in section 18(1) of SIS;
 - c. from at least 1 July 2000 the trustee of a pooled superannuation trust as defined in section 10 of SIS; and

- d. the trustee of trusts which relevantly comprised the individual superannuation amounts which the plaintiff and a number of group members invested in the Traded Policies Funds (as defined in paragraph 8).
4. AMCL (now known as PM Corporation Pty Ltd) was at all material times:
 - a. a public company named AM Corporation Ltd ACN 001 372 676; and
 - b. indirectly, the parent company of LML.
 5. At all material times ACN 060 777 237 Pty Ltd (deregistered) (formerly known as AM Life Ltd) (**AM Life**) was:
 - a. the parent company of LML; and
 - b. a subsidiary of AMCL.
 6. The third defendant, Rich, was at all material times from at least January 1996:
 - a. a director of LML;
 - b. a director of AMCL;
 - c. a director of AM Life;
 - d. until October 2001 the Chief Executive Officer and managing director of:
 - i. LML;
 - ii. AMCL;
 - iii. AM Life;
 - e. from October 2001 the Deputy Chairman of the Board of Directors of:
 - i. LML;
 - ii. AMCL;
 - iii. AM Life;

- f. from on or about 25 June 2001, a member of the AM Investment Committee being a committee of the Board of Directors of AMCL (**AM Investment Committee**);
- g. from at least 21 December 1999 until on or about 27 March 2000, a member of the General Investment Committee established on 24 May 1999 by AMCL (**GIC**); and
- h. from its inception in or about October 1999, a member of the Traded Policies Sub-Committee being a sub-committee of the AM Investment Committee (**Traded Policies Sub-Committee**).

7. The fourth defendant, Smith, was at all material times from at least January 1996:

- a. a director of LML;
- b. a director of AMCL;
- c. a director of AM Life;
- d. until October 2001, the Chairman of the board of directors of:
 - i. LML;
 - ii. AMCL;
 - iii. AM Life;
- e. from on or about 20 March 1997, a member of the AM Investment Committee;
- f. from at least 21 December 1999 until on or about 27 March 2000, a member of the GIC; and
- g. from its inception in or about October 1999, the Chairman of the Traded Policies Sub-Committee; and
- h. at all material times, a member of the AM Compliance Committee, being the committee referred to in paragraph 40 of the Affidavit of Andrew Paul Tennent Sutherland, sworn 27 October 2008 and filed herein (AM Compliance Committee).

B. The Traded Policies Funds and traded policies generally

B1 The Traded Policies Funds

8. At various times during the periods referred to below, AMCL, LML and AM Life offered to persons (including the plaintiff and group members) the opportunity to acquire a beneficial interest in a superannuation fund (as defined by section 10 of SIS) by investing in one or more of the investment options set out below:
 - a. from January 1996 to June 1998 – an investment option known until December 1996 as the Traded Policies Fund and known subsequently as the Series I Traded Policies Fund (**Traded Policies Fund**);
 - b. from on or about 12 December 1996 to 31 March 2001 – an investment option known until about June 1998 as the Traded Policies Fund and thereafter as the Traded Policies Fund (Series II) (**Series II Fund**);
 - c. from in or about December 1998 until 31 March 2001 – an investment option known as the Traded Policies Fund (Series III) (**Series III Fund**);
 - d. from in or about March 1999 to 30 June 2000 – an investment option known as the International Traded Policies (Hedged) Fund (**International (Hedged) Fund**);
 - e. from in or about March 1999 to 30 June 2000 – an investment option known as the International Traded Policies (Unhedged) Fund (**International (Unhedged) Fund**);
 - f. from on or about 1 April 2001 to 30 June 2002 – an investment option known as the Diversified Traded Policies Fund (**DTP Fund**),

(collectively, the **Traded Policies Funds**).
9. LML and AMCL issued and published documents containing invitations to invest in the Traded Policies Funds and other documents to be read in conjunction with them and AM Life issued and entered into standard-form contracts with investors (together these documents are referred to as **Offer Documents**).

Particulars

Those of the Offer Documents known to the plaintiff and the date of their issue and publication are particularised in column 1 of Schedule B.

10A. In relation to each Offer Document, Rich:

- a. reviewed drafts;
- b. approved its contents; and
- c. authorised and directed that it be issued and published.

Particulars

The Plaintiff refers to and relies upon paragraph 6 above, paragraph 40 of the Affidavit of Andrew Paul Tennent Sutherland sworn 27 October 2008 and filed herein and section 4.1 of the Australian Prudential Regulation Authority Inspector's Report of the Investigation of the Affairs of the AM Pooled Superannuation Trust (APRA Report). Further particulars may be provided after discovery.

10B. In relation to each Offer Document, Smith:

- a. reviewed drafts;
- b. approved its contents; and
- c. authorised and directed that it be issued and published.

Particulars

The Plaintiff refers to and relies upon paragraph 7 above, paragraph 40 of the Affidavit of Andrew Paul Tennent Sutherland sworn 27 October 2008 and filed herein and section 4.1 of the APRA Report. Further particulars may be provided after discovery.

- 10. For the purposes of section 162 of SIS, the Offer Documents were regulated documents in relation to a public offer entity.
- 11. For the purposes of section 162 of SIS, LML was the trustee authorising the issue of the Offer Documents.

12. From in or about May 2002 until in or about July 2002, LML and AMCL invited persons who then had investments in the DTP Fund, to invest in the Fixed Term Traded Policies Fund (**FTTP Fund**) from on or about 1 July 2002 (**FTTP invitation**).

Particulars

By a letter from LML and AMCL dated 16 May 2002, the plaintiff was advised that, unless instructed otherwise, an investment in the DTP Fund would become an investment in the FTTP Fund on 1 July 2002; the plaintiff did not instruct otherwise.

12A. The FTTP invitation was:

- a. signed by Smith;
- b. approved by Rich and Smith; and
- c. issued and published on the authorisation and direction of Rich and Smith.

Particulars

The Plaintiff refers to and relies upon paragraphs 6 and 7 above and section 4.1 of the APRA Report. Further particulars may be provided after discovery.

13. At all material times the predominant investment assets of the Traded Policies Funds and the FTTP Fund comprised traded policies.

B2 Characteristics of traded policies and the market generally

14. At all material times:

- a. traded policies were endowment life insurance policies;
- b. traded policies entitled the policy owner to receive payment only:
 - i. following the occurrence of an event defined in the policy, such as the death of the insured or the end of the endowment period; and
 - ii. of an amount consisting of the insured sum plus a further amount being discretionary bonuses (which upon declaration became accrued rights);
- c. traded policies, unlike bonds or shares, paid no interest payments or dividends;

- d. traded policies required the holder of the traded policy to pay premiums during the life of the policy; and
- e. traded policies entitled the holder of the traded policy to surrender the policy during its life to the issuing life office and to receive a payment at that time.

C. Representations about Traded Policies Funds

C1 Primary representations

15. LML_z and AMCL_z Rich and Smith made representations to the plaintiff and group members (primary representations) that:

- a. each of the Traded Policies Funds was suitable for investors with a low-risk tolerance level (**low-risk representation**);

Particulars

The low-risk representation was express and in writing and made to the plaintiff and group members and was contained in the Offer Documents at the places specified in column 2 of Schedule B and was a representation made from the time of the issue of the relevant Offer Documents.

- b. each of the Traded Policies Funds:
 - i. had sufficient liquidity management plans to allow them to maintain positive liquidity (i.e. cash reserves); and
 - ii. had and would maintain sufficient liquidity,(**liquidity representation**);

Particulars

The liquidity representation was express and in writing and implied; insofar as it was express it was made to the plaintiff and group members and was contained in the Offer Documents at the places specified in column 3 of Schedule B; insofar as it was implied, it was implied by reason of the existence of the exit rule (as defined in paragraph 30) and that the Offer Documents represented that the Traded Policies

Funds had and would invest predominantly in traded policies which had the characteristics pleaded in paragraph 14; the liquidity representation was a representation made from the time of the issue of the relevant Offer Documents.

- c. an investment in the Series II Fund was less risky than an investment in AM's Australian Fixed Interest Fund or an investment in AM's Capital Stable Fund (**Series II Fund representation**);

Particulars

The Series II Fund representation was express and in writing and made to the plaintiff and group members and was contained in the Offer Documents at the places specified in column 4 of Schedule B and was a representation made from the time of the issue of the relevant Offer Documents.

- d. an investment in the Series III Fund was less risky than an investment in AM's Balanced Growth Fund (**Balanced Growth Fund**) and exhibited broadly similar risk/return characteristics to capital stable funds (**Series III Fund representation**);

Particulars

The Series III Fund representation was express and in writing and made to the plaintiff and group members and was contained in the Offer Documents at the places specified in column 4 of Schedule B and was a representation made from the time of the issue of the relevant Offer Documents.

- e. An investment in the International (Hedged) Fund exhibited broadly similar risk/return characteristics to capital stable funds (**International (Hedged) Fund representation**);

Particulars

The International (Hedged) Fund representation was express and in writing and made to the plaintiff and group members and was contained in the Offer Documents at the places specified in column 4 of Schedule B and was a representation made from the time of the issue of the relevant Offer Documents.

- f. an investment in the Traded Policies Funds exhibited broadly similar risk/return characteristics to an investment in five year government bonds (**Government Bond representation**).

Particulars

The Government Bond representation was express and in writing and made to the plaintiff and group members and was contained in the Offer Documents at the places specified in column 4 of Schedule B and was a representation made from the time of the issue of the relevant Offer Documents.

C2 Implied representation

16. LML_z and AMCL_z Rich and Smith represented by making the primary representations and offering investors the opportunity to invest in the Traded Policies Funds by issuing and publishing the Offer Documents (**implied representation**) that:

- a. the primary representations were and continued to be materially accurate; and
- b. all matters material to the risk of making or maintaining investments in Traded Policies Funds had been disclosed.

Particulars

The implied representation is to be implied by reason of the making of the primary representations and by all of the circumstances, including the fact that they were made in Offer Documents which were regulated documents in relation to a public offer entity within the meaning of section 162 of SIS.

C3 Nature of representations

17. The primary representations and the implied representations (**representations**) were:

- a. made in trade or commerce for the purposes of sections 52 and 55A of the *Trade Practices Act 1974 (Cth) (TPA)*;
- b. made in trade or commerce for the purposes of sections 42 and 50 of the *Fair Trading Act 1987 (NSW) (FTA)*;

- c. made in relation to financial services for the purposes of section 12DA of the *Australian Securities & Investments Commission Act 2001 (Cth) (ASIC Act)*;
- d. made as to the nature, the characteristics and the suitability for their purpose of services within the meaning of section 55A of the TPA and section 50 of the FTA;
- e. made, to the extent the representations were made in the Offer Documents, in relation to a regulated document within the meaning of section 162 of SIS;
- f. material statements within the meaning of section 162 of SIS; and
- g. all continuing representations in that the representations were made in circumstances where the plaintiff and group members were entitled to believe that a relevant matter affecting the plaintiff and group members or the accuracy of the representations would, if it existed, be communicated.

Particulars

The circumstances were that:

- i. *LML in its capacity as trustee of the LifeTrack Superannuation Fund (the Master Fund) was obliged to make disclosure of information concerning 'events' (as defined in Regulation 2.33 of the Superannuation Industry (Supervision) Regulations 1994 (Regulations) in force until 11 March 2002) to the plaintiff and group members;*
- ii. *LML in its capacity as trustee of the AM Pooled Superannuation Trust (PST) was obliged to make disclosure of information concerning 'events' (as defined in Regulation 2.62 of the Regulations) to members of the PST;*
- iii. *LML was obliged by reason of sections 31 and 34 of SIS, and Regulations 2.32 and 2.63 to disclose information to the plaintiff and group members (as members of the Master Fund and the PST), that LML reasonably believed a member would reasonably need to make an informed judgment about the effect (generally and in respect of the member's current and future entitlements) of 'events' (as defined in Regulation 2.62 of the Regulations);*
- iv. *LML, ~~and~~ AMCL, Rich and Smith had in Offer Documents represented that in the event there was a material alteration of any information in the*

Offer Documents, the information would be withdrawn as further particularised at the places specified in column 5 of Schedule B;

v. Rich held the positions in paragraph 6 above and by reason thereof was obliged to ensure LML complied with its obligations under the Regulations;

vi. Smith held the positions in paragraph 7 above and by reason thereof was obliged to ensure LML complied with its obligations under the Regulations.

h. representations made as to:

i. the then existing nature of an investment in the relevant Traded Policies Fund or Funds; and

ii. future matters with the meaning of section 51A of the TPA, section 41 of the FTA and/or section 12BB of the ASIC Act.

D Investments by plaintiff and group members and reliance

18. During the Relevant Period, the plaintiff and group members:

a. applied to LML or to AM Life to invest money in Traded Policies Funds through the Master Fund, the PST or AM Life; and

Particulars

i. *The plaintiff applied to invest via the Master Fund by way of the "LifeTrack Superannuation Fund Personal Super Application" contained in the "LifeTrack Personal Super Key Features Statement" dated 1 August 2000; this application form was signed by the plaintiff on 17 January 2001 and submitted to LML by the plaintiff's financial advisor, Paulwen.*

ii. *The plaintiff's initial investment in the Master Fund was \$249,567.33.*

iii. *Particulars of the investments in relation to group members will be provided following the trial of common issues or otherwise as the court may determine.*

b. directed that their monies be invested in one or more of the Traded Policies Funds.

Particulars

- i. Applications to invest via the Master Fund and directions to invest in Traded Policies Funds were made by completing and submitting to LML or AMCL a standard application form contained in an Investment Document.*
- ii. The plaintiff instructed on his application form that 80% of his initial investment in the Master Fund be invested in the Series II Fund, 10% in the AM Absolute Return Fund and 10% in the Deutsche Strategic Value Fund.*
- iii. Applications to invest via AM Life and directions to invest in Traded Policies Funds were made by completing and submitting to AM Life or AMCL no later than 30 June 2000, a standard form document known as a "Cashback Annuity Contract" with AM Life; or a standard form document known as a "Trustees Pooled Superannuation Contract" with AM Life.*
- iv. Applications to invest via the PST and directions to invest in Traded Policies Funds were made by completing and submitting a standard application form contained in an Investment Document on or after 1 July 2000.*
- v. Particulars in relation to group members will be provided following the trial of common issues or otherwise as the court may direct.*

19. From time to time during the Relevant Period pursuant to the directions of the plaintiff or group members:

- a. LML (as trustee of the Master Fund) facilitated the investment in one or more of the Traded Policies Funds;
- b. AM Life invested or caused the investment of monies in one or more of the Traded Policies Funds.

20. On or about 1 July 2000 Cashback Annuity contracts and Trustees Pooled Super contracts with AM Life were terminated and group members who had invested in Traded Policies Funds by means of those contracts became members of the Master Fund or PST with equivalent interests in Traded Policies Funds.

21. From time to time after 1 July 2000 LML (as trustee of the PST) facilitated investment in one or more of the Traded Policies Funds pursuant to the directions of the plaintiff and group members.
22. During the Relevant Period, the plaintiff and group members invested and continued to retain his, her or its investment in the Traded Policies Funds in reliance directly or indirectly upon some or all of the representations (and each of them).

Particulars

- i. The plaintiff, an investor with a low-risk tolerance, was a Paulwen client; in relation to the investment of his superannuation funds the plaintiff acted on the recommendation of Paul Plummer of Paulwen; Mr Plummer recommended the investment particularised in paragraph 18 to the plaintiff in December or January 2001 after Mr Plummer had read all the Offer Documents at or about the time they had been published up to and including the "LifeTrack Personal Super Key Features Statement" dated 1 August 2000.*
- ii. Among other things, Mr Plummer based his recommendation to the plaintiff on his belief (obtained by reason of being a recipient of the representations – other than the Series III Fund representation (**relevant representations**)) that (a) the plaintiff's proposed investment was low-risk, (b) that positive liquidity would always be maintained in the Series II Fund such as to allow the plaintiff to exit the Series II Fund at will, (c) that the plaintiff's proposed investment was less risky than an investment in AM's Australian Fixed Interest Fund or an investment in AM's Capital Stable Fund, (d) that the plaintiff's proposed investment exhibited broadly similar risk/return characteristics to an investment in five year government bonds and (e) that all matters material to the risk of making or maintaining investments in Traded Policies Funds had been disclosed.*
- iii. Paulwen remained the plaintiff's financial adviser until the end of the Relevant Period and Paulwen, through Mr Plummer, continued to maintain the recommendation that the plaintiff retain his investment in the Series II Fund on the basis that there had been no material change and that there had been no communication from AMCL or LML to suggest the relevant representations (or any of them) were not correct in any material respect.*

- iv. In the event the relevant representations (or any of them) were not correct Paulwen, through Mr Plummer, would not have recommended the plaintiff's investment and, in the event Mr Plummer had become aware at any time during the Relevant Period after January 2001 that the relevant representations (or any of them) were not correct he would have recommended that the plaintiff exit the Series II Fund; the plaintiff would have followed Paulwen's advice.*
- v. Particulars in relation to group members will be provided following the trial of common issues or otherwise as the court may direct.*

E Characteristics of a suitable fund for investors with a Low-Risk tolerance

23. The plaintiff and group members, being investors with a low-risk tolerance level (**low-risk investors**) investing superannuation funds in public offer superannuation funds, sought to place funds in a fund or funds which had the characteristics of a public offer fund with a low-risk investment strategy.
24. At all material times the characteristics of a public offer fund with a low-risk investment strategy were that the fund:
- a. had data recording historical returns of the fund or funds with a similar investment strategy so as to allow reasonably based predictions to be made as to future performance of the fund;
 - b. had a valuation methodology which ensured the value of an investment in the fund could be accurately measured;
 - c. had an investment strategy that in addition to providing for low-risk had appropriate regard to the issues of:
 - i. diversity;
 - ii. liquidity having regard to anticipated cash flow requirements; and
 - iii. the fund's ability to discharge its existing and prospective liabilities;
 - d. had the means to meet or substantially meet its liquidity targets;

- e. did not have an investment strategy which had any significant or material risk of capital loss;
- f. had an objective of achieving a long-term rate of return comprised of both income and capital growth;
- g. specifically excluded aggressive investments and short term investments;
- h. limited the risk of fluctuations in the value of investments, including not having any significant investments involving unhedged currency exchange rates risk;
- i. as a concomitant of low to medium risk, were likely to have low to medium growth.

Particulars

The plaintiff will file opinion evidence at the time of service of his evidence in chief which will describe in detail the usual characteristics of low-risk public offer superannuation funds which were the types of fund which were suitable for investment by the plaintiff and group members.

F The Risk Position of the Traded Policies Funds

25. For the reasons pleaded in paragraphs 26 to 33, at all material times the Traded Policies Funds were not suitable for low-risk investors.

F1 Market Issues

26. There was no or no sufficient data recording historical returns of the fund or funds with a similar investment strategy so as to allow reasonably based predictions to be made as to future performance of the fund as:

- a. other than the trusts in which the assets of the Traded Policies Funds were held, there had never been and was no other public offer superannuation fund or sub-fund forming part of such a fund which had an investment strategy (as defined in SIS) to invest exclusively or substantially in traded policies or which invested exclusively or a substantial proportion of its funds in traded policies and as a consequence there was no observable data or historical record as to how

superannuation funds investing exclusively or predominantly in traded policies in the Australian market was likely to perform;

- b. unlike the United Kingdom, which had an established traded policies market, there was no ready or developed market in Australia for the sale of traded policies and (other than sales by or via PolicyLink Pty Ltd (**PolicyLink**) to LML) bulk sales of traded policies were rare in Australia and, as a consequence, making predictions as to the future characteristics of the Australian market for traded policies and as to the volume of traded policies that would be traded on the market was highly speculative;
- c. other than bulk purchases for the purposes of the Traded Policies Funds, bulk purchases of traded policies were rare in Australia and it was difficult to predict the volume of traded policies that may become available for purchase, sale or resale.

Particulars

The Australian market consisted primarily of three suppliers: The Life Insurance Policy Exchange Pty Ltd, PolicyLink and Australian Policy Traders Pty Ltd; the major institutional purchaser was LML with whom PolicyLink had an exclusive supply agreement. Exclusive bulk purchasing / supply agreements of the type between LML and PolicyLink were unparalleled in the Australian market. The plaintiff will file opinion evidence at the time of service of his evidence in chief which will describe the market for traded policies in Australia at material times.

F2 Investment Strategy

27. At all material times no investment strategy for each of the Traded Policies Funds could have been, or alternatively, was devised for low-risk investors while the Traded Policies Funds invested in traded policies to the extent proposed by LML and AMCL.

Particulars

The plaintiff will file opinion evidence at the time of service of his evidence in chief which will describe what proper investment strategy could have existed for each of the Traded Policies Funds if the Traded Policies Funds were suitable for low-risk investors and whether the investment strategy for each of the Traded Policies Funds in the period was

