

DEFENCE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Professional Negligence
Registry	Sydney
Case number	2017/00279308

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	16

FILING DETAILS

Filed for	James Francis Christopher Kenny fifteenth defendant
Legal representative	Leonie Beyers HWL Ebsworth Lawyers
Legal representative reference	PCN: 45509 NSW Ref: LRB:MUC:993524 Court User No: 1290
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HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at

PLEADING AND PARTICULARS

Unless otherwise indicated, the fifteenth defendant adopts the defined terms used in the Further Amended Statement of Claim filed on 19 June 2020.

The fifteenth defendant pleads to the allegations in the Further Amended Statement of Claim as follows:

I. INTRODUCTION

1. The fifteenth defendant does not admit paragraph 1.

2. In response to paragraph 2, the fifteenth defendant:
 - (a) as to subparagraph (a), admits that BAS was performed on persons at TCI Parramatta, TCI Bondi, TCI Southport and Concord Private Hospital;
 - (b) as to subparagraph (b), admits that he performed BAS on the eleventh plaintiff;
 - (c) as to subparagraph (c), admits that the eleventh plaintiff attended a consultation with him prior to undergoing BAS;
 - (d) denies subparagraph (d);
 - (dd) as to subparagraph (dd), admits that the eleventh plaintiff attended consultations with Dr Kenny after undergoing BAS;
 - (e) as to subparagraph (e), admits that the eleventh plaintiff had BAS performed under anaesthesia administered by an anaesthetist; and
 - (f) otherwise does not admit the paragraph.
- 2A. The fifteenth defendant does not admit paragraph 2A.
3. In response to paragraph 3, the fifteenth defendant:
 - (a) admits that seven or more persons have brought claims against a defendant; and
 - (b) otherwise does not admit the paragraph.
4. The fifteenth defendant does not plead to paragraph 4 as it does not contain allegations against him.
5. The fifteenth defendant does not plead to paragraph 5 as it does not contain allegations against him.
6. The fifteenth defendant does not plead to paragraph 6 as it does not contain allegations against him.
7. The fifteenth defendant does not plead to paragraph 7 as it does not contain allegations against him.
8. The fifteenth defendant does not plead to paragraph 8 as it does not contain allegations against him.
- 8A to 8E. The fifteenth defendant does not plead to paragraphs 8A to 8E as they do not contain allegations against him.
- 8F. The fifteenth defendant:
 - (a) says that at around the time of her BAS, the eleventh plaintiff identified her date of birth as [REDACTED]

- (b) says that at around the time of her BAS, the eleventh plaintiff identified her place of residence as in New South Wales;
- (c) says that at around the time of her BAS, the eleventh plaintiff indicated she had not had any children;
- (d) says that at around the time of her BAS, the eleventh plaintiff identified her occupation [REDACTED] and
- (e) otherwise does not admit the paragraph.

8G. The fifteenth defendant does not plead to paragraph 8G as it does not contain allegations against him.

9. In relation to paragraph 9, the fifteenth defendant:

- (a) admits subparagraph (a);
- (b) as to subparagraph (b):
 - (i) admits that the first defendant was a corporation within the meaning of s 4 of the CCA; and
 - (ii) otherwise denies the subparagraph;
- (c) does not admit subparagraph (c);
- (d) as to subparagraph (d):
 - (i) admits that BAS was performed on persons at TCI Parramatta, including on the eleventh plaintiff and on persons at TCI Bondi, TCI Southport and Concord Private Hospital;
 - (ii) otherwise does not admit the subparagraph;
- (e) does not admit subparagraph (e); and
- (f) does not admit subparagraph (f).

10. In response to paragraph 10, the fifteenth defendant:

- (a) admits subparagraph (a);
- (b) as to subparagraph (b):
 - (i) admits that the first defendant was a corporation within the meaning of s 4 of the CCA; and
 - (ii) otherwise denies the subparagraph;
- (c) does not admit subparagraph (c);

- (d) as to subparagraph (d):
 - (i) admits that BAS was performed on persons at TCI Parramatta; and
 - (ii) otherwise does not admit the subparagraph;
 - (e) does not admit subparagraph (e);
 - (f) does not admit subparagraph (f);
 - (g) does not admit subparagraph (g); and
 - (h) does not admit subparagraph (h).
11. The fifteenth defendant does not admit paragraph 11.
12. In response to paragraph 12, the fifteenth defendant:
- (a) admits subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) admits that the first defendant was a corporation within the meaning of s 4 of the CCA; and
 - (ii) otherwise denies the subparagraph;
 - (c) does not admit subparagraph (c);
 - (d) does not admit subparagraph (d);
 - (e) does not admit subparagraph (e);
 - (f) does not admit subparagraph (f);
 - (g) does not admit subparagraph (g); and
 - (h) does not admit subparagraph (h).
13. In response to paragraph 13, the fifteenth defendant:
- (a) admits subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) admits that the first defendant was a corporation within the meaning of s 4 of the CCA; and
 - (ii) otherwise denies the subparagraph;
 - (c) does not admit subparagraph (c);

- (d) as to sub paragraph (d):
 - (i) admits that BAS was performed on persons at TCI Southport; and
 - (ii) otherwise does not admit the subparagraph;
 - (e) does not admit subparagraph (e);
 - (f) does not admit subparagraph (f);
 - (g) does not admit subparagraph (g); and
 - (h) does not admit subparagraph (h).
14. In response to paragraph 14, the fifteenth defendant:
- (a) as to subparagraph (a):
 - (i) admits that the fifth defendant was a registered medical practitioner and practised as a plastic and reconstructive surgeon; and
 - (ii) otherwise does not admit the paragraph;
 - (b) admits the fifth defendant was formerly a director of TCI Parramatta, TCI Bondi and TCI Southport;
 - (c) does not admit subparagraph (e);
 - (d) as to subparagraph (d):
 - (i) admits that the fifth defendant was the surgical director at TCI facilities including TCI Parramatta, TCI Bondi and TCI Southport; and
 - (ii) otherwise does not admit the paragraph;
 - (e) as to subparagraph (e):
 - (i) admits that the fifth defendant conducted training of the fifteenth defendant in relation to BAS;
 - (ii) otherwise does not admit the subparagraph;
 - (f) does not admit subparagraph (f);
 - (g) notes that subparagraph (g) has been removed by amendment;
 - (h) does not admit subparagraph (h);
 - (i) does not admit subparagraph (i);
 - (j) does not admit subparagraph (j);
 - (k) does not admit subparagraph (k);

- (l) as to subparagraph (l);
 - (i) denies that the fifteenth defendant performed BAS in accordance with a One Size Fits All Approach; and
 - (ii) otherwise does not admit the paragraph;
- (m) as to subparagraph (m):
 - (i) does not admit the subparagraph; and
 - (ii) denies that the fifteenth defendant performed BAS in accordance with a One Size Fits All Approach;
- (n) as to subparagraph (n):
 - (i) does not admit the subparagraph; and
 - (ii) denies that the fifteenth defendant performed BAS in accordance with a One Size Fits All Approach;
- (o) as to subparagraph (o):
 - (i) does not admit the subparagraph; and
 - (ii) denies that the fifteenth defendant performed BAS in accordance with a One Size Fits All Approach; and
- (p) does not admit subparagraph (p).

14A to 14I. The fifteenth defendant does not plead to paragraphs 14A to 14I as they do not contain allegations against him.

14J. In response to paragraph 14J, the fifteenth defendant:

- (a) as to subparagraph (a);
 - (i) admits that he was at all material times a registered medical practitioner;
 - (ii) says that he had qualifications, training and experience relevant to the performance of BAS; and
 - (iii) otherwise does not admit the paragraph;
- (b) does not admit subparagraph (b);
- (c) as to subparagraph (c):
 - (i) admits that the fifth defendant conducted training of the fifteenth defendant in relation to BAS;
 - (ii) denies that he was trained, supervised and/or assisted by the fifth defendant in the performance of a One Size Fits All Approach to BAS; and

- (iii) otherwise does not admit the subparagraph;
- (d) as to subparagraph (d):
 - (i) admits that he carried out the following duties or activities:
 - (A) pre-operative consultations with, and advice to, women about BAS;
 - (B) obtaining consent from women to undergo BAS;
 - (C) BAS under conscious sedation or general anaesthesia;
 - (D) the injection of local anaesthetic during conscious sedation of women undergoing BAS;
 - (E) post-BAS follow-up consultations; and
 - (F) the diagnosis and treatment of BAS complications; and
 - (ii) denies that he carried out a One Size Fits All Approach to BAS; and
 - (iii) otherwise denies the subparagraph;
- (e) as to subparagraph (e):
 - (i) admits that he performed BAS on the eleventh plaintiff; and
 - (ii) otherwise denies the subparagraph.

14K. The fifteenth defendant does not plead to paragraph 14K as it does not contain allegations against him.

II. ALLEGED SYSTEM OF BAS

15. In response to paragraph 15, the fifteenth defendant:
- (a) admits that BAS was offered to and performed on women at TCI Parramatta, TCI Bondi, TCI Southport and Concord Private Hospital;
 - (b) admits that BAS was performed by surgeons, including the fifteenth defendant;
 - (c) admits that patients were charged a fee for BAS; and
 - (d) otherwise does not admit the paragraph.
16. In response to paragraph 16, the fifteenth defendant says, so far as the allegation concerns his own practice or what he observed:
- (a) denies subparagraph (a);
 - (b) denies subparagraph (b);
 - (c) otherwise does not admit the paragraph.

17. In response to paragraph 17, the fifteenth defendant:
- (a) repeats subparagraph 14(b), above;
 - (b) says that the fifth defendant was the surgical director of the business conducted at the TCI Premises; and
 - (c) otherwise does not admit the paragraph.
18. In response to paragraph 18, the fifteenth defendant:
- (a) admits that on or around March 2014 he entered into an agreement with the second defendant which was headed 'Accreditation Deed' (**Accreditation Deed**);
 - (b) admits that it was a term of the Accreditation Deed that he would perform medical services in accordance with the deed;

Particulars

Accreditation Deed, cl 5.8

- (c) admits that it was term of the Accreditation Deed that the medical services were to be performed at premises from which The Cosmetic Institute business operated; and
 - (d) otherwise does not admit the paragraph.
19. In response to paragraph 19, the fifteenth defendant:
- (a) repeats subparagraphs 18(a) to (c), above;
 - (b) admits that it was a term of the Accreditation Deed that he was granted the right during the term of the deed to be described as an "Accredited TCI Practitioner";

Particulars

Accreditation Deed, cl 5.9

- (c) admits that it was a term of the Accreditation Deed that the second defendant would provide space suitable for the conduct of a professional practice and such plant and equipment as were reasonably necessary for the provision of medical services by the fifteenth defendant;

Particulars

Accreditation Deed, cl 3.2(a), (b)

- (d) admits that on or around March 2014 he entered into an agreement with the second defendant which was headed 'Deed for the provision of training' (**Training Deed**);

- (e) admits that it was a term of the Training Deed that the fifteenth defendant would undertake a training program as instructed by the second defendant; and

Particulars

Training Deed, cl 3(a)

- (f) otherwise does not admit the paragraph.

20. In response to paragraph 20, the fifteenth defendant:

- (a) admits that anaesthetists provided anaesthesia to enable the performance of BAS at TCI Parramatta, TCI Bondi, TCI Southport and Concord Private Hospital; and
- (b) otherwise does not admit the paragraph.

The alleged 'One Size Fits All Approach'

21. In response to paragraph 21, the fifteenth defendant:

- (a) as to subparagraph (a):
 - (i) denies that the pre-operative consultation conducted by him with the eleventh plaintiff was conducted in the absence of an appropriately qualified and trained surgeon;
 - (ii) denies that the advice he provided to the eleventh plaintiff was not provided by an appropriately qualified and trained surgeon; and
 - (iii) otherwise does not admit the subparagraph;
- (b) as to subparagraph (b):
 - (i) admits that he performed surgery on the eleventh plaintiff under anaesthesia administered by an anaesthetist; and
 - (ii) otherwise does not admit the subparagraph;
- (c) as to subparagraph (c):
 - (i) admits that he performed surgery on the eleventh plaintiff using a bilateral infra-mammary incision; and
 - (ii) otherwise does not admit the subparagraph;
- (d) as to subparagraph (d):
 - (i) admits that he implanted round, textured, silicone implants into the eleventh plaintiff; and
 - (ii) otherwise does not admit the subparagraph;

- (e) as to subparagraph (e):
 - (i) admits that in conducting surgery on the eleventh plaintiff he inserted the implants into subpectoral pockets; and
 - (ii) otherwise does not admit the subparagraph;
- (f) denies subparagraph (f); and
- (g) as to subparagraph (g):
 - (i) admits that he performed surgery at TCI Parramatta and TCI Bondi in which he injected patients with local anaesthesia; and
 - (ii) otherwise does not admit the paragraph.

22. The fifteenth defendant denies paragraph 22.

The alleged representations

23. In response to paragraph 23, the fifteenth defendant:

- (a) says that he did not prepare or publish the promotional materials identified in the particulars to the paragraph; and
- (b) does not admit the paragraph.

23A. The fifteenth defendant does not plead to paragraph 23A as it does not contain an allegation against him.

Pre-surgery consultations

24. In response to paragraph 24, the fifteenth defendant:

- (a) admits that the eleventh plaintiff attended a pre-surgery consultation with him prior to undergoing BAS; and
- (b) otherwise does not admit the paragraph.

Post-surgery consultations

24A. In response to paragraph 24A, the fifteenth defendant:

- (a) admits that following BAS, the eleventh plaintiff participated in person or by videolink or by telephone, in follow up consultations with a TCI surgeon and/or cosmetic consultant and/or nurse; and
- (b) otherwise does not admit the paragraph.

24B. In response to paragraph 24B, the fifteenth defendant:

- (a) says that the fifth defendant was at times available to consult with the fifteenth defendant about the performance of BAS; and
- (b) otherwise does not admit the paragraph.

24C. In response to paragraph 24C, the fifteenth defendant:

- (a) admits that the fifth defendant was at times available to treat or assist in the treatment of patients following the performance of BAS;; and
- (b) otherwise does not admit the paragraph.

III. QUESTIONS WHICH IT IS CONTENDED ARE COMMON

25. In response to paragraph 25, the fifteenth respondent says that the questions identified in the paragraph are not questions of law or fact common to all group members, and says further:

- (a) as to subparagraph (a), the question identified in that subparagraph requires separate enquiries into the contractual relationship between each of the TCI Surgeons and each of the first, second, third or fourth defendants;
- (b) as to subparagraph (b), the question identified in that subparagraph requires separate enquiries into whether any of the TCI Surgeons made the representations alleged to any of the plaintiffs and other individual group members, on separate occasions;
- (c) as to subparagraph (c), the question identified in that subparagraph requires separate enquiries into whether any of the defendants made the representations alleged to any of the plaintiffs and other individual group members, on separate occasions;
- (d) as to subparagraph (d), the question identified in that subparagraph requires separate enquiries into whether any of the TCI Surgeons performed BAS negligently in respect of any of the plaintiffs and other individual group members;
- (e) as to subparagraph (e), the question identified in that subparagraph requires separate enquiries into whether any of the defendants, in respect of any of the plaintiffs and other individual group members:
 - (i) failed to comply with the statutory guarantee under s 60 of the ACL;
 - (ii) breached a common law duty to exercise due care and skill in performing BAS;

- (iii) breached any implied warranty that BAS would be performed with due care and skill; and
 - (iv) failed to comply with any guarantee implied into the agreement by s 61(2) of the ACL that BAS would be fit for purpose;
- (f) as to subparagraph (f), the question identified in that subparagraph requires separate enquiries into whether any representations made by one or more of the defendants to one or more of the plaintiffs or other group members were misleading representations with respect to future matters for the purposes of s 4 of the ACL;
- (g) as to subparagraph (g), the question identified in that subparagraph requires separate enquiries into whether any representations made by one or more of the defendants to one or more of the plaintiffs or other group members were misleading or deceptive and in contravention of ss 18, 29(1)(b) and 29(1)(m) of the ACL;
- (h) as to subparagraph (h), the question identified in that subparagraph requires separate enquiries into whether any representations made by one or more of the defendants to one or more of the plaintiffs or other group members were negligent misrepresentations;
- (i) as to subparagraph (i), the question identified in that subparagraph requires separate enquiries into whether the fifth defendant devised, designed, implemented, supervised and conducted the training of each of the TCI Surgeons;
- (j) as to subparagraph (j), the question identified in that subparagraph requires separate enquiries into whether the fifth defendant recommended to any of the first, second, third or fourth defendants, in respect of each of the TCI Surgeons, that the relevant surgeons be accredited to perform BAS;
- (k) as to subparagraph (k), the question identified in that subparagraph requires separate enquiries into whether the fifth defendant authorised accreditation, in respect of each of the TCI Surgeons, for the relevant surgeon to perform BAS;
- (l) as to subparagraph (l), the question identified in that subparagraph:
 - (i) assumes the existence of the One Size Fits All approach without addressing the anterior question of whether such an approach existed; and

- (ii) requires separate enquiries into whether, for each BAS performed, that BAS was performed in accordance with the alleged One Size Fits All approach;
- (m) as to subparagraph (m), the question identified in that subparagraph requires separate enquiries into whether the BAS services provided to each of the group members were, in each case, provided under the control and direction of the first defendant;
- (n) as to subparagraph (n), the question identified in that subparagraph:
 - (i) assumes the existence of the One Size Fits All approach without addressing the anterior question of whether such an approach existed; and
 - (ii) requires separate enquiries into:
 - (A) whether a One Size Fits All Approach was adopted in respect of each group member; and
 - (B) whether, in each case, the adoption of the alleged approach was negligent; and
- (o) does not admit that these proceedings otherwise raise questions of law or fact common to the claims of group members.

IV. THE PLAINTIFFS' BAS

- 26. The fifteenth defendant does not plead to paragraph 26 because it does not contain any allegations against him.
- 27. The fifteenth defendant does not plead to paragraph 27 because it does not contain any allegations against him.
- 28. The fifteenth defendant does not plead to paragraph 28 because it does not contain any allegations against him.
- 29. The fifteenth defendant does not plead to paragraph 29 because it does not contain any allegations against him.
- 30. The fifteenth defendant does not plead to paragraph 30 because it does not contain any allegations against him.
- 31. The fifteenth defendant does not plead to paragraph 31 because it does not contain any allegations against him.
- 32. The fifteenth defendant does not plead to paragraph 32 because it does not contain any allegations against him.

33. The fifteenth defendant does not plead to paragraph 33 because it does not contain any allegations against him.
34. The fifteenth defendant does not plead to paragraph 34 because it does not contain any allegations against him.
35. The fifteenth defendant does not plead to paragraph 35 because it does not contain any allegations against him.
36. The fifteenth defendant does not plead to paragraph 36 because it does not contain any allegations against him.
37. The fifteenth defendant does not plead to paragraph 37 because it does not contain any allegations against him.
38. The fifteenth defendant does not plead to paragraph 38 because it does not contain any allegations against him.
39. The fifteenth defendant does not plead to paragraph 39 because it does not contain any allegations against him.
40. The fifteenth defendant does not plead to paragraph 40 because it does not contain any allegations against him.
41. The fifteenth defendant does not plead to paragraph 41 because it does not contain any allegations against him.
42. The fifteenth defendant does not plead to paragraph 42 because it does not contain any allegations against him.
43. The fifteenth defendant does not plead to paragraph 43 because it does not contain any allegations against him.
44. The fifteenth defendant does not plead to paragraph 44 because it does not contain any allegations against him.
45. The fifteenth defendant does not plead to paragraph 45 because it does not contain any allegations against him.
46. The fifteenth defendant does not plead to paragraph 46 because it does not contain any allegations against him.
47. The fifteenth defendant does not plead to paragraph 47 because it does not contain any allegations against him.
48. The fifteenth defendant does not plead to paragraph 48 because it does not contain any allegations against him.

49. The fifteenth defendant does not plead to paragraph 49 because it does not contain any allegations against him.
50. The fifteenth defendant does not plead to paragraph 50 because it does not contain any allegations against him.
51. The fifteenth defendant does not plead to paragraph 51 because it does not contain any allegations against him.
52. The fifteenth defendant does not plead to paragraph 52 because it does not contain any allegations against him.
53. The fifteenth defendant does not plead to paragraph 53 because it does not contain any allegations against him.
54. The fifteenth defendant does not plead to paragraph 54 because it does not contain any allegations against him.
55. The fifteenth defendant does not plead to paragraph 55 because it does not contain any allegations against him.
56. The fifteenth defendant does not plead to paragraph 56 because it does not contain any allegations against him.
57. The fifteenth defendant does not plead to paragraph 57 because it does not contain any allegations against him.
58. The fifteenth defendant does not plead to paragraph 58 because it does not contain any allegations against him.
59. The fifteenth defendant does not plead to paragraph 59 because it does not contain any allegations against him.
60. The fifteenth defendant does not plead to paragraph 60 because it does not contain any allegations against him.
61. The fifteenth defendant does not plead to paragraph 61 because it does not contain any allegations against him.
62. The fifteenth defendant does not plead to paragraph 62 because it does not contain any allegations against him.
63. The fifteenth defendant does not plead to paragraph 63 because it does not contain any allegations against him.
64. The fifteenth defendant does not plead to paragraph 64 because it does not contain any allegations against him.

65. The fifteenth defendant does not plead to paragraph 65 because it does not contain any allegations against him.
66. The fifteenth defendant does not plead to paragraph 66 because it does not contain any allegations against him.
67. The fifteenth defendant does not plead to paragraph 67 because it does not contain any allegations against him.
68. The fifteenth defendant does not plead to paragraph 68 because it does not contain any allegations against him.
69. The fifteenth defendant does not plead to paragraph 69 because it does not contain any allegations against him.
70. The fifteenth defendant does not plead to paragraph 70 because it does not contain any allegations against him.
71. The fifteenth defendant does not plead to paragraph 71 because it does not contain any allegations against him.
72. The fifteenth defendant does not plead to paragraph 72 because it does not contain any allegations against him.
73. The fifteenth defendant does not plead to paragraph 73 because it does not contain any allegations against him.
74. The fifteenth defendant does not plead to paragraph 74 because it does not contain any allegations against him.
75. The fifteenth defendant does not plead to paragraph 75 because it does not contain any allegations against him.
76. The fifteenth defendant does not plead to paragraph 76 because it does not contain any allegations against him.
77. The fifteenth defendant does not plead to paragraph 77 because it does not contain any allegations against him.

77AA-77JO. The fifteenth defendant does not plead to paragraphs 77AA through to 77JO because they do not contain allegations against him.

77KA. In response to paragraph 77 KA, the fifteenth defendant:

- (a) denies that he disseminated the material referred to in the paragraph on the websites identified; and
- (b) otherwise does not admit the paragraph.

77KB. In response to paragraph 77KB, the fifteenth defendant:

- (a) admits that the eleventh plaintiff attended at TCI Parramatta premises on 18 June 2015 for a pre-surgery consultation; and
- (b) otherwise does not admit the paragraph.

77KC. In response to paragraph 77KC, the fifteenth defendant:

- (a) admits that on 7 May 2014 Ms Turner agreed that she would receive [REDACTED]
[REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
- (b) otherwise does not admit the paragraph.

77KD. The fifteenth defendant admits paragraph 77KD.

77KE. The fifteenth defendant admits paragraph 77KE.

77KF. The fifteenth defendant does not admit paragraph 77KF.

77KG. The fifteenth defendant does not admit paragraph 77KG.

77KH. The fifteenth defendant does not admit paragraph 77KH.

77KI. The fifteenth defendant does not admit paragraph 77KI.

77LA to 77LL. The fifteenth defendant does not plead to paragraphs 77LA through to 77LL because they do not contain allegations against him.

V. ALLEGED NEGLIGENCE

78. In response to paragraph 78:

- (a) the fifteenth defendant admits that he owed the eleventh plaintiff a duty to exercise reasonable care and skill in the provision of advice about, and in the performance of, BAS; and
- (b) otherwise does not admit the paragraph.

79. In response to paragraph 79:
- (a) the fifteenth defendant admits that, in relation to the eleventh plaintiff, he knew or ought to have known that a failure to take reasonable care and skill in the performance of BAS could increase the risk of a medical complication; and
 - (b) otherwise does not admit the paragraph.
80. The fifteenth defendant denies paragraph 80 insofar as it contains an allegation against him.
81. The fifteenth defendant does not plead to paragraph 81 because it does not contain any allegations against him.
- 81A-81J. The fifteenth defendant does not plead to paragraphs 81A to 81J because they do not contain any allegations against him.
- 81K. In response to paragraph 81K, the fifteenth defendant:
- (a) denies the allegation insofar as it concerns the eleventh plaintiff; and
 - (b) does not admit the allegation insofar as it concerns any other members of the Kenny Sub-Group.
- 81L. The fifteenth defendant does not plead to paragraph 81L because it does not contain any allegations against him.

VI. COMPETITION AND CONSUMER ACT 2010 (CTH)

86. In response to paragraph 86, the fifteenth defendant:
- (a) admits that the eleventh plaintiff acquired BAS for personal use;
 - (b) says that the term 'service' is not given a particular meaning by s 3 of the ACL; and
 - (c) otherwise does not admit the paragraph.
87. In response to paragraph 87, the fifteenth defendant:
- (a) admits that the eleventh plaintiff was supplied with BAS as a consumer within the meaning of s 3(12) of the ACL; and
 - (b) otherwise does not admit the paragraph.
88. In response to paragraph 88, the fifteenth defendant:
- (a) admits that the eleventh plaintiff acquired BAS as a consumer within the meaning of s 3(3) of the ACL; and
 - (b) otherwise does not admit the paragraph.

89. In response to paragraph 89, the fifteenth defendant:
- (a) admits that women may obtain BAS for one or more of the purposes identified in subparagraph (a) to (d);
 - (b) otherwise does not admit the paragraph; and
 - (c) says further that the motivations for obtaining BAS will vary from patient to patient.
90. In response to paragraph 90 and insofar as it contains an allegation against him, the fifteenth defendant:
- (a) admits that, during her pre-surgery consultation with him, the eleventh plaintiff conveyed that she wanted her breasts enlarged;
 - (b) repeats paragraph 89, above; and
 - (c) otherwise does not admit the paragraph.
91. In response to paragraph 91, the fifteenth defendant:
- (a) admits that, in a given case, BAS may be performed with the reasonable expectation that the result would be likely to be one or more of the results identified in subparagraph (a) to (d);
 - (b) otherwise does not admit the paragraph; and
 - (c) says further that what is a reasonable expectation as to the outcome of BAS will vary from case to case.
92. In response to paragraph 92 and insofar as it contains an allegation against him, the fifteenth defendant:
- (a) insofar as paragraph 92 alleges that the fifteenth defendant knew that BAS was performed in the expectation that the result would be as identified in subparagraphs (a) to (d) of paragraph 91 – repeats paragraph 91, above; and
 - (b) otherwise does not admit the paragraph.
93. In response to paragraph 93 and insofar as it contains allegations against him, the fifteenth defendant:
- (a) says that he is a natural person;

- (b) says that, by reason of the fact that he is a natural person, ss 60, 61(1) and 61(2) of the ACL do not apply to his conduct; and

Particulars

Competition and Consumer Act 2010 (Cth), s 131

- (c) denies the paragraph.
94. In response to paragraph 94 and insofar as it contains allegations against him, the fifteenth defendant:
- (a) repeats paragraph 93, above; and
 - (b) denies the paragraph.
95. In response to paragraph 95 and insofar as it contains allegations against him, the fifteenth defendant:
- (a) repeats paragraphs 92 and 93, above; and
 - (b) denies the paragraph.
96. In response to paragraph 96 and insofar as it contains allegations against him, the fifteenth defendant:
- (a) repeats paragraphs 92 and 93, above; and
 - (b) denies the paragraph.
97. In response to paragraph 97 and insofar as it contains allegations against him, the fifteenth defendant:
- (a) repeats paragraph 23, above; and
 - (b) does not admit the paragraph.
98. In response to paragraph 98 and insofar as it contains allegations against him, the fifteenth defendant:
- (a) repeats paragraphs 93 to 96, above;
 - (b) repeats paragraph 97, above;
 - (c) if he made any of the representations listed in paragraph 23 to the eleventh plaintiff (which is not admitted):
 - (i) does not admit that any such representations were as to future matters for the purposes of s 4 of the ACL;
 - (ii) says, in any event, that if any such representations were as to future matters there were reasonable grounds for making the representations;

- (iii) denies that any such representations were misleading or deceptive;
- (iv) denies that any such representations were false or misleading; and
- (d) otherwise does not admit the allegation.

99. In response to paragraph 99 and insofar as it contains allegations against him, the fifteenth defendant:

- (a) denies the paragraph insofar as it concerns the eleventh plaintiff; and
- (b) otherwise does not admit the paragraph.

VII. ALLEGED INJURY, LOSS AND DAMAGE

100. In response to paragraph 100 and insofar as it contains allegations against him, the fifteenth defendant:

- (a) as to subparagraph (a):
 - (i) denies the allegation insofar as it concerns the eleventh plaintiff;
 - (ii) says that:
 - (A) in relation to the eleventh plaintiff, any failure to take precautions against the risk of harm (which failure is not admitted) was not negligent;

Particulars

Civil Liability Act 2005 (NSW), ss 5B and 5C

- (B) in relation to the other Tang sub-group members, the question of whether the fifteenth defendant was negligent falls to be assessed by reference to ss 5B and 5C of the *Civil Liability Act 2005 (NSW)* or, where applicable, ss 9 and 10 of the *Civil Liability Act 2003 (Qld)*;
- (iii) says that, in relation to all Tang sub-group members, causation will need to be assessed in accordance with s 5D of the *Civil Liability Act 2005 (NSW)* or, where applicable, 11 of the *Civil Liability Act 2003 (Qld)*;

- (iv) says that:
 - (A) in relation to the eleventh plaintiff, the harm of the kind alleged in the 'particulars of injuries' was the materialisation of an inherent risk within the meaning of s 51 of the *Civil Liability Act 2005* (NSW);
 - (B) in relation to the other Tang sub-group members, liability for, or in respect of, any of those 'particulars of injuries' will need to be assessed by reference to s 51 of the *Civil Liability Act 2005* (NSW) or, where applicable, s 16 of the *Civil Liability Act 2003* (Qld);
 - (v) says that, in relation to all Tang sub-group members, liability will need to be assessed in accordance with s 50 of the *Civil Liability Act 2005* (NSW) or, where applicable, s22 of the *Civil Liability Act 2003* (Qld);
 - (vi) says, further and in the alternative, that any entitlement to damages (which is denied) is governed by Part 2 of the *Civil Liability Act 2002* (NSW) or, where applicable, Chapter 3 of the *Civil Liability Act 2003* (Qld); and
 - (vii) otherwise does not admit the subparagraph;
- (b) as to subparagraph (b):
- (i) denies the allegation insofar as it concerns the eleventh plaintiff;
 - (ii) repeats paragraph 23, above;
 - (iii) repeats subparagraphs 100(a)(ii) and 100(a)(iv), above;
 - (iv) repeats subparagraphs 100(a)(vi) and 100(a)(vii), above; and
 - (v) otherwise does not admit the subparagraph;
- (c) as to subparagraph (c):
- (i) denies the allegation;
 - (ii) repeats paragraph 98, above; and
 - (iii) says that, by reason of ss 137C(1) and 137E(1) of the *Competition and Consumer Act 2010* (Cth), the group members are not entitled to recover the damages claimed;
- (d) as to subparagraph (d):
- (i) denies the allegation;
 - (ii) repeats paragraphs 93 to 94, above;

- (iii) says in the alternative that, in relation to all Tang sub-group members:
- (A) liability falls to be assessed in accordance with Part 1A of the *Civil Liability Act 2005* (NSW) or, where applicable, Chapter 2 of the *Civil Liability Act 2003* (Qld);

Particulars

Judiciary Act 1903 (Cth), ss 79 and 80

Civil Liability Act 2005 (NSW), s 5A (1)

Civil Liability Act 2003 (Qld), s4 (1)

- (B) any entitlement to damages (which is denied) is governed by Part 2 of the *Civil Liability Act 2002* (NSW); or, where applicable, Chapter 3 of the *Civil Liability Act 2003* (Qld)

Particulars

Judiciary Act 1903 (Cth), ss 79 and 80

Civil Liability Act 2005 (NSW), s 11A

Civil Liability Act 2003 (Qld) s50

- (e) as to subparagraph (e):
- (i) denies the allegation;
- (ii) repeats paragraphs 93 and 94, above;
- (iii) repeats subparagraph 100(d)(iii), above; and
- (iv) in the alternative, repeats subparagraph 100(d) (iv), above.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 of 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

Leonie Beyers
Solicitor on record

30/10/2020

FURTHER DETAILS ABOUT FILING PARTY**Fifteenth defendant:**

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