



Form 7A (version 5)
UCPR 14.3

COO

Principal Registrar &
Chief Executive Officer

DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Civil Claims
List	Professional Negligence
Registry	Sydney
Case number	2017/279308

TITLE OF PROCEEDINGS

First plaintiff	AMY RICKHUSS
Number of plaintiffs	12
First defendant	THE COSMETIC INSTITUTE PTY LTD (IN LIQUIDATION) \ (ACN 153 061 155)
Number of defendants	19

FILING DETAILS

Filed for	Certain Underwriters at Lloyd's subscribing to Policy No. 04012, 17th Defendant
Legal representative	Simon Ellis, Lander & Rogers
Legal representative reference	GJH.GLA.2066645
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PLEADINGS AND PARTICULARS

Note: in this defence, unless otherwise stated, the 17th Defendant (**Certain Underwriters at Lloyd's subscribing to Policy No. 04012**) adopts the terminology and definitions used by the Plaintiffs in the Second Further Amended Statement of Claim dated 10 December 2020.

In response to the Plaintiffs' Second Further Amended Statement of Claim (**SFASOC**), the 17th Defendant says as follows:

A. Group Members

1. It does not plead to paragraph 1 because it contains no allegations against it.
2. It does not admit the allegations in paragraph 2.

2A. It does not admit the allegations in paragraph 2A.

3. It does not admit the allegations in paragraph 3.

B. The Plaintiffs

4. It does not admit the allegations in paragraph 4.

5. It does not admit the allegations in paragraph 5.

6. It does not admit the allegations in paragraph 6.

7. It does not admit the allegations in paragraph 7.

8. It does not admit the allegations in paragraph 8

8A. It does not admit the allegations in paragraph 8A

8B. It does not admit the allegations in paragraph 8B

8C. It does not admit the allegations in paragraph 8C

8D. It does not admit the allegations in paragraph 8D.

8E. It does not admit the allegations in paragraph 8E.

8F. It does not admit the allegations in paragraph 8F.

8G. It does not admit the allegations in paragraph 8G.

C. The Defendants

9. To paragraph 9, it:

(a) admits sub-paragraphs (a) and (b); and

(b) otherwise, it does not admit the allegations in paragraph 9.

10. To paragraph 10, it:

(a) admits sub-paragraphs (a) and (b); and

(b) otherwise, it does not admit the allegations in paragraph 10.

11. It admits the allegations in paragraph 11.

12. To paragraph 12, it:

(a) admits sub-paragraphs (a) and (b); and

(b) otherwise, it does not admit the allegations in paragraph 12.

13. To paragraph 13, it:

(a) admits sub-paragraphs (a) and (b); and

(b) otherwise, it does not admit the allegations in paragraph 13.

14. To paragraph 14:

(a) It admits that Dr Dona:

- (i) is a registered medical practitioner;
- (ii) is a plastic and reconstructive surgeon;
- (iii) was a director of TCI Paramatta from around 20 July 2012 to 8 February 2016;
- (iv) was a director of TCI Bondi from 28 August 2013 to 8 February 2016
- (v) was a director of TCI Southport from 1 May 2015 to 8 February 2016;
- (vi) was a director and beneficial shareholder of Dona Family Pty Limited (ACN 123 469 723), which was a company incorporated under the Corporations Act 2001 (Cth) and a shareholder of The Cosmetic Institute (**TCI**), TCI Parramatta, TCI Bondi and TCI Southport;

(b) otherwise, it does not admit the allegations in paragraph 14.

14A. To paragraph 14A:

(a) it admits that the sixth defendant (Niroshan Sivathasan):

- (i) was a registered medical practitioner without any specialist surgical qualifications; and
- (ii) performed BAS on Ms Rickhuss;

(b) it denies sub-paragraph (b);

(c) otherwise, it does not admit the allegations in paragraph 14A.

14B. To paragraph 14B:

(a) it admits that the seventh defendant (Van Nguyen):

- (i) was a registered medical practitioner without any specialist surgical qualifications; and
- (ii) performed BAS on Ms Pollock;

(b) it denies sub-paragraph (b);

(c) otherwise, it does not admit the allegations in paragraph 14B.

14C. To paragraph 14C:

(a) it admits that the eighth defendant (Victor Lee):

- (i) was a registered medical practitioner without any specialist surgical qualifications; and

- (ii) performed BAS on Ms Bruen;
 - (b) it denies sub-paragraph (b);
 - (c) otherwise, it does not admit the allegations in paragraph 14C.
- 14D. To paragraph 14D:
- (a) it admits that the ninth defendant (Chi Vien Duong):
 - (i) was a registered medical practitioner without any specialist surgical qualifications; and
 - (ii) performed BAS on Ms Rowlands;
 - (b) it denies sub-paragraph (b);
 - (c) otherwise, it does not admit the allegations in paragraph 14D.
- 14E. To paragraph 14E:
- (a) it admits that the tenth defendant (Ahn Tang):
 - (i) was a registered medical practitioner without any specialist surgical qualifications; and
 - (ii) performed BAS on Ms Rutherford;
 - (b) it denies sub-paragraph (b);
 - (c) otherwise, it does not admit the allegations in paragraph 14E.
- 14F. To paragraph 14F:
- (a) it admits that the eleventh defendant (Napoleon Chiu):
 - (i) was a registered medical practitioner without any specialist surgical qualifications; and
 - (ii) performed BAS on Ms Axen;
 - (b) it denies sub-paragraph (b);
 - (c) otherwise, it does not admit the allegations in paragraph 14F.
- 14G. To paragraph 14G:
- (a) it admits that the twelfth defendant (Daniel Kwok):
 - (i) was a registered medical practitioner without any specialist surgical qualifications; and
 - (ii) performed BAS on Ms Zahr;
 - (b) it denies sub-paragraph (b);

(c) otherwise, it does not admit the allegations in paragraph 14G.

14H. To paragraph 14H:

(a) it admits that the thirteenth defendant (Pedro Valente):

(i) was a registered medical practitioner without any specialist surgical qualifications; and

(ii) performed BAS on Ms Love;

(b) it denies sub-paragraph (b); and

(c) otherwise, it does not admit the allegations in paragraph 14H.

14I. To paragraph 14I:

(a) it admits that the fourteenth defendant (Farheen Ali):

(i) was a registered medical practitioner without any specialist surgical qualifications; and

(ii) performed BAS on Ms Gielisse;

(b) otherwise, it does not admit the allegations in paragraph 14I.

14J. To paragraph 14J:

(a) it admits that the fifteenth defendant (James Kenny):

(i) was a registered medical practitioner and general surgeon; and

(ii) performed BAS on Ms Turner;

(b) it denies sub-paragraph (b);

(c) otherwise, it does not admit the allegations in paragraph 14J.

14K. To paragraph 14K:

(a) it admits that the sixteenth defendant (Sri Darshn):

(i) was a registered medical practitioner without any specialist surgical qualifications; and

(ii) performed BAS on Ms Sanchez;

(b) it denies sub-paragraph (b);

(c) otherwise, it does not admit the allegations in paragraph 14K.

14L. Save to say that the relevant coverholder is Newline Australia Insurance Pty Ltd, it admits the allegations in paragraph 14L.

14M. It does not plead to paragraph 14M because it contains no allegations against it.

14N. It does not plead to paragraph 14N because it contains no allegations against it.

Part II. - THE FIRST TO FIFTH DEFENDANTS' SYSTEM OF BAS

A. TCI Facilities

15. To paragraph 15:

(a) it admits that BAS was performed by some or all of the TCI Surgeons at a cost of \$5,990 at:

(i) TCI Parramatta Premises from around August 2012 to September 2015;

(ii) TCI Bondi Premises from around August 2013 to September 2015;

(iii) TCI Southport Premises from around August 2015;

(iv) Concord Private Hospital and Holroyd Private Hospital from around September 2015,

(b) otherwise, it does not admit the allegations in paragraph 15.

16. To paragraph 16:

(a) it admits that the TCI Parramatta Premises and TCI Bondi Premises were not licensed under the *Private Health Facilities Act 2007* (NSW) for the treatment of patients administered general, epidural or major regional anaesthetic or sedation resulting in more than conscious sedation;

(b) otherwise, it does not admit the allegations in paragraph 16.

17. It does not admit the allegations in paragraph 17.

B. TCI Surgeons

18. It admits paragraph 18.

19. Subject to production of and reference to the said training and accreditation contracts for their full terms and effect, it admits the allegations in paragraph 19.

C. TCI Anaesthetists

20. It admits paragraph 20.

D. The One Size Fits All Approach

21. It does not admit the allegations in paragraph 21.

22. It does not admit the allegations in paragraph 22.

E. The Representations

23. It does not admit the allegations in paragraph 23.

23A. It does not admits the allegations in paragraph 23A.

F. Pre-Surgery Consultations

24. To paragraph 24:

- (a) it admits that prior to undergoing BAS, each of the plaintiffs and group members attended a pre-surgery consultation with a TCI Surgeon and/or a cosmetic consultant;
- (b) otherwise, it does not admit the allegations in paragraph 24.

G. Post-Surgery Consultations

24A. It does not admit the allegations in paragraph 24A.

24B. It does not admit the allegations in paragraph 24B.

24C. It does not admit the allegations in paragraph 24C.

Part III. - Questions common to claims of group members

25. It does not admit the allegations in paragraph 25.

Part IV. - The Plaintiffs' BAS

A. Amy Rickhuss

26. It does not admit the allegations in paragraph 26.

27. To paragraph 27:

- (a) it admits that Ms Rickhuss attended a pre-surgery consultation at the TCI Paramatta Premises;
- (b) otherwise, it does not admit the allegations in paragraph 27.

28. It does not admit the allegations in paragraph 28.

29. It admits paragraph 29.

30. It does not admit the allegations in paragraph 30.

31. It admits paragraph 31.

32. It does not admit the allegations in paragraph 32.

33. It admits paragraph 33.

34. It admits paragraph 34.

35. It admits paragraph 35.

36. It does not admit the allegations in paragraph 36.

B. Kylie Pollock

37. It does not admit the allegations in paragraph 37.
38. To paragraph 38:
- (a) it admits that Ms Pollock attended a pre-surgery consultation at the TCI Bondi Premises;
 - (b) otherwise, it does not admit the allegations in paragraph 38.
39. It does not admit the allegations in paragraph 39.
40. It admits paragraph 40.
41. It does not admit the allegations in paragraph 41.
42. To paragraph 42:
- (a) [REDACTED];
 - (b) otherwise, it does not admit the allegations in paragraph 42.
43. It admits paragraph 43.
44. It admits paragraph 44.
45. It admits paragraph 45.
46. It admits paragraph 46.
47. It does not admit the allegations in paragraph 47.
- C. Jessica Bruen**
48. It does not admit the allegations in paragraph 48.
49. To paragraph 49:
- (a) it admits that Ms Bruen attended a pre-surgery consultation at the TCI Bondi Premises;
 - (b) otherwise, it does not admit the allegations in paragraph 49.
50. It does not admit the allegations in paragraph 50.
51. It admits paragraph 51.
52. It does not admit the allegations in paragraph 52.
53. It does not admit the allegations in paragraph 53.
54. It does not admit the allegations in paragraph 54.
55. It does not admit the allegations in paragraph 55.
56. It does not admit the allegations in paragraph 56.

D. Kirsty-Anne Rowlands

57. It does not admit the allegations in paragraph 57.

58. To paragraph 58:

(a) it admits that Ms Rowlands attended a pre-surgery consultation at the TCI Parramatta Premises;

(b) otherwise, it does not admit the allegations in paragraph 58.

59. It does not admit the allegations in paragraph 59.

60. It admits paragraph 60.

61. It does not admit the allegations in paragraph 61.

62. It does not admit the allegations in paragraph 62.

63. It does not admit the allegations in paragraph 63.

64. It does not admit the allegations in paragraph 64.

E. Lily Knowland

65 - 77. It does not plead to paragraphs 65 to 77 as Ms Knowland makes no claims against it.

F. Tiffany Rutherford

77FA - 77FO. It does not plead to paragraphs 77FA to 77FO as Ms Rutherford makes no claims against it.

G. Alysha Axen

77GA - 77GJ. It does not plead to paragraphs 77GA to 77GJ as Ms Axen makes no claims against it.

H. Sherine Zahr

77HA - 77HO. It does not plead to paragraphs 77HA to 77HO as Ms Zahr makes no claims against it.

I. Emma Love

77IA. It does not admit the allegations in paragraph 77IA.

77IB. To paragraph 77IB:

(a) it admits that Ms Love attended a pre-surgery consultation at the TCI Parramatta Premises;

(b) otherwise, it does not admit the allegations in paragraph 77IB.

77IC. It does not admit the allegations in paragraph 77IC.

77ID. It admits paragraph 77ID.

77IE. It does not admit the allegations in paragraph 77IE.

77IF. To paragraph 77IF:

(a)

[REDACTED]
[REDACTED]
[REDACTED];

(b) otherwise, it does not admit the allegations in paragraph 77IF.

77IG. It admits paragraph 77IG.

77IH. It does not admit the allegations in paragraph 77IH.

77II. It admits paragraph 77II.

77IJ. It does not admit the allegations in paragraph 77IJ.

J. Candiece Gielisse

77JA - 77JO. It does not plead to paragraphs 77HA to 77HO as Ms Gielisse makes no claims against it.

K. Ali Turner

77KA. It does not admit the allegations in paragraph 77KA.

77KB. To paragraph 77KB:

(a) it admits that Ms Turner attended a pre-surgery consultation at the TCI Parramatta Premises;

(b) otherwise, it does not admit the allegations in paragraph 77IB.

77KC. To paragraph 77KC:

(a) it does not admit the allegations;

(b)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

PARTICULARS

A copy of the said disclaimer may be inspected at the offices of Newline's solicitors.

77KD. It admits paragraph 77KD.

77KE. To paragraph 77KE:

- (a) it says that [REDACTED];
- (b) otherwise, it denies the allegations in paragraph 77KE.

77KF. To paragraph 77KF:

- (a) [REDACTED];
- (b) otherwise, it does not admit the allegations in paragraph 77KF.

77KG. It does not admit the allegations in paragraph 77KG.

77KH. It does not admit the allegations in paragraph 77KH.

77KI. It does not admit the allegations in paragraph 77KI.

L. Stephanie Sanchez

77LA - 77LL. It does not plead to paragraphs 77LA to 77LL as Ms Sanchez makes no claims against it.

Part V. - Negligence

78. To paragraph 78:

- (a) subject to sections 5B and 5C of the *Civil Liability Act 2002* (NSW) (**CLA**) and, where applicable, sections 9 and 10 of the *Civil Liability Act 2003* (Qld) (**Qld Act**), it admits that the first to sixteenth defendants each owed the plaintiffs a duty to exercise reasonable care and skill in the performance of any medical services by them for the plaintiffs;
- (b) otherwise, it does not admit the allegations.

79. To paragraph 79:

- (a) it admits the allegations in paragraph 79 insofar as they relate to the first to sixteenth defendants;
- (b) otherwise, it does not admit the allegations.

80. To paragraph 80:

- (a) it does not admit the allegations in paragraph 80 insofar as they relate to the first to sixteenth defendants;
- (b) otherwise, it denies the allegations and refers to paragraph 96(b) below.

81. To paragraph 81:

- (a) it does not admit the allegations; and

(b) it refers to paragraph 96(b) below.

81A. It does not admit the allegations in paragraph 81A.

81B. It does not admit the allegations in paragraph 81B.

81C. It does not admit the allegations in paragraph 81C.

81D. It does not admit the allegations in paragraph 81D.

81E. It does not admit the allegations in paragraph 81E.

81F. It does not admit the allegations in paragraph 81F.

81G. It does not admit the allegations in paragraph 81G.

81H. It does not admit the allegations in paragraph 81H.

81I. It does not admit the allegations in paragraph 81I.

81J. It does not admit the allegations in paragraph 81J.

81K. It does not admit the allegations in paragraph 81K.

81L. It does not admit the allegations in paragraph 81L.

Part VI. - Competition and Consumer Act

82. To paragraph 82:

(a) it admits that BAS was ordinarily acquired by the plaintiffs and group members for personal use;

(b) otherwise, it does not admit the allegations.

83. It does not admit the allegations in paragraph 83.

84. It does not admit the allegations in paragraph 84.

85. It does not admit the allegations in paragraph 85.

86. It does not admit the allegations in paragraph 86.

87. It does not admit the allegations in paragraph 87.

88. It does not admit the allegations in paragraph 88.

89. It does not admit the allegations in paragraph 89.

90. To paragraph 90:

(a) it does not admit the allegations; and

(b) it refers to paragraph 96 below.

91. It does not admit the allegations in paragraph 91.

92. It does not admit the allegations in paragraph 92.
93. It does not admit the allegations in paragraph 93.
94. To paragraph 94:
- (a) it does not admit the allegations; and
 - (b) it refers to paragraph 96 below.
95. It does not admit the allegations in paragraph 95.
96. To paragraph 96:
- (a) it denies the allegations; and
 - (b) it says further that:
 - (i) if (which is not admitted) the first to fourth defendants breached any duty of care in the manner alleged, then:
 - (A) any systemic act or omission of the first to fourth defendants did not of itself constitute causation; and
 - (B) any injury, loss or damage to the plaintiffs or group members was caused by the sixth to sixteenth defendants;
 - (ii) any sums the plaintiffs and group members may recover are to be assessed in accordance with Part 2 of the CLA and, where applicable, Part 3 of the Qld Act;
 - (iii) as regards the claims for breach of guarantees in the ACL, by operation of section 275 of the ACL, such claims are subject to limits under the CLA;
 - (iv) as regards the claims for misleading or deceptive conduct under sections 18, 29 and 34 of the ACL:
 - (A) the plaintiff cannot recover damages for misleading or deceptive conduct under section 236 of the ACL, by operation of section 137C of the *Competition and Consumer Act 2010* (Cth) (**CCA**);
 - (B) the plaintiff cannot recover compensation for misleading or deceptive conduct under section 237 or 238 of the ACL, by operation of section 137E of CCA;
 - (C) further and in the alternative, section 74(4) of the *Fair Trading Act 1987* (NSW) precludes claims for personal injury under sections 236 to 238 of the ACL.

Part VIII - Claims against Insurers

A. Claims against Newline

97. To paragraph 97:

- (a) it does not admit that TCI Bondi was an insured, and otherwise does not admit the allegations;
- (b) it says further that it issued a policy of medical malpractice insurance to TCI Parramatta and TCI for the period from 28 July 2014 to 30 June 2015 (**2014 Policy**).

PARTICULARS

- (i) The 2014 Policy was in writing and to be implied.
- (ii) Insofar as it was in writing, it was comprised of a schedule, Newline's 02-13 Med Mal CI wording, important notice to the insured, and proposal form, of which copies may be inspected at the offices of Newline's solicitors by prior appointment.
- (iii) Insofar as it was implied, it was to be so implied by operation of law.

98. To paragraph 98:

- (a) it admits the allegations;
- (b) it says further that the said policy of medical malpractice insurance (**2015 Policy**) subsequently included TCI Southport Pty Ltd and IWP Operations Pty Ltd as insureds by endorsements dated 1 August and 28 August 2015 respectively.

PARTICULARS

- (i) The 2015 Policy was in writing and to be implied.
- (ii) Insofar as it was in writing, it was comprised of a schedule, Newline's 02-13 Med Mal CI wording, important notice to the insured, proposal form, and the said endorsements, of which copies may be inspected at the offices of Newline's solicitors by prior appointment.
- (iii) Insofar as it was implied, it was to be so implied by operation of law.

99. To paragraph 99:

- (a) it admits the allegations;
- (b) it refers to paragraph 98 above.

100. To paragraph 100:

- (a) subject to production of and reference to the full terms and effect of the 2014 and 2015 Policies, it admits the allegations;
 - (b) it refers to paragraph 104 below.
101. To paragraph 101:
- (a) subject to production of and reference to the full terms and effect of the 2014 and 2015 Policies, it admits the allegations;
 - (b) it refers to paragraph 104 below.
102. Subject to production of and reference to the full terms and effect of the 2014 and 2015 Policies, it admits the allegations in paragraph 102.
103. To paragraph 103:
- (a) it admits that it received notifications from Lockton Companies Australia Pty Ltd (**Lockton**), being the insurance broker of the first to fourth defendants, in respect of:
 - (i) Ms Rickhuss on 6 February 2015;
 - (ii) Ms Bruen on 24 September 2015;
 - (iii) Ms Rowlands on 8 October 2015;
 - (iv) Ms Love on or about 29 October 2015; and
 - (v) Ms Turner on 6 March 2016;
 - (b) with respect to Ms Pollock, it says that:
 - (i) it received an email dated 12 August 2014 from Richard Jane of Lockton attaching a table of notifications recording, amongst other things, that the date of "complaint / claim notified" in respect of Ms Pollock was 3 July 2014;
 - (ii) in the said email, Mr Jane stated that the table contained "some notifications of circumstances that are relevant to the previous program;"
 - (iii) it was a term of the 2014 Policy and the 2015 Policy (**Policies**) that Newline would not indemnify any Insured against (*inter alia*) any liability or Loss directly or indirectly arising out of, caused by, resulting from or in consequence of:
 - (A) any Claim first made against any Insured prior to the commencement of the Period of Insurance; or

(B) any acts, errors, omissions or facts which any Insured knew or ought to have known, prior to the commencement of the Period of Insurance, might give rise to a Claim or Loss;

(Prior Knowledge/Claims Exclusion);

- (iv) the circumstances notified regarding Ms Pollock fell within the scope of the Prior Knowledge/Claims Exclusion;
 - (v) in the premises, there was no cover in respect of the claim by Ms Pollock under the 2014 Policy or the 2015 Policy;
 - (vi) in an email exchange between Newline and Mr Jane of Lockton dated 26 August 2014, Mr Jane confirmed that the notification in respect of Ms Pollock did not apply to Newline;
- (c) otherwise, it denies the allegations in paragraph 103.

PARTICULARS

- (i) Copies of the above emails may be inspected at the offices of Newline's solicitors by prior appointment.
- (ii) The Prior Knowledge/Claims Exclusion is General Exclusion 4C of the Policies.

104. To paragraph 104:

- (a) it denies the allegations;
- (b) it says further that:
 - (i) Insuring Clause 1A of the Policies, headed "Malpractice," did not cover misleading or deceptive conduct of the nature alleged;
 - (ii) if (which is not admitted) TCI, TCI Parramatta, TCI Bondi and/or TCI Southport engaged in misleading or deceptive conduct of the nature alleged:
 - (A) such conduct was not covered by Insuring Clause 1C of the Policies, headed "Misleading and Deceptive Conduct", by reason that:
 - (1) Insuring Clause 1C only covered conduct by an Insured that was unintentional and was committed in the provision of "Healthcare Services";
 - (2) "Healthcare Services" were defined in Section 7 of the Policies as: "any care, treatment, advice, service or goods

provided in respect of the physical or mental health of a person admitted to their care...”;

- (iii) in the premises, there was no cover under the 2014 Policy or the 2015 Policy in respect of any such conduct;
- (iv) the matters alleged in paragraph 133(p) below fell within the scope of General Exclusion 4G.4 of the 2014 Policy and 2015 Policy, being intentional, wilful or reckless:
 - (A) acts without regard for the consequences;
 - (B) disregard of the need to take all reasonable steps to prevent loss; and/or
 - (C) as regards the matters alleged in paragraph 133(p)(iii) below, breach of statute;

such that Newline is not liable to indemnify TCI, TCI Parramatta, TCI Bondi and/or TCI Southport in respect of any liability to Ms Rickhuss, Ms Pollock, Ms Bruen, Ms Rowlands, Ms Love, Ms Turner or group members (*inter alia*) arising directly or indirectly out of such matters;

- (c) the insureds under the 2014 Policy (**2014 Insureds**) and the insureds under the 2015 Policy (**2015 Insureds**) failed and/or refused to provide Newline with requested documents and information, contrary to General Condition 5B.1 of the 2014 Policy and 2015 Policy respectively and their duty of utmost good faith under section 13 of the *Insurance Contracts Act 1984* (Cth) (**ICA**), such that:
 - (i) the 2014 Insureds breached the 2014 Policy;
 - (ii) the 2015 Insureds breached the 2015 Policy; and
 - (iii) Newline is not liable to indemnify TCI, TCI Parramatta, TCI Bondi and/or TCI Southport in respect of any liability to Ms Rickhuss, Ms Pollock, Ms Bruen, Ms Rowlands, Ms Love, Ms Turner or group members.

PARTICULARS

Newline refers to paragraphs 37 to 43 of a letter from its solicitors, Landers & Rogers, to the liquidators of TCI dated 14 December 2018, a copy of which may be inspected at the offices of its solicitors by prior appointment.

- (d) otherwise, it refers to paragraphs 107 and 132 to 160 below.

105. To paragraph 105:

- (a) it admits that patients other than Ms Rickhuss, Ms Pollock, Ms Bruen, Ms Rowlands, Ms Love and Ms Turner had surgery performed at premises owned and/or operated by TCI, TCI Parramatta, TCI Bondi and/or TCI Southport in the period 28 July 2014 to 30 June 2016; and
- (b) otherwise, it does not admit the allegations in paragraph 105.

106. To paragraph 106:

- (a) it admits that it received notifications from Lockton on behalf of one or more of the first to fourth defendants in respect of group members other than Ms Rickhuss, Ms Pollock, Ms Bruen, Ms Rowlands, Ms Love and Ms Turner in the period 28 July 2014 to 30 June 2016;
- (b) it says further that it is not liable to any plaintiff or group member for whom a claim or circumstances were not notified to Newline in accordance with section 40(3) of the ICA within the said period from 28 July 2014 to 30 June 2016;
- (c) otherwise, it does not admit the allegations in paragraph 106.

107. To paragraph 107:

- (a) it denies the allegations;
- (b) it says further that:
 - (i) it is not liable to indemnify TCI, TCI Parramatta, TCI Bondi and/or TCI Southport in respect of claims by group members where such claims or circumstances that might give rise to such claims were not notified to Newline during the period of insurance of the 2014 Policy or the 2015 Policy;
 - (ii) if it is liable (which is denied) then:
 - (A) its liability is limited to \$10,000,000 (inclusive of defence costs) in the aggregate under each of the 2014 Policy and/or the 2015 Policy; and
 - (B) its liability (including in respect of defence costs) is limited to its relative legal and financial exposure attributed to matters covered under the 2014 Policy and/or the 2015 Policy, as distinct from matters not covered.

PARTICULARS

Newline refers (*inter alia*) to the Schedule and General Condition 6B of the 2014 Policy and the 2015 Policy.

(a) otherwise, it refers to paragraph 104 above and paragraphs 132 to 160 below.

B. Claims Against Allied World

108. It does not plead to paragraph 108 because it contains no allegations against it.

109. It does not plead to paragraph 109 because it contains no allegations against it.

110. It does not plead to paragraph 110 because it contains no allegations against it.

111. It does not plead to paragraph 111 because it contains no allegations against it.

112. It does not plead to paragraph 112 because it contains no allegations against it.

113. It does not plead to paragraph 113 because it contains no allegations against it.

114. It does not plead to paragraph 114 because it contains no allegations against it.

115. It does not plead to paragraph 115 because it contains no allegations against it.

116. It does not plead to paragraph 116 because it contains no allegations against it.

C. Claims against MDANI

117. It does not plead to paragraph 117 because it contains no allegations against it.

118. It does not plead to paragraph 118 because it contains no allegations against it.

119. It does not plead to paragraph 119 because it contains no allegations against it.

120. It does not plead to paragraph 120 because it contains no allegations against it.

121. It does not plead to paragraph 121 because it contains no allegations against it.

122. It does not plead to paragraph 122 because it contains no allegations against it.

123. It does not plead to paragraph 123 because it contains no allegations against it.

124. It does not plead to paragraph 124 because it contains no allegations against it.

125. It does not plead to paragraph 125 because it contains no allegations against it.

126. It does not plead to paragraph 126 because it contains no allegations against it.

127. It does not plead to paragraph 127 because it contains no allegations against it.

128. It does not plead to paragraph 128 because it contains no allegations against it.

129. It does not plead to paragraph 129 because it contains no allegations against it.

130. It does not plead to paragraph 130 because it contains no allegations against it.

131. It does not plead to paragraph 131 because it contains no allegations against it.

Limitation Defences

132. Further and in the alternative:

- (a) the claim of Ms Pollock was discoverable more than 3 years prior to the commencement of this proceeding on 14 September 2017;
- (b) in the premises, such claim is statute barred by operation of 50C of the *Limitation Act 1969* (NSW) and/or section 87F of the CCA;
- (c) further and in the alternative, any of the group members' claims:
 - (i) which were discoverable 3 years or more prior to the commencement of this proceeding are statute barred; and/or
 - (ii) which occurred in Queensland and accrued 3 years or more prior to the commencement of this proceeding are statute barred pursuant to section 11 of the *Limitation Act 1974* (Qld).

Avoidance of the 2014 Policy and the 2015 Policy

133. At all material times, TCI, TCI Parramatta, TCI Bondi (and subsequently TCI Southport) and related companies (the **TCI Group**) conducted operations (*inter alia*) as follows:

- (a) the TCI Group engaged doctors with no prior experience, alternatively minimal experience, performing cosmetic procedures or BAS;
- (b) the said doctors were provided limited and inadequate training, consisting of:
 - (i) observation and assistance of other TCI doctors (themselves not being plastic surgeons); and
 - (ii) two days of training by Dr Eddy Dona;
- (c) in such training, doctors were shown and performed limited BAS techniques and accordingly:
 - (i) they were no more than surgical technicians who could not perform required variations, mastoplexy or other procedures commonly performed by plastic surgeons;
 - (ii) BAS performed by the doctors was suitable only for limited patients;
 - (iii) patients were exposed to increased risks of complications and poor results;
- (d) doctors thereafter practised BAS operating skills and techniques unsupervised on full fee-paying patients of the TCI Group, without patients being informed of this;
- (e) there was no training or oversight of doctors in relation to infection control practices, resulting in significant spikes in complications and infections when new doctors commenced with the TCI Group, and ongoing issues (*inter alia*) with Dr Kenny;

- (f) there was no adequate system of ongoing evaluation of the performance of doctors, despite certain doctors being known by management of the TCI Group to present increased risks;
- (g) monetary incentives were offered to staff of the TCI Group who booked the most cosmetic procedures;
- (h) large numbers of vulnerable women with limited means were targeted by the TCI Group (*inter alia*) with payment plans;
- (i) the TCI Group grossly minimalised cautions to patients about risks of BAS, unsatisfactory results and follow-up issues;
- (j) the TCI Group scheduled consultations for patients with persons referred to as consultants who were not in fact medical practitioners and were not supervised in those consultations by medical practitioners;
- (k) the only qualified plastic surgeon associated with the TCI Group was Dr Dona, who:
 - (i) did not generally perform surgery for the TCI Group; and
 - (ii) was not generally available to supervise or provide advice to doctors contracted by the TCI Group when those doctors performed BAS;
- (l) there was no adequate system for the management, investigation and rectification of complications, and no formal audit system;
- (m) up until around September 2015, BAS was performed on patients at the TCI Parramatta Premises and TCI Bondi Premises using sedation resulting in more than conscious sedation, in premises that were required to be licensed under the *Private Health Facilities Act 2007* (NSW), but which in breach of that legislation were not in fact so licensed;
- (n) such sedation was otherwise inappropriate for BAS because (*inter alia*) it resulted in:
 - (i) unsafe doses of local anaesthetic;
 - (ii) patient movement which increased the risk of unsatisfactory outcomes and complications;
- (o) the breast implants used were textured implants linked by research to an increased rate of breast cancer;
- (p) otherwise, management of the TCI Group made decisions:

- (i) not to pursue requisite licensing of the TCI Parramatta Premises and TCI Bondi Premises;
- (ii) not to engage suitably trained and qualified plastic surgeons;
- (iii) to permit doctors to perform BAS in unlicensed facilities using more than conscious sedation;
- (iv) not to enforce appropriate patient selection processes, so that TCI doctors operated on patients (including those with ptosis who required mastopexy) who were unsuitable for BAS performed by the TCI doctors with their limited skills;
- (v) to permit individual doctors to continue to operate despite poor results and high complication rates;

knowing that this would compromise standards and patient safety;

(together, the **TCI Group Practices**).

PARTICULARS

- (i) Newline refers to:
 - (A) statements to the substance alleged by the TCI Group's former nursing manager, Ms Nicole Montgomery, and its former operations manager, Mr Alfie Lombardi, in an ABC Four Corners investigation broadcast on 13 August 2018;
 - (B) sworn testimony of Ms Montgomery to the substance alleged to the NSW Parliamentary Inquiry into the cosmetic health services industry during its hearing on 1 August 2018 (**Parliamentary Inquiry**), such testimony being recorded in a report on the said hearing (**Report**);
 - (C) the reports of Professor Anand Deva dated 22 March 2018, 20 May 2020 and 8 December 2020 served by the Plaintiffs;
 - (D) the report of Professor Mark Ashton dated 11 May 2020 served by the Plaintiffs;
 - (E) the report of Professor Cliff Hughes dated 18 May 2020 served by the Plaintiffs;
 - (F) the report of Dr Rohit Kumar dated 18 May 2020 served by the Plaintiffs.

- (ii) As regards paragraph (e), Newline further refers to the report of Dr Michael Whitby dated 5 August 2020 served by the Plaintiffs.
- (iii) As regards paragraph (f):
 - (A) Dr Nguyen was permitted to operate unsupervised until 2017 despite being placed on probation in October 2014 and having a reputation within the TCI Group as a “cowboy” and a “loose cannon” with inappropriate patient selection;
 - (B) many of Dr Kenny’s patients required revision surgery to drop implants;
 - (C) Dr Lee required (but was not provided) constant post-operative supervision.
- (iv) As regards paragraphs (m) and (n), Newline further refers to:
 - (A) the reports of Dr Matthew Griffiths dated 5 April 2018 and 5 May 2020 served by the Plaintiffs;
 - (B) an email from Dr Erez Ben-Menachem to Dr Kerdic and others dated 22 September 2014, instructing anaesthetists not to leave TCI facilities until the last patient of the day was conscious;
 - (C) rules 5(a) and 5(r) of the *Private Health Facilities Regulation 2010* (NSW);
 - (D) a draft investigation report of the NSW Health Care Complaints Commission (**HCCC**) dated 8 December 2015;
 - (E) an expert report dated 13 November 2015 served on the TCI Group by the HCCC;
 - (F) the TCI Group’s admissions in a response dated 26 February 2016 to the HCCC’s draft investigation report that 27 patients had been placed under deep sedation and/or general anaesthetic, in premises that were not licensed for the provision of deep sedation or general anaesthetic;
 - (G) a report of the HCCC dated 23 March 2016, which contained findings (*inter alia*) that:
 - (1) patients of the TCI Group were given a combination of sedative drugs that in many cases were consistent with general anaesthesia (for which the TCI Group was not

licensed) and which were in excess of the safe upper limit recommended for the drugs used; and

- (2) these practices placed the health and safety of members of the public at risk;
- (H) testimony of Dr Scott Turner of the Australasian Society of Aesthetic Plastic Surgeons to the Parliamentary Inquiry to the effect that all patients of the TCI Group were having deep to almost general anaesthetic procedures in an unlicensed facility (page 10 of the Report).
- (v) As regards paragraph (p), Newline further refers (*inter alia*) to:
 - (A) TCI board minutes dated 8 May 2013;
 - (B) a letter from Dr Dona to Mr Segal dated 12 August 2013;
 - (C) an email from Dr Dona to Mr David Segal dated 19 February 2015;
 - (D) an email from Dr Dona to Mr Segal and others dated 16 April 2015;
 - (E) an email from Dr Dona to Mr Segal dated 8 July 2015;
 - (F) an email from Dr Dona to Mr Segal dated 14 August 2015;
 - (G) an email exchange between Dr Dona and Mr Segal from 5 to 7 October 2015.
- (vi) Copies of the said documents may be inspected at the offices of Newline's solicitors by prior appointment.

Further particulars may be provided following the inspection of subpoenaed and discovered documents and prior to trial.

2014 Policy

- 134. By operation of section 21 of the ICA, TCI and TCI Parramatta (and TCI Bondi if it was an insured, which is not admitted) had a duty to disclose to Newline before the 2014 Policy was entered into every matter that they knew, or a reasonable person in the circumstances could be expected to know, to be a matter relevant to the decision of Newline whether to accept the risk of the 2014 Policy and, if so, on what terms (**duty of disclosure**).
- 135. Prior to their entry into the 2014 Policy, each of the 2014 Insureds knew, or a reasonable person in the circumstances could be expected to know, that the TCI Group Practices were relevant to the decision of Newline whether to accept the risk of the 2014 Policy and, if so, on what terms.

136. On around 25 June 2014, Mr Richard Jane of Lockton, as agent for the 2014 Insureds, emailed Newline various documents including a proposal form for medical malpractice insurance (**2014 proposal form**) which:
- (a) did not disclose any of the TCI Group Practices;
 - (b) made representations in response to questions in the 2014 proposal form as follows:
 - (i) question 12, as to whether the proposed insured was duly licensed to practise at the addresses specified, being the TCI Parramatta Premises and TCI Bondi Premises, to which the answer was "yes;"
 - (ii) question 24(a), as to whether the proposed insured had any medical teaching facilities, to which the answer was "no";
 - (iii) question 24(b), as to whether the proposed insured would ensure that competent and adequately trained staff only would be employed and that staff were properly supervised, to which the answer was "yes," with the express representation that all staff were appropriately trained and accredited;
 - (iv) question 28, as to whether any further information should be made known so that a proper estimate of the risk may be formed, to which the answer was "yes," for which the only details provided were that an additional facility was being considered for Queensland, thus impliedly representing that no other such information should be made known;
 - (v) that the person signing the proposal form declared (*inter alia*) that the above statements were true, had not suppressed or misstated any facts, and was authorised to act for all persons who may be entitled to indemnity.

PARTICULARS

A copy of the email and attachments including the 2014 proposal form may be inspected at the offices of Newline's solicitors by prior appointment.

137. In the said email to Newline dated 25 June 2014, Mr Jane of Lockton, as agent for the 2014 Insureds, made the following representations regarding the TCI Group:
- (a) "our team of highly trained and experienced surgeons are supported and mentored by our surgical director;"
 - (b) "his knowledge, experience and mentorship ensure our surgeons remain at the forefront of cosmetic surgery's best practice."

138. In an email to Newline dated 2 July 2014, Mr Jane of Lockton, as agent for the 2014 Insureds, represented that no unsupervised procedures were performed within the practice of the TCI Group.

PARTICULARS

A copy of the said email may be inspected at the offices of Newline's solicitors by prior appointment.

139. On around 3 July 2014, Mr Jane of Lockton, as agent for the 2014 Insureds, emailed Newline a medical malpractice addendum signed by the managing director of TCI and/or the TCI Group, in which the 2014 Insureds made the following representations:

- (a) that the details of all individuals undertaking procedures/treatments were (*inter alia*) as follows:

Name	Years of experience on cosmetic procedures	Number of procedures performed
Dr Huy Tang	2	1200+
Dr Farheen Ali	2	700
Dr Daniel Kwok	1	100
Dr Charles Wang	4	2000+
Dr Victor Lee	4	2000+
Dr Van Nguyen	10	2000+

- (b) that the said deponent was authorised to complete the addendum on behalf of the 2014 Insureds, that all answers were, after enquiry, true and correct to the best of the deponent's knowledge, and that no material facts had been misstated, omitted or suppressed.

PARTICULARS

A copy of the said addendum may be inspected at the offices of Newline's solicitors by prior appointment.

140. Prior to entering into the 2014 Policy on or around 28 July 2014, none of the 2014 Insureds made any further disclosure as to any of the matters alleged in paragraphs 133 to 139 above.

141. In the premises:

- (a) each of the 2014 Insureds failed to comply with the duty of disclosure; and

- (b) the representations made by each of the 2014 Insureds alleged in paragraphs 136 to 139 above were false (**2014 Misrepresentations**).

PARTICULARS

Newline refers to:

- (i) the matters alleged in paragraph 133 above and the particulars thereto;
 - (ii) the contents of the letter from Lander & Rogers dated 14 December 2018 to the liquidators of TCI referred to in the particulars to paragraph 104(c) above.
142. Further, the 2014 Misrepresentations, and the non-disclosure of matters referred to in paragraph 133(p) above, were made by each of the 2014 Insureds fraudulently, and the failure by each of them to comply with the duty of disclosure was fraudulent, within the meaning of section 28 of the ICA.

PARTICULARS

Newline refers to the matters alleged in paragraphs 133 to 141 above and the particulars thereto, and says further that:

- (i) the systems first proposed by Dr Dona and Mr Segal when setting up the TCI Group changed significantly in the first 12 – 18 months, and subsequent shortcomings and compromises regarding patient care were identified by Dr Dona and communicated to TCI's board as early as August 2013;
- (ii) the matters not disclosed and misrepresented, regarding the practices of the TCI Group, were so significant and serious that they were obviously highly relevant to the risk to be insured;
- (iii) the said non-disclosures and the 2014 Misrepresentations were made by or on behalf of the 2014 Insureds:
 - (A) without belief in their truth; and/or
 - (B) with conscious indifference including as to their disclosure obligations under the ICA.

Further particulars may be provided prior to trial.

143. Newline would not have accepted the risk of providing medical malpractice insurance to the 2014 Insureds and/or the TCI Group, alternatively would not have entered into the 2014 Policy on the same terms and conditions, if the 2014 Insureds had not failed to comply with the duty of disclosure or had not made the 2014 Misrepresentations.

144. In the premises, Newline was entitled to avoid the 2014 Policy pursuant to section 28(2) of the ICA.

2015 Policy

145. By email dated 19 May 2015, the TCI Group was informed by the HCCC that the HCCC had referred a letter of complaint dated 23 March 2015 from Dr John McHugh of the Australasian College of Cosmetic Surgery (**McHugh complaint**) for investigation (**2015 Investigation**).

PARTICULARS

A copy of the said email may be inspected at the offices of Newline's solicitors by prior appointment.

146. The TCI Group received a copy of the McHugh complaint by email dated 29 May 2015, such complaint making serious allegations regarding (*inter alia*):
- (a) the lack of training and supervision of doctors by the TCI Group;
 - (b) the TCI Group's sedation practices; and
 - (c) the dangers to which patients of the TCI Group were being exposed.

PARTICULARS

A copy of the said email and the McHugh complaint may be inspected at the offices of Newline's solicitors by prior appointment.

147. In a letter to the TCI Group dated 10 June 2015, the HCCC stated that:
- (a) the McHugh complaint warranted investigation as it raised significant questions (*inter alia*) about care provided at TCI Group facilities and the use of deep sedation at unlicensed premises; and
 - (b) the HCCC required a response by the TCI Group to questions set out in its letter by 26 June 2015.

PARTICULARS

A copy of the said letter may be inspected at the offices of Newline's solicitors by prior appointment.

148. Prior to the inception of the 2015 Policy, by operation of section 21 of the ICA, each of the 2015 Insureds had a duty of disclosure to Newline, in the terms set out in paragraph 134 above.
149. Prior to their entry into the 2015 Policy, each of the 2015 Insureds knew, or a reasonable person in the circumstances could be expected to know, the matters alleged in paragraphs

133 and 145 to 147 above to be relevant to the decision of Newline whether to accept the risk of the 2015 Policy.

150. On 28 May 2015, Mr Jane of Lockton, as agent for the TCI Group, emailed Newline a proposal form on Newline letterhead (**2015 proposal form**) which:

- (a) did not disclose:
 - (i) the TCI Group Practices;
 - (ii) the McHugh complaint; or
 - (iii) the 2015 Investigation;
- (b) made representations in response to questions in the 2015 proposal form as follows:
 - (i) question 12, as to whether the practice held the required accreditation or licence at all appropriate times, to which the answer was "yes;"
 - (ii) question 25(a), as to whether any claims had been made or were pending which would fall within the scope of insurance cover, in respect of which an attached claims summary:
 - (A) did not list the 2015 Investigation; and
 - (B) impliedly represented that there were no claims other than as listed in that schedule;
 - (iii) question 25(b), as to whether any person was aware, after enquiry, of any circumstances which might give rise to any claim against the Business, to which the answer was "no;"
 - (iv) question 27(c), as to whether the 2015 Insureds' contracts confirmed that persons engaged by them were appropriately qualified, to which the answer was "yes;"
 - (v) question 28, as to whether any staff provided healthcare services to patients without the supervision of a medical practitioner, to which the answer was "no;"
 - (vi) question 29(a), as to whether work undertaken by professional/technical staff was regularly reviewed by a principal/manager, to which the answer was "yes";
 - (vii) that the person completing the proposal form was authorised to do so on behalf of the 2015 Insureds and that all answers were, after enquiry, true

and correct to the best of that person's knowledge, and that no material facts had been misstated, omitted or suppressed.

PARTICULARS

- (i) As regards subparagraphs (b)(ii) and (iii), the 2015 proposal form did not refer to various other investigations into the TCI Group by the HCCC and NSW Health in response to patient complaints.
 - (ii) A copy of the 2015 proposal form may be inspected at the offices of Newline's solicitors by prior appointment.
151. Prior to entering into the 2015 Policy on or around 30 June 2015, none of the 2015 Insureds made any further disclosure as to any of the matters alleged in paragraph 150 above.
152. Further and in the alternative:
- (a) the 2014 Misrepresentations and breaches by the 2014 Insureds of the duty of disclosure were continuing misrepresentations and breaches, for the purposes of section 21 of the ICA and the 2015 Policy renewal; and/or
 - (b) the duty of disclosure of the 2015 Insureds included a duty to:
 - (i) disclose the TCI Group Practices; and/or
 - (ii) correct the 2014 Misrepresentations and breaches by the 2014 Insureds of the duty of disclosure;
 - (c) the 2015 Insureds failed to correct the 2014 Misrepresentations and breaches by the 2014 Insureds of the duty of disclosure prior to entering into the 2015 Policy.
153. By reason of the matters alleged in paragraphs 133 to 152 above:
- (a) each of the 2015 Insureds failed to comply with the duty of disclosure; and
 - (b) the representations made by each of the 2015 Insureds alleged in paragraph 150 above were false (**2015 Misrepresentations**).

PARTICULARS

Newline refers to the matters alleged in paragraphs 133, 145 to 150 above and 154 below and the particulars thereto.

154. Further, the 2015 Misrepresentations, and the non-disclosure of matters referred to in paragraphs 133(p) and 145 to 147 above, were made by each of the 2015 Insureds fraudulently, and the failure by each of them to comply with the duty of disclosure was fraudulent, within the meaning of section 28 of the ICA.

PARTICULARS

Newline refers to the matters alleged in paragraphs 133 to 153 above and the particulars thereto, and says further that:

- (i) the McHugh complaint made serious allegations about the practices of the TCI Group and dangers posed to patients;
- (ii) the 2015 Investigation by the HCCC was of critical importance to the ongoing operations of the TCI Group and the risk to be insured under the 2015 Policy, given the HCCC's regulatory powers;
- (iii) the TCI Group regarded the McHugh complaint and the 2015 Investigation as sufficiently serious and material to future operations that they retained Moisson Lawyers to take detailed instructions and respond to the HCCC;
- (iv) the McHugh complaint and the 2015 Investigation were ongoing and unresolved at the time that the 2015 Insureds entered into the 2015 Policy;
- (v) the 2015 Investigation itself was a Claim as defined in the 2015 Policy;
- (vi) in an email to Mr Segal and other TCI Group directors dated 14 August 2015, Dr Dona stated (*inter alia*) that:
 - (A) the directors believed that the HCCC would say "we must stop local and sedation as we are currently doing";
 - (B) there were "countless potential law suits etc once it becomes known that we should not have been performing the anaesthetic that we have been doing";
- (vii) otherwise, and in the premises:
 - (A) the matters not disclosed and misrepresented, regarding the practices of the TCI Group, were so significant and serious that they were obviously highly relevant to the risk to be insured;
 - (B) the non-disclosures and 2015 Misrepresentations were made by or on behalf of the 2015 Insureds:
 - (1) without belief in their truth; and/or
 - (2) with conscious indifference including as to their disclosure obligations under the ICA.

Further particulars may be provided prior to trial.

155. Newline would not have entered into the 2015 Policy, alternatively would not have entered into the 2015 Policy on the same terms and conditions, if:

- (a) the 2015 Insureds had not made the 2015 Misrepresentations and/or failed to comply with the duty of disclosure; and/or
 - (b) the 2014 Insureds had not made the 2014 Misrepresentations and/or failed to comply with the duty of disclosure.
156. In the premises, Newline was entitled to avoid the 2015 Policy pursuant to section 28(2) of the ICA.

Other matters

157. On 25 January 2019, pursuant to section 28(2) of the ICA, Newline avoided the 2014 Policy and the 2015 Policy.

PARTICULARS

The avoidance was communicated by letters dated 25 January 2019 to the liquidators of TCI Parramatta and the liquidators of TCI, TCI Bondi and TCI Southport, copies of which may be inspected at the offices of Newline's solicitors by prior appointment.

158. In the premises:
- (a) the 2014 Policy is not enforceable by the 2014 Insureds;
 - (b) the 2015 Policy is not enforceable by the 2015 Insureds; and
 - (c) Newline is not liable for any claim for indemnity brought by the first to fourth defendants under the 2014 Policy and/or the 2015 Policy.
159. Further and in the alternative, in the premises, if (which is denied) Newline is not entitled to avoid the 2014 Policy and/or the 2015 Policy, its liability to indemnify the first to fourth defendants is reduced to nil, alternatively reduced to the position it would have been in had there been no misrepresentation or non-disclosure, by operation of section 28(3) of the ICA.

PARTICULARS

Newline would not have accepted the risk of providing medical malpractice insurance to the 2014 Insureds and/or the 2015 Insureds if:

- (i) the 2014 Insureds had not made the 2014 Misrepresentations and/or failed to comply with the duty of disclosure; and/or
 - (ii) the 2015 Insureds had not made the 2015 Misrepresentations and/or failed to comply with the duty of disclosure.
160. Newline relies upon the following matters in defence of the claims made against it in this proceeding:

- (a) the matters alleged in paragraphs 97 to 107 and 133 to 159 above, that it would have been entitled to rely on for claims made by TCI, TCI Parramatta and TCI Bondi under the 2014 Policy, pursuant to section 7(a) of the *Civil Liability (Third Party Claims against Insurers) Act 2017 NSW (2017 Act)*;
- (b) the matters alleged in paragraphs 97 to 107 and 133 to 159 above, that it would have been entitled to rely on for claims made by TCI, TCI Parramatta, TCI Bondi and TCI Southport under the 2015 Policy, pursuant to section 7(a) of the 2017 Act; and
- (c) further and in the alternative, the matters alleged in paragraphs 1 to 96 and 132 above, that TCI, TCI Parramatta, TCI Bondi and TCI Southport would have been entitled to rely on for claims made against them by the Plaintiffs, pursuant to section 7(b) of the 2017 Act.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

Capacity

Date of signature

Solicitor for the 17th Defendant

10 March 2021

FURTHER DETAILS ABOUT FILING PARTY**Filing party**

Name Certain Underwriters at Lloyd's subscribing to Policy No. 04012,
17th Defendant

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