Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Commonwealth Bank of Australia and its associated Australian entities (Group)

Round 2 Hearing – Financial Advice Closing Submissions

PART A – PROPOSED FINDINGS

1. Counsel Assisting has made submissions that it is open to the Commissioner to make a number of findings of "misconduct" (as that term is defined in the Letters Patent), conduct falling below community standards and expectations and findings as to the cause or causes of that conduct. The proposed findings of misconduct include alleged breaches of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). This section of the submission sets out CBA's response to those submissions.

CASE STUDY: FEES FOR NO SERVICE

2. CBA acknowledges that the circumstances covered in this case study are unacceptable and have impacted a large number of customers. The customer remediation and the uplift in supervision and monitoring frameworks, processes and systems that have been implemented to address these issues are significant and have been the subject of ongoing regulatory focus, including the recent enforceable undertaking. Nonetheless, the issues should not have occurred and when they did, they should have been identified and dealt with in a more timely manner. Charging customers fees for services that are not provided is not acceptable and for that we apologise.

3. This case study concerned clients who were charged fees for no service by the following entities of CBA: Commonwealth Financial Planning Limited (**CFPL**), Count Financial Limited (**Count**) and BW Financial Advice Limited (**BWFA**).

4. Those clients who were charged fees for no service were either:

   a. clients who were allocated a financial adviser where that financial adviser failed to provide ongoing services to the client; or

b. "orphan" clients who were no longer allocated to an active financial adviser and were charged fees without receiving any financial advice or services.

5. As noted by Counsel Assisting, the clients in category (a) above were clients of CFPL and BWFA only, while the clients in category (b) above were clients of CFPL, Count and BWFA[1].

6. The "orphan" client issue within Count is different to the orphan client issue within CFPL or BWFA. While CFPL's and BWFA's orphan clients may have been charged fees for no service (as a result of no longer being allocated to an active financial adviser), some of Count's orphan clients were incorrectly charged an administration fee after a decision had been made to switch that fee off[2]. The administration fee was a fee that the orphan client paid for administrative and transaction services upon being allocated to Count's Head Office after their adviser departed Count[3].

A. Alleged Findings of Misconduct

A1. First Alleged Misconduct Finding – Breach of s 912A(1)(a) Corporations Act

7. CBA accepts that CFPL, Count and BWFA contravened s 912A(1)(a) in respect of some clients as communicated to ASIC on 13 August 2014 (CFPL)[4], 9 September 2014 (Count)[5] and 5 December 2014 (BWFA)[6].

8. As Counsel Assisting stated, Ms Perkovic's evidence was that CBA has provided remediation in the order of $118.5 million to the affected clients[7]. It may be noted that, first, CBA remediated clients even where the evidence was inconclusive as to whether services had been provided i.e. there may or may not have been a failure to deliver service[8]. Second, clients were also remediated for the fees charged for

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[1] T1944.13–33.

[2] T1271.26–T1275.2.

[3] T1271.26–T1275.2.

[4] Exhibit 2.73.3 (CBA.0001.0039.0453) - CFPL's Notification by an AFS licensee of a significant breach of a licensee's obligations dated 13 August 2014, Exhibit MP-3 to witness statement of Marianne Perkovic dated 3 April 2018 in response to Rubric 2-1 (**Perkovic 2-1 Statement**).

[5] Exhibit 2.75.2 (CBA.0508.0008.0008) - Count's Notification by an AFS licensee of a significant breach of a licensee's obligations dated 9 September 2014, Exhibit MP-2 to witness statement of Marianne Perkovic dated 3 April 2018 in response to Rubric 2-2 (**Perkovic 2-2 Statement**).

[6] Exhibit 2.78.2 (CBA.0517.0020.0018) - BWFA's Notification by an AFS licensee of a significant breach of a licensee's obligations dated 5 December 2014, Exhibit MP-2 to witness statement of Marianne Perkovic dated 9 April 2018 in response to Rubric 2-17 (**Perkovic 2-17 Statement**).

[7] T1944.4–11.

[8] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [132(c)]: "*Fees were refunded where CFPL was unable to locate sufficient evidence – such as a Statement of Advice – that the customer was provided with an Annual Review.*"; see also [145] and [150]. Exhibit 2.78 (CBA.9000.0012.0001) - Perkovic 2-17 Statement at

services and also interest (or a rate of return) on those fees charged[9]. Third, CBA also provided remediation to clients where the financial adviser had offered the client an annual review and the client had declined, and where the financial adviser had tried to contact the client to offer a review but was unable to contact the client[10].

9. Counsel Assisting referred[11] to a Count Risk and Compliance Forum document dated December 2015[12] as evidence of Count advisers who were not providing services, suggesting that Count had a systemic problem that was separate to the orphan client issue raised in its notification to ASIC[13]. That submission should be rejected, as:

   a. The Count Risk and Compliance Forum document dated December 2015 suggested that there were seven[14] authorised representatives who were under investigation for not having provided ongoing services to clients. This is in circumstances where Count had 496 authorised representatives as at 31 December 2015[15]. To the extent that any authorised representatives did not provide ongoing services that is not an acceptable outcome. However, the seven authorised representatives should be viewed as isolated instances rather than evidence of a systemic problem.

   b. Ms Perkovic's evidence was that, based on sample testing of files[16], Count had concluded that there was no systemic problem with its authorised representatives not providing services[17]. That evidence was not contradicted.

A2. Second Alleged Misconduct Finding – Breach of s 912A(1)(d) Corporations Act

10. Section 912A(1)(d) obliges financial services licensees such as CFPL, Count and BWFA to ensure they have "*available adequate resources* (*including financial, technological and human resources)"* to "*provide the financial services covered by the licence*", and *"carry out supervisory arrangements*".

[74(c)]: "*Fees were refunded where BWFA was unable to locate sufficient evidence – such as a Statement of Advice – that the customer was provided with an Annual Review.*"; see also [82].

[9] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [135] - [138].

[10] See ASIC 17-145 MR "*Compensation update: major financial advisory institutions continue refund programs for fees for no service*".

[11] T1944.18–22.

[12] Exhibit 2.90 (CBA.0001.0075.7263) - Count Risk & Compliance Forum dated December 2015.

[13] Exhibit 2.75.2 (CBA.0508.0008.0008) - Count's significant breach notification dated 9 September 2014, Perkovic 2-2 Statement, Exhibit MP-2.

[14] Exhibit 2.90 (CBA.0001.0075.7263) at .7277; .7281; .7287; .7290; two advisers mentioned at .7293 and .7304.

[15] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [13].

[16] 800 files over Financial Wisdom Limited and Count: T1338.46–47.

[17] T1338.35–T1339:6; see also T1944.24–27.

11. There is no evidence that CBA's licensees did not have adequate resources available to provide ongoing services to its clients. Nor is there any evidence in support of a finding that the failure to provide ongoing services was caused by a lack of available resources within CBA, or CBA's licensees.

12. The associated suggestion by Counsel Assisting that the increase in the number of clients in the period from 2008 to 2017 and the decrease in the number of financial advisers in the same period indicates that "*CFPL acted to lessen rather than increase the prospects of clients receiving meaningful services*"[18] should be rejected. First, the number of clients in the period from 2008 to 2017 relates to all clients of CFPL who had ever received financial advice from CFPL, including but not limited to clients receiving ongoing service (i.e., it is a cumulative figure not the number of current customers at that point in time)[19]. Counsel Assisting has not established that CFPL was increasingly servicing more clients each year over this period. Second, Ms Perkovic's evidence was that the following resources were available, in addition to financial advisers, to meet the needs for ongoing service: paraplanners, increased efficiencies in systems, and increased support from the head office[20].

13. CBA acknowledged, as part of the Enforceable Undertaking that CFPL entered into with ASIC on 25 October 2011[21], ASIC's concerns that CFPL may have contravened the obligation under s 912A(1)(d). Ms Perkovic also acknowledged in evidence that CFPL and BWFA did not have the "proper supervision and monitoring"[22] for the provision of ongoing service. As acknowledged in the Enforceable Undertaking it is accepted that, while CFPL and BWFA had available adequate resources to meet their ongoing service obligations and that some supervisory arrangements were in place[23], the supervisory arrangements, namely the IT systems, that CFPL and BWFA had in place to monitor those ongoing service obligations were inadequate. That is why the licensees commenced taking steps in 2012 to address this. Counsel

[18] T1947.9–13.

[19] Exhibit 2.74 (CBA.9000.0021.0001) - Supplementary Statement of Marianne Perkovic in Answer to Rubric 2-1 dated 4 April 2018 (**Perkovic 2-1 Supplementary Statement**) at [6].

[20] T1282.8–T1284.31. In addition, Ms Perkovic has provided a witness statement setting out the resources within each licensee to provide the financial services, monitor those financial services and ensure compliance with relevant legislation: see Exhibit 2.172 (CBA.9000.0015.0001) - witness statement of Marianne Perkovic dated 13 April 2018 in response to Rubric 2-11 (**Perkovic 2-11 Statement**).

[21] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [101]

[22] T1289.17–24; T1298.16–19; T1312.25–37; T1316.6-12.

[23] For example, the existence of OGS checklists for specific clients are checked when general file reviews are conducted: Exhibit 2.81 (CBA.0523.0001.0430) - Memorandum from Jaime Henderson to Lisa Chambers dated 12 April 2012 (**the Henderson memo**).

Assisting has not established any basis for the allegation that Count did not have adequate supervisory arrangements in place.

A3. Third Alleged Misconduct Finding – Breach of s 12DI(3) ASIC Act

14. Counsel Assisting submitted that there may have been a contravention of s 12DI(3) of the ASIC Act, with respect to orphan clients[24].

15. To establish a contravention of s 12DI(3) of the ASIC Act, it is necessary to prove at least:

    a. the acceptance of payment or other consideration for financial services;

    b. at the time of acceptance, the existence of reasonable grounds for believing that the recipient of the payment will not be able to supply the financial services within the period specified or within a reasonable time.

Acceptance of payment for financial services

16. CFPL and BWFA each accepted payment for financial services, being ongoing service.

17. Count did not. The services were provided by the adviser firms which operated under Count's franchise model[25]. In the case of Count orphan clients, Count accepted payment of an administration fee for transaction or administrative services by Count's Head Office[26].

Existence of reasonable grounds for belief of an inability to supply

18. For this limb the question is not whether there were reasonable grounds for believing that the recipient *would not* supply the financial services. Such a construction would render the words *"be able to"* in the section ineffective. Rather the question is whether there were reasonable grounds for believing that the recipient *would not be able to* supply the financial services[27].

[24] T1944.46–1945.3

[25] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [14] - [20]; The authorised representative is considered to be the person who provided the service by operation of ss 769B(7) and 962C(2), of the Corporations Act.

[26] T1271.26–T1275.2.

[27] See following cases that apply the corresponding provisions in the Australian Consumer Law s 36 and former TPA s 58 which are not materially different from s 12DI: *Australian Competition & Consumer Commission v*

19. The evidence does not establish that there were reasonable grounds at the time that CFPL and BWFA received payment in the belief that CFPL and BWFA would not be able to provide services.

20. It does not follow from the fact that services were not provided to some orphan clients that it could reasonably be believed that CFPL and BWFA were *not able* to provide such services, particularly as:

    a. the period in which the financial services were to be provided was 12 months;

    b. each licensee employed many advisers;

    c. the July 2012 BIM Report Deloitte "*identified… over 1,050 clients that [were] allocated to over 50 inactive planners*…"[28], but recommended a course of action which was to "*validate through examining advice files whether the potential issues identified are as a result of data quality issues only or whether clients have been impacted*"[29]. That could not be said to give rise to a reasonable ground to believe the services could not be provided to those clients: the report made clear that it was possible the relevant clients had received the service, but that had not been documented (it was not known whether the issue was a data issue). It has not been suggested that Deloitte's approach was unreasonable;

    d. in respect of CFPL's orphan clients, the standard process to be followed was that upon departure of their adviser, the client would be allocated to a new adviser[30]. That standard procedure itself demonstrates that CFPL would *be able to* supply the services: it had an ability to allocate a new adviser who, in turn, had the ability to provide the service;

    e. in respect of BWFA's orphan clients, unlike the position with CFPL, there is no evidence one way or the other as to BWFA's protocols when BWFA advisers left;

Commercial & General Publications Pty Ltd [2002] FCA 900 at [213]-[214]; *ACCC v EDirect Pty Ltd* [2008] FCA 65; *ACCC v Multimedia International Services Pty Ltd* [2016] FCA 439 at [52].

[28] Exhibit 2.85 (CBA.0520.0002.6443), at .6454 (page 12).

[29] Exhibit 2.85 (CBA.0520.0002.6443), at .6452-3 (page 10-11).

[30] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [147]; Exhibit 2.81 (CBA.00041.0089.3797) - Henderson Memorandum, at .3798: "*Currently, when a Financial Planner leaves their role as a Financial Planner, it is the FPM's [financial planning manager's] obligation to ensure all clients are transferred to new planners within the business. …*"

f. in respect of CFPL, BWFA and Count, when orphan clients requested services, they were provided.

21. The present circumstances may be contrasted with examples in the case law concerning the analogous (now repealed) s 58(b) of the *Trade Practices Act 1974* (Cth) which involved circumstances in which it was not possible for the recipient to have provided the promised service[31].

A4. Fourth Alleged Misconduct Finding – Breach of s 912D(1B) Corporations Act

22. Counsel Assisting has submitted that it is open to find that CFPL and Count may have contravened s 912D(1B)[32]. CBA submits that the Commissioner should not make such a finding with respect to CFPL or Count.

The reporting requirement under s 912D

23. Section 912D requires actual knowledge of a significant breach before the reporting requirement in 912D(1B) is engaged. The legislature has expressly made it the responsibility of financial services licensees to determine the significance - and thus reportability – of a breach[33]. On its proper construction, whether a contravention of s 912D(1B) of the Corporations Act is alleged by reference to a failure to give notice "*after becoming aware*" of a breach or by reference to a failure to give notice "*as soon as practicable*", a contravention is to be determined by reference to a finding that the contravener had:

a. actual knowledge of a breach or likely[34] breach; and

b. actual knowledge that that breach or likely breach was significant; and

[31] For example: selling mobile telephone services to people in an area where the provider had no coverage: *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2008] FCA 65; a security company being paid to provide security personnel on a run where they did not have the resources to provide all the services they were contracted to provide: *Australian Competition and Consumer Commission v Chubb Security Australia Pty Limited* [2004] FCA 1750; see also *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* [2004] VSCA 232 and *ACCC v Commercial & General Publications Pty Ltd* [2002] FCA 900.

[32] T1946.19–26.

[33] The context to the creation of this responsibility has been summarised in a Treasury report in the following terms: *"Originally, AFS licensees were required to report all breaches to ASIC, regardless of severity. Such a requirement put a large regulatory burden on licensees, as well as an administrative burden on ASIC in having to deal with an influx of minor and insignificant reports. In that context, in 2003 a 'significance' test was introduced to provide a threshold for matters that were required to be reported to ASIC"* Commonwealth Treasury: ASIC Enforcement Review Position and Consultation Paper 1 - Self-reporting of contraventions by financial services and credit licensees, 11 April 2017, p 5. See also exchanges between Counsel Assisting and Ms Louise Macaulay from ASIC at T1906.15–T1907.23 and the Commissioner and Ms Macaulay at T1907.27–45.

[34] It is important to note that "likely" breach has the very specific definition in s 912D(1A) that "a financial services licensee is likely to breach an obligation referred to in that subsection if, and only if, the person is no longer able to comply with the obligation". In other words, it is limited to a future breach that has not yet occurred.

c. despite that knowledge, the contravener failed to give notice to ASIC in accordance with s 912D(1B) of the Corporations Act.

24. The language of section 912D(1B) indicates that actual knowledge is required to engage the obligation. The terms of the provision only find support for a subjective construction of the obligation, in which neither reasonable foreseeability nor constructive knowledge, in the sense of knowledge of circumstances that would indicate the facts to an honest and reasonable person, play any part: see *Harris v Commercial Minerals Ltd* (1996) 186 CLR 1 at 9-10. None of the common legislative drafting techniques (including those of a definitional type used in the ASX Listing Rules e.g Rule 19.12) to import an objective test into the provision have been employed, e.g. "ought reasonably to know" or "ought to have been aware"[35]. In that respect, section 912D may be readily contrasted with sections 947D and 1043A of the Corporations Act.

25. In relation to fees for no service, each of the relevant CBA licensees, following early warning notices being given on 11 July 2014 by CFPL and 22 August 2014 by Count[36], made significant breach reports to ASIC under s 912D: CFPL on 13 August 2014[37] and Count on 9 September 2014[38]. The evidence does not support a finding that CFPL or Count had actual knowledge of the breach and its significance "*for at least 18 months*"[39]. Nor does the evidence support a finding that, fixed with that knowledge, each licensee made a conscious decision not to report the breach to the regulator. Rather, the evidence demonstrates that each of CFPL and Count were unable to determine whether what had occurred with fees for no service was a significant breach of their obligations as a licensee under s 912A(1)(a).

26. Nonetheless, the time taken to identify and address these issues was too long. CBA acknowledges that this failing may fall below community standards and expectations, but it does not amount to a breach of s 912D of the Corporations Act.

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[35] See eg *Joslyn v Berryman* (2003) 214 CLR 552; *Neindorf v Junkovic* (2005) 222 ALR 631; *Allen v Chadwick* (2015) 256 CLR 148; *Dedousis v Water Board* (1994) 181 CLR 171.

[36] CFPL provided an early warning notice to ASIC on 11 July 2014: see Exhibit 2.73.2 (CBA.0001.0039.0405) - Perkovic 2-1 Statement, Exhibit MP-2. Count provided an early warning notice to ASIC on 22 August 2014: see Exhibit 2.75.1 (CBA.0001.0039.0459) - Perkovic 2-2 Statement, Exhibit MP-1.

[37] Exhibit 2.73.3 (CBA.0001.0039.0453) - Perkovic 2-1 Statement, Exhibit MP-3.

[38] Exhibit 2.75.2 (CBA.0508.0008.0008) - Perkovic 2-2 Statement, Exhibit MP-2.

[39] T1946.19–22.

CFPL

27. CFPL first became aware of a potential issue with regard to the non-delivery of ongoing service obligations in April 2012 through the Henderson Memorandum[40]. The Henderson Memorandum identified two potential issues: Ongoing Service (**OGS**) clients without active advisers ("orphan" clients), and OGS clients with active advisers who were not providing OGS service. The Memorandum reported, among other things, that there was "*no source of truth*" or "*single reference point*" recording details of OGS clients, and that:

> "*Collation of OGS Clients is a manual investigation involving searches in COIN, FMS, Symmetry, First Wrap and Commission Statements for external products – even with thorough investigations, clients can be missed due to issues with adviser codes*"[41]

28. On 19 July 2012, Deloitte issued its draft Business Issues Management Report (**CFPL BIM Report**)[42]. That report noted deficiencies in CFPL's systems that placed OGS clients at risk of not receiving contracted services, including an absence of controls to ensure that OGS clients were reviewed on an ongoing basis. Deloitte recommended that CFPL investigate potential client issues, enhance controls in relation to advice fees, and develop an effective OGS management system[43]. Relevantly, Deloitte identified:

    a. that OGS fees were charged to over 1050 clients who were allocated to inactive planners who had left before 2012[44];

    b. that there were "*data limitations*" which meant "*there was not a method to identify* the *number of clients that [were] not receiving OGS service and [were] attached to an active planner*"[45]; and

[40] Exhibit 2.81 (CBA.0001.0089.3797) - Memorandum from Jaime Henderson to Lisa Chambers dated 12 April 2012. At that time CFPL had approximately 700-800 employed advisers and contracted authorised representatives: Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [14], servicing approximately 150,000 clients: Exhibit 2.74 (CBA.9000.0021.0001) - Perkovic 2-1 Supplementary Statement at [5].

[41] Exhibit 2.81 (CBA.0001.0089.3797) - Henderson Memo at .3798.

[42] Exhibit 2.85 (CBA.0520.0002.6443) - Deloitte report titled "CBA Wealth Management: Business Issues Management" (**CFPL BIM Report**) dated 19 July 2012. Deloitte were engaged by CBA in May 2012 to assist in identifying and assessing potential latent issues within the CBA Wealth Management financial advice business.

[43] At .6452-.6455.

[44] At .6446.

[45] At .6454.

c. *"[t]here is no effective system in place to manage client information and workflow to enable compliance, effective risk management and client service standards to be met and in a post-FOFA environment, to deliver cost effective advice according to customer needs. Client details are captured in various systems and not in a consistent or accurate manner. There is no program which is currently examining the development of a customer information system"*[46].

29. The evidence is clear that, as at mid-2012, CFPL did not know:

a. the extent and scope of the orphan client issue without a manual review of each and every client file. While CFPL had been informed that there were OGS clients who were no longer assigned to an active adviser, it was at this time uncertain whether the potential clients identified by Deloitte were in fact 'orphans' who were paying for OGS but not attached to an active adviser, or the problem was really one of poor data quality (possibly informed by inadequate documentation in relation to clients)[47]. As matters transpired, it was both, with the weighting heavily skewed to poor data. Ultimately, after investigation, the number of 'true' orphan clients identified and remediated by CFPL was just ten per cent of the 1,050 clients referred to by Deloitte in the CFPL BIM Report[48];

b. whether there was any systemic failure by advisers to provide OGS to clients. In mid-2012, CFPL had about 156,306 financial advice clients[49] (which included, but was not limited to, approximately 21,000 ongoing service clients[50]). Other than by manually reviewing tens of thousands of client files, CFPL at that time had no way to identify which clients were OGS clients and how many of those clients were attached to an active adviser and not receiving services[51]. Although it was brought to CFPL's attention that its

[46] Exhibit 2.85 (CBA.0520.0002.6443) at .6446.

[47] Deloitte's three recommendations in relation to the FFNS issue included R2, which was to "*validate… whether the potential issues identified are as a result of data quality issues only or whether clients have been impacted*". That recommendation is expressed as relating to three issues which, importantly, included the orphan clients issue: "*Finding 3: OGS not being met for clients attached to inactive planners.*"

[48] In 2014, CFPL refunded $310,007 in fees to only 115 orphan clients: Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement, at [118(b)]. It can be inferred that the investigation by CFPL, in accordance with Deloitte's recommendation, revealed that a significant number of the apparent orphans only appeared to be so because CFPL's documentation did not properly record their status.

[49] Exhibit 2.74 (CBA.9000.0021.0001) - Perkovic 2-1 Supplementary Statement at [5].

[50] Exhibit 2.80 (CBA.0001.0095.3334) - CFPL Response to Notice of Direction at .3334.

[51] And would therefore not be receiving the services for which they had contracted: Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [121].

paper-based systems needed to be upgraded and enhanced, there was no indication at this time that there was any systemic failure with respect to service provision.

30. Thus, even if constructive knowledge were sufficient for the purposes of s 912D(1B) (which, for the reasons outlined, it is not), given the uncertainty surrounding these issues at the time they were first revealed, there would be no basis for finding that CFPL *ought* to have been aware in 2012 that either the orphan client or failure to provide OGS issues constituted a significant breach of the obligation to provide financial services efficiently, honestly and fairly (or any other obligation in s 912A). This is also the case with respect to any *actual* awareness by CFPL, as would be required to sustain a finding of breach of s 912D(1B).

31. Rather, the evidence demonstrates that by mid-2012, CFPL was (relevantly) aware of two matters. *First,* CFPL was aware that its systems and controls for managing the provision of OGS required improvement. CFPL was already in the process of improving its systems as part of the Enforceable Undertaking it had entered into with ASIC on 25 October 2011[52] (including supervision and monitoring systems) and in order to comply with the FOFA reforms[53] which, for OGS clients, relevantly required issuing fee disclosure statements annually. *Second*, CFPL knew that further investigation was required to determine how many clients were orphan clients and how many clients (if any) were not receiving OGS services. Deloitte recognised that this exercise would need to be undertaken by CFPL to establish the existence and extent of the issue[54].

32. During 2012 and 2013, CFPL built systems[55] and undertook work to collate and validate data to enable it to identify OGS clients and track service delivery[56]. The systems being built for that purpose assisted CFPL to track the provision of OGS services[57]. The work involved:

    a. from September 2012, mandating the use of CommSee and Electronic Document Management to record client information and interactions and to store client file documentation;

[52] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [101].
[53] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [101].
[54] Exhibit 2.85 (CBA.0520.0002.6443) - BIM Report at .6446 (page 4).
[55] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [149].
[56] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [121].
[57] T1319.14–25; T1319.47–T1320.1.

b. from March 2013, interrogating available data sources to identify all OGS clients and the start dates of their arrangements;

c. from July 2013, introducing workflow functionality for advisers to record and make available information concerning the delivery of annual reviews and other components of the ongoing service program by advisers; and

d. centralising information in relation to OGS clients and service obligations in the FDS tool, which was introduced in October 2013[58].

33. Ascertaining instances where OGS clients had not been provided with services by active advisers was complex and took time. Because ongoing services (such as annual reviews) may be provided at any stage during the year in which those services are paid for, CFPL could only analyse the extent of the delivery of these services by monitoring delivery over a year-long period[59]. Having captured the information needed to identify the universe of ongoing service clients by late 2013, CFPL then commenced an extensive review of the provision of services over the next financial year[60].

34. Until CFPL had undertaken its investigation and improved its systems to the point where it could confidently identify those clients who were not receiving ongoing services, CFPL was unable to determine whether, having regard to the factors described in s 912D(1)(b) of the Corporations Act, there had been a significant breach arising from a failure by its advisers to provide ongoing services to clients.

35. Towards the end of June 2014, the non-delivery of ongoing services by active advisers began to emerge as an issue of significance[61]. On 11 July 2014, an Early Warning Notice[62] was sent by CFPL to ASIC noting that an electronic sweep of clients records had not identified electronic evidence of services having been provided for certain clients. On 13 August 2014, CFPL lodged a significant breach notification with ASIC[63] which identified that "*the implementation of new systems for*

[58] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [121].
[59] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [122].
[60] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [122].
[61] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [123].
[62] Exhibit 2.73.2 (CBA.0001.0039.0405) - Perkovic 2-1 Statement, Exhibit MP-2.
[63] Exhibit 2.73.3 (CBA.0001.0039.0453) - Perkovic 2-1 Statement, Exhibit MP-3;.

CFPL enabled the licensee to identify customers who may not have received ongoing service…"[64].

36. The evidence is clear that CFPL did not in fact form a view that a significant breach had occurred with respect to clients being charged fees for no service until August 2014. There is no evidence to support a finding to the contrary. While CBA acknowledges that, having known of a potential issue from mid-2012 should have acted more quickly to improve its systems and controls and investigate the matter so that it was in a position to form a view as to significance and notify ASIC sooner, and even if such conduct is viewed as too slow, that is of itself not a breach of s 912D(1B).

Count

37. As with CFPL, the orphan client issue at Count required investigation and analysis before Count was in a position to determine whether a significant breach or likely breach of s 912A(1)(a) had occurred.

38. Following the release of the Henderson Memorandum in April 2012 identifying fee for no service issues in relation to CFPL, Ms Perkovic asked the CEO of Count whether a similar orphan client issue could exist at Count[65]. The potential issue for Count arose where an adviser firm or authorised representative had left Count but had not taken all of their clients with them, in which case, after three months[66], those clients became clients of Count's 'Head Office' [67]. Count would transact on behalf of these orphan clients by accessing investment platforms in return for an administration fee[68]. The issue for these orphan clients was about ensuring that the ongoing service fee was dialled down to the administration fee and, after April 2013, that ongoing service fees and administration fees were switched off.

39. On 14 May 2012, an incident was raised on CBA's internal risk issues management system, RiskInSite, in relation to "orphaned clients" for Count[69]. The raising of this incident in RiskInSite indicated that Count considered that the matter required further investigation to determine whether any actual or suspected failure of standards or

[64] Exhibit 2.73.3 (CBA.0001.0039.0453) - Perkovic 2-1 Statement, Exhibit MP-3 at.0454.

[65] T1332.41–47.

[66] The three-month period was provided to enable the adviser time to transition their clients across to their new licensee and new platform provider: T1272.6–13

[67] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [47] and [49]; T1273.6–8.

[68] T1272.6–13; T1273.1–2; T1274.19–21.

[69] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [49].

breach of obligations by Count had occurred[70]. That investigation was challenging because of two issues[71]:

a. *First*, the data available did not distinguish between commissions (which were not paid by orphan clients in return for any ongoing service or administration service) and ongoing service fees or administration fees;

b. *Second*, a significant number of advisers were targeted to join another Australian Financial Services Licensee in the first half of 2012, which made it difficult to isolate 'true orphan clients' from those clients in the process of transitioning with their adviser to the new licensee.

40. Significantly, the draft BIM Report prepared by Deloitte in November 2012 in relation to Count concluded that[72]:

> *"Without significant analysis and additional data being readily available (such as funds under administration) it is not possible to determine the portion of the fee income related to the Adviser Servicing Fees (ongoing service)"*; and
>
> "*It is understood that it is not common practice for Count advisers to dial up fees and as such it is not expected that a significant portion of the fee income received is in relation to ongoing service adviser fees"*.

41. Deloitte recommended that Count consider further investigation of the orphan client book, including by identifying those clients that are "true orphans" and identifying any instances where an orphan client is paying dialled up ongoing service fees, so that they can be dialled down to the administration fee [73].

42. Count acted upon Deloitte's recommendations. In February 2013, an initial investigation indicated there were approximately 388 orphan client accounts where fees were being charged in excess of commission (that excess estimated at an aggregate amount of $185,739 per annum)[74]. In April 2013, Count began implementing a process of switching off ongoing service fees paid by clients who no longer had an active Count adviser by instructing product providers to cease

[70] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [51]; T1334.3–T1335.6.

[71] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [53].

[72] Exhibit 2.89 (CBA.0534.0001.0024) - Draft Business Issues Management Report prepared by Deloitte concerning Count in November 2012, at .0038; Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [54]; T1336.06–22.

[73] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [55].

[74] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [58].

deducting fees from those clients' accounts[75]. On 15 May 2013, the Count orphan client issue was noted at a meeting of the Count Board (having been first referred to at the Count Board Risk Committee in March 2013)[76].

43. It is important to note, therefore, that when first referred to the Count Board in May 2013, the scope of the issue was identified as affecting a relatively small proportion of Count clients (388 of a total client base of 88,239 as at 31 December 2013[77]). There is no evidence of the Count Board forming a view at this stage that a significant breach of s 912A had occurred.

44. In mid-2014, Count identified that the process to switch off all ongoing service fees for orphan clients from April 2013 had not been effective in two respects[78]. *First*, Count had inadvertently failed to instruct two product providers to stop deducting ongoing service fees[79]. *Second*, some product providers had not yet complied with the instruction to switch off fees paid by clients who no longer had an active Count adviser[80].

45. Following the identification of these issues, on 15 August 2014, the Count orphan client issue was escalated to Count's Breach Review Panel which decided to lodge an early warning notification to ASIC on the basis that the Panel was in the process of investigating those issues[81]. Following further investigation, the Panel resolved at its meeting on 8 September 2014 to formally notify the matter to ASIC and issued the breach notification the following day, on 9 September 2014[82].

46. Although CFPL made a s 912D breach notification in relation to its fee for no service issue on 13 August 2014, that awareness for the purposes of the reporting of *that* ongoing service issue cannot necessarily be attributed to Count in respect of *its* orphan client issue[83]. Count's issue was of a different, and more confined, nature in

[75] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [60].

[76] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [61].

[77] Exhibit 2.76 (CBA.9000.0022.0001) - Perkovic 2-2 Supplementary Statement at [5(b)].

[78] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [62].

[79] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [62(a)].

[80] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [62(b)].

[81] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [63] and [64].

[82] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [65]; Exhibit 2.75.2 (CBA.0508.0008.0008) - Perkovic 2-2 Statement, Exhibit MP-2.

[83] Attribution of knowledge amongst corporate entities will depend on the particular circumstances of the case, and the specific legislative scheme: *Meridian Global Funds Management Asia v Securities Commission* [1995] 2 AC 500. This case has been applied in various intermediate appellate courts in Australia including in *North Sydney Council v Roman* (2007) 69 NSWLR 240 (NSWCA); *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 (VSCA).

comparison to CFPL's[84]. Although the identification of the CFPL issue in 2012 had served as the catalyst for Count investigating whether it had an orphan client issue, and it could be inferred that the breach report by CFPL informed the escalation of the Count issue to Count's Breach Review Panel on 15 August 2014, the awareness of the two CBA entities ought not be conflated. Count was required to, and did, undertake its own investigation and assessment.

47. That assessment required Count to consider whether the particular conduct concerned involved Count deviating from the obligation to do all things necessary to ensure the services were provided in a manner that was honest, efficient and fair, and to have deviated from that obligation in a way that was significant for the purposes of s 912D.

48. Count's conduct ought to be seen as a consequence of its failure to quickly and accurately assess the issues that arose out of the orphan client problem. The evidence does not establish any intent on the part of Count to mislead or fail to report a significant breach, or likely significant breach, to ASIC. CBA accepts, as Ms Perkovic acknowledged in her evidence, that Count should have acted in a more timely manner to identify the significance of the issue[85], however there is no evidence supporting a finding that Count was aware of the significance of the breach before September 2014[86].

B. Alleged Findings on Causes of Misconduct

B1. Submission that misconduct was attributable to the remuneration practices of CFPL

49. Counsel Assisting submitted that it is open to the Commissioner to find that CFPL engaged in misconduct because of its remuneration practices[87].

50. In support of this, Counsel Assisting referred to Ms Perkovic's evidence that CFPL's remuneration and performance targets were not aligned so as to ensure the delivery of service[88] and submitted that it was only in 2015 that CFPL changed its

[84] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [80]. Count's ongoing service issue did not relate to the circumstance where the client had an active adviser but was not provided with the promised service.

[85] T1337.10.

[86] This is consistent with Ms Perkovic's evidence under examination see, eg, T1337.34–35. As Ms Perkovic said under examination: *"With the breach process, you do need to determine the significance* (T1336.26–27).

[87] T1946.28–30

[88] T1946.29; see also T1343.6–8.

remuneration policy to align remuneration and performance targets to ensure delivery of service[89].

51. However, since 1 July 2013, CFPL has had in place a Variable Remuneration Plan (**VRP**) for financial advisers[90], whereby an adviser's remuneration contains the following components:

    a. fixed remuneration, comprising base remuneration and superannuation; and

    b. VRP, which contains a "risk gateway opener" (a prerequisite to eligibility for payment of the variable remuneration component, related to risk management and behaviour)[91].

52. Ms Perkovic referred to changes to each of the licensees' remuneration structures, to include the "balanced scorecard system", being one of a number of measures put in place since 1 January 2013 to better prevent a financial adviser from providing inappropriate financial advice or engaging in dishonest conduct[92]. Since 2015, the risk management component has included "ensuring delivery of ongoing service to all customers" as a mandatory threshold[93].

53. In contrast to Counsel Assisting's submission about remuneration practices, Ms Perkovic identified the principal causes of the fees for no service issue for each licensee in her witness statements as follows:

    a. for CFPL and BWFA, the absence of centralised processes and systems (including adequate documentation) to detect whether those clients who were paying for an ongoing service were in fact receiving that service[94]; and

    b. for Count, inconsistency in the approach taken to reducing ongoing service fees upon an adviser departing where the client did not transfer or nominate a new adviser, together with the product design of 'wrap' accounts which did

[89] T1946.31–32.

[90] Exhibit 2.5 (CBA.9000.0017.0001) - witness statement of Hugh Humphrey dated 13 April 2018 in response to Rubric 2-33 (**Humphrey 2-33 Statement**) at [16]; Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [149(d)].

[91] Exhibit 2.5 (CBA.9000.0017.0001) - Humphrey 2-33 Statement at [16].

[92] Exhibit 2.196 (CBA.9000.0016.0001) - Perkovic 2-11 Statement at [47], [67] and [68].

[93] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [149(d)].

[94] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [146] – [147]; Exhibit 2.78 (CBA.9000.0012.0001) - Perkovic 2-17 Statement at [81] – [84].

not allow clients to transact on their account without the assistance of an adviser[95].

54. That evidence was not contradicted.

B2. Submission that misconduct was attributable to CBA's culture

55. Counsel Assisting submitted that it was open to find that the alleged misconduct concerning the fees for no service issue was attributable to a cultural tolerance of risks and conduct potentially detrimental to clients but to the financial advantage of CBA[96].

56. While CBA acknowledges APRA's concerns as to culture within CBA, and CBA is taking ongoing steps to improve its culture[97], there is no basis in the evidence for a submission that the culture of CBA directed, encouraged, tolerated or led to the identified failing. That would be inconsistent with the investigations conducted by CBA's licensees to identify the extent of the issue and then subsequently provide remediation to clients[98].

B3. Submission that the size of CBA's licensees led to failure to give timely notice of breach

57. Counsel Assisting submitted that it was open to the Commissioner to find that a reason for the delay in providing breach notices to ASIC was a consequence of the manner in which CBA's practice for considering whether to notify a breach takes into account the size of CBA's licensees[99].

58. As the significance of a breach for the purposes of s 912D of the Corporations Act is to be determined subjectively, by reference to the criteria specified in s 912D(1)(b)(i) – (v), it must follow that the size of the licensee is one of many factors that may inform the decision-making process of the particular licensee as to when a reportable breach has occurred. Indeed, ASIC's evidence before the Commission reflected the legal characterisation of that inquiry. During her examination, Ms Louise Macaulay, Senior Executive Leader of ASIC's Financial Advisers team said, in response to a question about s 912D breach reporting:

[95] Exhibit 2.75 (CBA.9000.0007.0001) - Perkovic 2-2 Statement at [79].

[96] T1946.32–36.

[97] APRA's concerns are set out in the "Prudential Inquiry into the Commonwealth Bank of Australia Final Report" prepared by John Laker AO, Jillian Broadbent AO and Graeme Samuel AC dated 30 April 2018.

[98] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [113] to [125].

[99] T1947.23–26.

"whether or not a breach is significant will depend on the nature of the breach and also on the – the nature of the licensee … a significant breach aspect relates to the conduct of the licensee's business, not to the conduct of the individual adviser."[100]

59. As outlined in addressing the fourth alleged misconduct finding above, the delay in CBA's licensees forming a view that the fee for no service issue amounted to a significant breach of their obligations under s 912A of the Corporations Act arose from the need for system improvement measures to be devised and implemented. It may be accepted that the need for those system improvement measures (and the length of time it took for them to be implemented in a way that could properly track the provision of services and identify the scope of the fee for no service issue) was influenced in part by the size of CBA's licensees. CBA accepts that it is open to find that the number of advisers and clients within CBA's licensees was a factor in the length of time it took those licensees to become aware that a significant breach had occurred[101], however CBA submits that this is contemplated and permitted by the legislative regime for breach reporting. Further, given that (for the reasons stated) no misconduct occurred with respect to CBA's reporting of the misconduct, it follows that there is no relevant causal relationship between the size of CBA's advice licensees and any misconduct alleged.

B4. Submission that CBA's internal systems were inadequate to ensure the provision of services for which fees were charged and to report contravening conduct

60. Counsel Assisting has submitted that it is open to the Commissioner to find that CFPL's internal systems were inadequate to ensure the provision of services for which fees were charged and to report contravening conduct[102].

61. CBA accepts it is open to find that prior to October 2013[103], CFPL did not have in place systems that enabled timely and comprehensive checks of whether services were being provided for ongoing service fees charged.

62. CBA accepts that it is open to find that prior to mid-2014[104], CFPL's internal systems were inadequate to identify and report contravening conduct.

[100] T1905.22–28.

[101] T1947.23–37.

[102] T1947.39–41.

[103] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 Statement at [149(a)(i)]: "*CFPL's Fee Disclosure Statement (FDS) Tool, which recorded the delivery of ongoing service and reported to clients annually, was fully operational by October 2013*".

CASE STUDY: PLATFORM FEES

A. Summary of evidence relevant to the matters under consideration

63. In addition to the matters identified by Counsel Assisting as being the evidence relevant to the topic of Investment Platform Fees, the following evidence ought to be considered by the Commissioner.

64. Colonial First State Investments Limited (**CFSIL**) provides each of its products to both affiliated and unaffiliated advisers[105].

65. Similarly, Avanteos Investments Limited (**AIL**) makes its products available to a spread of affiliated and unaffiliated advisers[106].

66. AIL provides a greater number of products to clients with unaffiliated advisers than affiliated advisers[107]. Certain of CFSIL's products are also provided to a greater number of clients through unaffiliated than affiliated advisers[108].

67. Both CFSIL and AIL have inbuilt system controls to support the accuracy of fees and have in place both internal and external audit processes to provide assurance that key controls are working effectively[109].

68. Members enter into direct contractual arrangements with their financial adviser for the provision of an ongoing service, including the payment of an adviser service fee. Members must authorise payment by CFSIL or AIL (as the case may be) of any adviser service fee (including ongoing service fees), to any dealer group or adviser. This authority to pay on behalf of the member can only be given via an appropriately executed request[110].

69. Under CFSIL's Dealer Terms of Trade, Dealers are obliged (amongst other things) to notify CFSIL within one day of any client requiring an ongoing service arrangement to cease[111]. In response to questions from the Commissioner as to how a Dealer's

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[104] Exhibit 2.73 (CBA.9000.0006.0001) - Perkovic 2-1 at [123] and [124]: "*By June or early July 2014, by reviewing the delivery of ongoing services using the systems in place since October 2013, CFPL was able to identify the contravening conduct*".

[105] Exhibit 2.71 (CBA.9000.0008.0001) - witness statement of Linda Marie Elkins dated 5 April 2018 in response to Rubric 2-24 (**Elkins 2-24 Statement**) at [15] (see in particular Table 1).

[106] Exhibit 2.71 (CBA.9000.0008.0001) - Elkins 2-24 Statement at [15] (see in particular Table 2).

[107] Exhibit 2.71.69 (CBA.0540.0002.0060) - Elkins 2-24 Statement, Exhibit LME-69, Table 2.

[108] See, for example, Exhibit 2.71.60 (CBA.9000.0003.0040) - Elkins 2-24 Statement, Exhibit LME-60, FirstChoice Employer Super figures at Table 1.

[109] Exhibit 2.71 (CBA.9000.0008.0001) - Elkins 2-24 Statement at [28].

[110] Exhibit 2.71 (CBA.9000.0008.0001) - Elkins 2-24 Statement at [30].

[111] Exhibit 2.71 (CBA.9000.0008.0001) - Elkins 2-24 Statement at [32].

obligation under Dealer Terms of Trade to comply with the law can have any effect, Ms Elkins pointed to the express term to report to CFSIL any breach of the law as the mechanism by which the obligation on Dealers takes effect[112].

70. CFSIL's and AIL's systems generate periodic statements disclosing any Adviser Service Fees (including Ongoing Service Fees) which are sent to members[113]. All clients using CFSIL products and clients with online access using AIL products are also able to view their account details, including these fees online at any time[114] .

71. Ms Elkins' evidence was that where administration fees are referable to funds under management, that is done:

    a. In recognition of the increased risk associated with unit pricing for higher levels of funds under management;

    b. In accordance with industry practice; and

    c. Reflecting that there may be increased servicing requirements for clients with higher levels of funds under management[115].

72. Ms Elkins' evidence was that CFSIL has brought a product to market in respect of which administration fees are dollar-fee based (rather than based on funds under management) in order to see whether there is appetite in the market for such a product[116] and that there are 'white label' products that offer a combination of funds under management and dollar based administration fee pricing[117].

73. In relation to the issue of whether CFSIL would consider ceasing to deal with a licensee within the CBA group, Ms Elkins' evidence was:

> *The power would be there for us to do that…*
>
> *…I would think that that would be unlikely, but not impossible, and I think it would – the governance structure we have in place across these entities, they are governed by independent boards. So I do think that would be possible, but I would agree that it would be unlikely and hopefully because*

[112] T1263.33–38.
[113] Exhibit 2.71 (CBA.9000.0008.0001) - Elkins 2-24 Statement at [33].
[114] Exhibit 2.71 (CBA.9000.0008.0001) - Elkins 2-24 Statement at [33].
[115] T1245–1247.
[116] T1248.16–19.
[117] T1248.30–32.

we would have knowledge of – of the steps being taken to remedy any situation that it would be possible[118].

74. Pressed further on this point, and asked to consider CFSIL's position if CFPL was in "egregious breach" of its duties, Ms Elkins' evidence was:

> *In that case it would be conceivable because of the – you know at least because of the independent board structure. I'm saying that in the cases that have occurred, we were satisfied with the actions that the licensee was taking in regard to remediating for the customers that we are responsible for*[119].

75. When pressed as to whether CFSIL's directors would act in the interests of CBA, Ms Elkins' evidence was that CFSIL's directors act in the interests of its investors[120].

76. In giving evidence as to CFSIL's response to CFPL's receipt of fees where no service had been provided to clients, Ms Elkins informed the Commissioner that:

a. CFSIL was aware of the Open Advice Review that was underway to investigate issues relating to inappropriate advice and then subsequently, the fees for no service issue[121], and the seriousness with which CFPL was already engaging with the remediation process[122];

b. she was very unhappy to discover fees had been charged where no service was provided, she formed the view that allowing CFPL to investigate and carry-out a remediation programme was going to get the best outcome for clients[123];

c. Because CFSIL was satisfied that CFPL was remediating clients, it did not consider that it too needed to independently remediate those clients[124];

d. Ms Elkins has further considered the issues with the benefit of hindsight, and remains of the view that permitting CFPL to undertake the investigation and remediation of the issue was the process that gave the best result to clients. That was because, having regard to the limited knowledge and view that

[118] T1255.46–T1256.8.
[119] T1257.2–6.
[120] T1256.43–45.
[121] T1258.27–32.
[122] T1259.12–15.
[123] T1259.15–18.
[124] T1259.21–22.

CFSIL had of the issue, if CFSIL had imposed a unilateral decision or its own outcome on the situation it would have either added confusion to the remediation process or potentially had a detrimental impact for clients[125].

77. Steps that CFSIL has taken in response to the fees for no service issue and against the FOFA background generally include bolstering its position under its Dealer Terms of Trade and improving its own disclosure to clients of adviser fees through its client statements[126]. Further Ms Elkins' evidence was that CFSIL is continually considering ways in which it can improve its processes and systems[127].

B. Alleged findings of misconduct

B.1 First Alleged Misconduct Finding – Breach of s 912A(1)(aa) of Corporations Act

78. CBA submits that the Commissioner should not find that CFSIL has breached its obligation under s 912A(1)(aa) of the Corporations Act to have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the provision of financial services.

79. Section 912A(1)(aa) does not require the elimination of conflicts, or the potential for conflicts, but rather the management of those conflicts[128]. Whether the management of a conflict has been adequate is a matter that is to be determined having regard to the particular facts in question. Management of conflicts can be implemented through an array of different steps, and may include, for example, implementing information barriers[129].

80. Ms Elkins' evidence reveals that CFSIL has in place a majority independent board that considers the issues before it by reference to the interests of its investors, not by reference to the interests of the CBA Group or any other of its entities. It is submitted that the maintenance of a majority independent board is amongst the most robust measures that CFSIL could adopt to manage conflicts.

81. The fact that AIL provides more of its products, and that CFSIL at least in certain instances provides more of its products, to clients through unaffiliated advisers tells against the proposition that CFSIL has failed properly to manage its conflicts.

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[125] T1259.25–30.

[126] T1260.5–20.

[127] T1254.35-41; T1261.31-36.

[128] See *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35 at [311].

[129] Ibid at [449].

Rather, it suggests that CFSIL and AIL have far less of a 'weighting' toward aligned CBA Group entities than might be expected.

82. In dealing with the example of the handling of 'fees for no service', Ms Elkins explained why CFSIL permitted CFPL to undertake the investigation and remediation of the issues that had arisen – those reasons were focussed solely on achieving the best outcome for clients.

83. It is difficult to address a generalised submission of a breach of s 912A(1)(aa), particularly given the need to have regard to the particular facts that ought to be identified in order to determine any given case. However, it is submitted that in light of the material before the Commissioner referred to above, there is not sufficient evidence to justify a finding in generalised terms that CFSIL has failed to meet its obligations under s 912A(1)(aa). In the event that further or other material is sought to be relied upon in relation to such a finding, CFSIL would welcome the opportunity to address that material.

C. Other factual findings

C.1 Submission that CFSIL preferred its own interests

84. The Commissioner should not find that CFSIL has preferred its own interests and those of CBA's advice licensees to the interests of those invested in products through CFSIL's advice platforms.

85. CFSIL's fees are charged in a manner that is industry standard. However, it has launched a product that enables clients to pay dollar based administration fees rather than being based on funds under management.

86. Again, the evidence of Ms Elkins reveals that CFSIL has acted having regard to the interests of investors, not other entities within the CBA Group. There is no particular decision of the CFSIL Board or management that has been challenged as being one made for the benefit of CFSIL or any other CBA Group member ahead of the interests of investors.

87. It was Ms Elkins' evidence that it was not inconceivable that CFSIL would cease making its products available to an affiliated licensee if the circumstances warranted making such a decision. There is no evidence to suggest that the treatment that CFPL received from CFSIL was any different to or better than the treatment afforded to other unaffiliated licensees who were involved in the issue of charging fees for no service. Ms Elkins' reliance on CFPL to investigate and remediate clients in respect

of that issue reflected a concern to ensure that the best outcome possible for clients was attained.

88. The Dealer Terms of Trade relies on self-reporting by Dealers of any failure to meet their obligations at law and of any decision by a client to cease using ongoing advice services. CFSIL also highlights adviser service fees in the statements it issues directly to clients and undertakes checks for the reasonableness of adviser service fees. This is reasonable in circumstances where the adviser and client have entered into a contractual arrangement.

89. In these circumstances, there is no basis for a finding that CFSIL has preferred its, or CBA's advice licensees', interests to that of its clients.

D. Alleged Findings of Conduct Below Community Standards and Expectations

D.1 First Alleged Below Community Standards and Expectations Finding – facilitating the deduction of fees where services had not been provided

90. CFSIL accepts that there have been instances where it has not consistently met community expectations in relation to the deduction of fees from clients' accounts.

91. CFSIL has taken the following steps to improve its activities and systems. CFSIL now requires Dealers to report within one day of a client determining that it no longer wishes to pay ongoing service fees. Improved disclosure of fees charged has been implemented. Clients receive periodic statements directly from CFSIL which disclose the Adviser Service Fees and other fees being paid by the client in relation to their investment through CFSIL's platform. This is separate from and additional to the fee disclosure that an adviser is required to give to a client. Internal and external audit processes, in an environment of heightened awareness around these issues, coupled with the assessment of the reasonableness of fees, operate to provide additional protection for clients. CFSIL is continuing to consider ways in which can improve its systems and procedures, and recognises that it must maintain its focus on continuous improvements that ought to be made to its systems in connection with the charging of fees through its products.

OTHER MATTERS

92. As a matter of clarification, we draw to the Commission's attention Counsel Assisting's opening submissions in which the statement of Mark Ballantyne dated 13 April 2016 was tendered[130].

93. At T1049.9-11, Counsel Assisting noted that Mr Ballantyne's statement identified instances where Count and Financial Wisdom advisers received prohibited conflicted remuneration. Senior Counsel Assisting then stated at T1049.18-20:

> *Mr Ballantyne also specifically excluded from his statement instances where Count Financial or* Financial *Wisdom paid prohibited remuneration.*

94. Mr Ballantyne's evidence was not intended to exclude instances where Count or Financial Wisdom may have paid prohibited remuneration. It may be that a misunderstanding arose from the fact that paragraphs 45-51 of Mr Ballantyne's statement were expressed in terms of receipt of payments by the licensees rather than advisers. However, in light of the arrangements between the parties (including the pass through of relevant revenue), any potential breach of Division 4 of Part 7.7A was intended to be covered in those paragraphs. In this regard, we draw the Commission's attention to paragraph 12 of the statement, which stated:

> *The contractual agreements that govern the arrangement between a Relevant Entity and a practice require the pass through of all revenue earned by the practice that is received by the Relevant Entity as their licensee after the deduction of relevant licensee fees.*

95. In light of the above, Mr Ballantyne's evidence sought to cover all instances of prohibited conflicted remuneration in relation to Count or Financial Wisdom in his answers to Q6 and Q7, and did not intend to exclude instances where Count or Financial Wisdom paid prohibited remuneration.

4 May 2018

[130] Exhibit 2.6 (CBA.9000.0018.0001) - Witness Statement of Mark Ballantyne dated 13 April 2018 in response to Rubric 2-33.