

ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

MODULE 5: SUPERANNUATION

Response of Aon Hewitt Financial Advice Limited to Closing Submissions

1. The closing submissions of Counsel Assisting the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Commission**) included a section dealing with the evidence given on behalf of Aon Hewitt Financial Advice Limited (**AHFA**) and findings said to be available arising from that evidence.¹ The findings said to be available include that AHFA engaged in misconduct because it breached provisions of the *Corporations Act*.
2. AHFA does not agree that the closing submissions accurately summarise the evidence which AHFA presented to the Commission. AHFA also disagrees that there is a basis in the evidence for a finding that it breached provisions of the *Corporations Act*.
3. For the reasons set out in more detail below, in AHFA's submission no finding of misconduct should be made in relation to it.

The Breach Notice

4. The evidence AHFA presented to the Commission² focused on a breach notice which AHFA submitted to ASIC on 27 March 2018 (**Breach Notice**).³
5. The Breach Notice principally concerned conduct of three individual Authorised Representatives of AHFA (that is, financial advisers who were not employees of AHFA but who operated under its Australian financial services licence). The conduct had been identified in a review undertaken by AHFA.
6. By the Breach Notice, AHFA informed ASIC that the first of the three Authorised Representatives had sent a letter to 331 clients in August 2016. The letter constituted personal advice and so required that the individual circumstances of those clients be taken into account and that a Statement of Advice and a Financial Services Guide (**FSG**) be provided to each client. The letter the first Authorised Representative sent indicated that, if no reply was received within 30 days from the date of the letter, the adviser would take steps to ensure the client's superannuation remained in their existing investment option and did not transition to MySuper.
7. A Statement of Advice and FSG were not provided with the first Authorised Representative's letter. This conduct likely amounted to a breach by the Authorised Representative of the following provisions of the *Corporations Act*:

¹ Round 5 (superannuation) closing submissions dated 24 August 2018 and revised on 28 August 2018, paragraphs 643 to 653.

² Witness Statement of Jayson Walker dated 26 July 2018 [AHF.011.001.0006] (**Walker Statement**).

³ The Breach Notice is Exhibit 2.2 [AHF.001.001.1373] to the Walker Statement.

- a. section 946A(1): the obligation of a providing entity (in this case the Authorised Representative) to give a Statement of Advice; and
 - b. section 941B(1): the obligation of an Authorised Representative to give a FSG.
8. AHFA stated in its Breach Notice that, in the absence of advice documentation, file notes or other correspondence indicating clients' informed consent, AHFA was unable to determine that the Authorised Representative was, as required by section 961B of the *Corporations Act*, acting in the best interests of the clients who received the letter and on whose behalf investment switches were made.
9. The second and third Authorised Representatives referred to in the Breach Notice were associated with a single corporate group. The Breach Notice indicated that these Authorised Representatives had failed to provide sufficient evidence to AHFA, on its request, that 500 of the advisers' clients gave informed consent to investment switches which the advisers had carried out on their behalf. The evidence AHFA presented to the Commission indicated that AHFA was still investigating the second and third Authorised Representatives' conduct in relation to these clients and that several possibilities were open.⁴
10. AHFA acknowledges, and has acknowledged to ASIC,⁵ that where clients have suffered loss as a result of breaches by its Authorised Representatives AHFA is liable to compensate those clients because of sections 917A, 917B and 917F of the *Corporations Act*.
11. However, the suspected breaches of sections 946A(1), 941B(1) and 961B of the *Corporations Act* reported in the Breach Notice, and the subject of evidence before the Commission, were all suspected breaches by Authorised Representatives of AHFA, not AHFA itself. The evidence does not indicate that AHFA participated in the conduct reported in the Breach Notice or that it was aware of that conduct at the time it occurred.
12. As set out at paragraphs 139 to 142 of the Walker Statement,⁶ AHFA is currently working with ASIC to finalise a review and remediation plan to identify and compensate affected clients, in line with its obligations as licensee under Division 6 of Part 7.6 of the *Corporations Act*.

Response to Closing Submissions

13. The Walker Statement does not support the proposed findings set out in paragraphs 648 and 649 of the closing submissions. Those findings concern the conduct of the first Authorised Representative referred to above. There is no basis in the evidence to make findings that travel beyond the matters set out in paragraphs 6 to 8 above.
14. There is no basis in the evidence which could support the finding sought by Counsel Assisting that AHFA (as opposed to the Authorised Representatives) committed any breach of sections 941B(1), 946A(1), 961B or 912A(1)(a) of the *Corporations Act*.⁷ Each provision is discussed below.

⁴ Walker Statement, page 5 [AHF.011.001.0010], paragraph 40.

⁵ Walker Statement, see page 20 [AHF.011.001.0025], paragraphs 139 to 142.

⁶ At page 20 [AHF.011.001.0025].

⁷ Closing submissions at page 175, paragraph 653.

Section 941B(1)

15. Section 941B(1) provides:

(1) An authorised representative (the **providing entity**) of a financial services licensee (the **authorising licensee**), or of 2 or more financial services licensees (the **authorising licensees**), must give a person a Financial Services Guide in accordance with this Division if the providing entity, as a representative of the authorising licensee, or one or more of the authorising licensees, provides a financial service to the person (the **client**) as a retail client.

16. The obligation in section 941B(1) is an obligation that falls on “the providing entity”, being the authorised representative of the “authorising licensee”. In the present circumstances, the providing entity in respect of the 331 clients was the first Authorised Representative. The “authorising licensee” is the financial services licensee of the providing entity; that is, AHFA. Any breach of this obligation as reported in the Breach Notice was a breach by the first Authorised Representative. It was not a breach by AHFA.

Section 946A(1)

17. Section 946A(1) provides:

(1) The providing entity must give the client a Statement of Advice in accordance with this Subdivision and Subdivision D.

18. Again, the obligation in section 946A(1) is an obligation that falls on the providing entity, not the authorising licensee. Any breach of this obligation as reported in the Breach Notice was a breach by the first Authorised Representative. It was not a breach by AHFA.

Section 961B(1)

19. Section 961B(1) provides:

(1) The provider must act in the best interests of the client in relation to the advice.

20. The term “*provider*”, for the purposes of Division 2 of Part 7.7A (under which s 961B falls), is defined in section 961. That section relevantly provides

(1) This Division applies in relation to the provision of personal advice (the **advice**) to a person (the **client**) as a retail client.

(2) The individual who is to provide the advice is referred to in this Division as the **provider**.

...

(4) An individual is a **provider** for the purposes of this Division even if the individual is a representative of a financial services licensee and is to provide the advice on behalf of that licensee.

21. The obligation in section 961B(1) is an obligation that falls on “the provider”. The provider is an individual who is to provide personal advice to a retail client, even if the individual is a representative of a financial services licensee. In the circumstances described in the Breach Notice, the first, second and third Authorised Representatives were each “the provider” in respect of the advice that was to have been given to their clients. AHFA was not “the provider”. Any breach of the obligation as reported in the Breach Notice was, therefore, a breach by the first, second and/or third Authorised Representatives. It was not a breach by AHFA.

22. It is not suggested that the matters set out in paragraphs 13 to 21 above in any way impact on AHFA’s liability to *compensate* clients affected by the conduct reported in the Breach

Notice. That liability arises by virtue of sections 917A, 917B and 917F of the *Corporations Act*. It does not arise because AHFA was in breach of sections 941B, 946A(1) and 961B of the *Corporations Act*, because AHFA was not in breach of those sections.

Section 912A(1)

23. AHFA submits that, given it did not breach sections 941B(1), 946A(1) and 961B of the *Corporations Act*, the Commissioner should not find that “in so doing” it breached section 912A(1)(a) of the *Corporations Act* (as submitted in paragraph 653.2 of the closing submissions).

Conclusion

24. The Commissioner should not make a finding that AHFA may have engaged in misconduct in connection with alleged breaches of sections 941B(1), 946A(1), 961B and s 912A(1)(a) of the *Corporations Act* having regard to the above matters.

30 August 2018