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

Colonial First State Investments Limited (CFSIL) and Avanteos Investments Limited (Avanteos)

Round 5 Hearing – Superannuation

RESPONSE TO PART H OF COUNSEL ASSISTING'S SUBMISSIONS

INTRODUCTION

1. These submissions respond, following consideration by the CFSIL and Avanteos boards, to Part H of Counsel Assisting's Closing Submissions for the Round 5 hearing of the Royal Commission. The submissions are made by those entities, unless otherwise specified in specific sections of the submissions.

2. The headings used by Counsel Assisting have been adopted for ease of reference. In section H.1 of these submissions, matters are advanced in order to clarify the summary of the evidence before the Commission that has been prepared by Counsel Assisting. In section H.2, a response is given by CFSIL and Avanteos (as relevant) to allegations of misconduct or conduct falling below community standards and expectations.

3. Counsel Assisting has correctly identified CFSIL as the RSE Licensee in respect of the Colonial First State FirstChoice Superannuation Trust (**Fund**). However, the description of Avanteos provided by Counsel Assisting (at [330] of their submissions) is incorrect. Avanteos is the trustee, and/or custodian and administrator of various RSEs and provides products and services to around 71,000 investors and members, representing approximately $29b of superannuation, investment and pension assets.[1] The figures cited by Counsel Assisting in relation to Avanteos[2] refer to the estimated amounts improperly deducted from, and the estimated number of, Avanteos Superannuation Trust accounts affected by the deduction of fees from accounts of deceased members.

[1] Exhibit 2.71 (CBA.9000.0008.0001) Statement of Linda Maree Elkins in response to Rubric 2.24, 5 April 2018, [11].
[2] Counsel Assisting's Closing Submissions, 24 August 2018, [330].

4. Additionally, although Linda Elkins is correctly identified as a director of CFSIL and the Executive General Manager of Colonial First State, she is not the Executive General Manager of CBA's wealth management unit.[3]

H.1 EVIDENCE

(a) *MySuper and Transition of Accrued Default Amounts*

5. CFSIL submits that analysis of evidence relevant to this topic is aided by recognising the difference between:

   (a) the facts relevant to CFSIL's non-compliance with the requirement to treat *contributions* made by members, in respect of whom the trustee did not hold an investment direction, as contributions to be paid into a MySuper product which requirement came into effect on 1 January 2014 (that is, the facts relevant to CFSIL's contravention of s.29WA of the *Superannuation Industry (Supervision) Act* 1993 (Cth) (**SIS Act**)); and

   (b) the facts relevant to CFSIL's broader transition of Accrued Default Amount (**ADA**) *balances* to a MySuper product, which was required to be effected by 1 July 2017.

6. In relation to the former, the Commission examined evidence concerning a particular cohort of members of the Fund (primarily being a subset of members in FirstChoice Personal) whom CFSIL initially understood were not persons in respect of whom contributions would need to be paid into a MySuper product. The majority of members in FirstChoice Personal, a choice product, became members of the Fund by completing an application which required the applicant to make an investment selection at the time of application. However, there were two further categories of members – those who were transferred into FirstChoice Personal as a result of a successor fund transfer and those who were transferred from the FirstChoice Employer division of the Fund on cessation of employment – in respect of whom the s.29WA issue arose.[4] Ultimately, some members of that cohort were transitioned to the Commonwealth Essential Super (**CES**) product, Essential Super, as their MySuper product. CES is a separate superannuation fund.

[3] Counsel Assisting's Closing Submissions, 24 August 2018, [331].
[4] Exhibit 5.185 (CBA.0001.0451.0173), Letter Colonial First State to APRA, 6 March 2014, p.3.

7. In relation to the latter (that is the broader transfer of all ADA balances to a MySuper product), the majority of members of the Fund, whose ADAs were to be transitioned to a MySuper product, were in FirstChoice Employer rather than FirstChoice Personal. Those members (in FirstChoice Employer) were transferred to the FirstChoice LifeStage product, being the MySuper product within the Fund. Certain documents examined by the Commission relate to the circumstances of the transition of those members from FirstChoice Employer to FirstChoice LifeStage (which transition occurred in accordance with legislative requirements).

Section 29WA breach

8. Counsel Assisting's submissions refer to a letter that CFSIL caused to be issued to APRA on 6 March 2014.[5] That letter refers to a meeting that CFSIL management had with APRA. The purpose of the meeting was to provide a regular update to APRA on a range of matters. One of the issues which arose in the meeting was management's understanding of the application of s.29WA of the SIS Act in relation to an identified subset of FirstChoice Personal members, and its impact on the best interests of those members. This cohort of members was originally automatically transferred from FirstChoice Employer to FirstChoice Personal on ceasing employment or due to a successor fund transfer. However, CFSIL considered these members to be "choice" members because they had subsequently confirmed their acceptance of FirstChoice Personal as their choice of fund and investment option(s) by their conduct, namely by directing personal contributions and/or superannuation guarantee contributions (via providing their new employer with a Choice form nominating this product) to their investment option in this product.

9. The reason for raising the issue was because management knew CFSIL was dealing with members whom it understood to be "choice" members, and so any application of s.29WA to those members would mean that their contributions would be directed away from a choice product to a MySuper offering.

10. CFSIL was also aware that it did not have a MySuper offering within the Fund to which such contributions could be directed, primarily because (in the case of the MySuper product established in the FirstChoice Employer division) there were impediments under the trust deed for the Fund and because the necessary IT infrastructure had not been established.[6] The reason why CFSIL had not set up the

[5] Exhibit 5.185 (CBA.0001.0451.0173), Letter Colonial First State to APRA, 6 March 2014.
[6] Exhibit 5.185 (CBA.0001.0451.0173), Letter Colonial First State to APRA, 6 March 2014, p.4.

necessary IT infrastructure by 1 January 2014 to direct those contributions to a MySuper product within the Fund was because of its genuine belief, based on management's understanding of what amounted to an investment direction for the purposes of s.29WA of the SIS Act (albeit one that it came to learn APRA did not share), that all members in FirstChoice Personal were choice members to whom s.29WA did not apply.

11. These concerns and background facts informed much of CFSIL's actions in response to its discovery of its s.29WA breach.

12. In that context, CFSIL had to rectify its breach by performing two tasks:

    (a) approving a MySuper offering to which affected FirstChoice Personal member contributions could be directed; and

    (b) notifying the affected members of the change that would be effected in dealing with their contributions if no investment direction was obtained from them in respect of future contributions.

Notification

13. So far as notification to the subset of FirstChoice Personal members (affected by the s.29WA breach) is concerned, Counsel Assisting is correct that Ms Elkins conceded, when confronted with a template letter to members (sent in 2014) concerning the transfer of contributions,[7] that the correspondence did not provide sufficient information to members, including in respect of what their insurance would be,[8] and that the call-out script (used in 2014)[9] was unbalanced in focusing on investment selection and did not describe the broader MySuper transfer.[10] Whilst Ms Elkins accepted Counsel Assisting's characterisation of the 2014 communications as "misleading", the other witness who was questioned on the same communications did not,[11] and CFSIL also does not accept the characterisation of the 2014 communications as explained in paragraph 57(a) below.

[7] Exhibit 5.189 (CBA.0001.0451.0217 and CBA.0001.0451.0218) Email Sutherland to APRA and attached template letter to members, 4 April 2014.
[8] Counsel Assisting's Closing Submissions, 24 August 2018, [339].
[9] Exhibit 5.187 (CBA.0001.0451.0203 and CBA.0001.0451.0204) Email CBA to APRA and attached call script, 26 March 2014..
[10] Counsel Assisting's Closing Submissions, 24 August 2018, [337].
[11] Mrs Rowell, the Deputy Chairman of APRA rejected the characterisation of those communications as misleading (T5191.06 – T5192.02.)

14. Counsel Assisting correctly notes that APRA raised no issue in respect of the proposed communications[12] and indeed, Mrs Rowell, the Deputy Chairman of APRA rejected the characterisation of those communications as misleading.[13] The form of communications to members reflected CFSIL's belief that the subset of members it was dealing with were truly 'choice' members, and the only problem was that their choice had yet to be confirmed in writing in a form consistent with APRA's view of what constituted an investment direction as required by s.29WA of the SIS Act.[14] Additionally, the letters requesting members to confirm their investment direction were made at a time when CFSIL had not yet determined the destination MySuper product (which determination would have been necessary in order to provide comparative information to members).

Approval of MySuper offering

15. So far as the ascertainment and approval of a MySuper offering for the FirstChoice Personal members are concerned, Counsel Assisting's submissions conflate the evidence associated with CFSIL's response to its breach of s.29WA (which was aimed at ensuring contributions were appropriately directed), and the evidence relating to the broader development of a program for the transfer of ADA account balances to a MySuper product. This has led to the suggestion by Counsel Assisting that, in April 2014, APRA suggested CFSIL bring forward the transfer of ADAs to a MySuper product, which management recommended was in members' best interests, but the Board of CFSIL resolved not to adopt that recommendation.[15] That statement is not correct.

16. Instead, the evidence on these issues is accurately summarised as follows:

    (a) in a Board meeting held on 30 April 2014, management recommended to the Board that Essential Super was a suitable MySuper product into which CFSIL could accept member contributions, where members had not provided an investment direction. That is to say, management recommended that Essential Super be the product to which contributions would be directed in order to prevent any future s.29WA breach. This recommendation was accepted by the Board, which then approved the use of Essential Super as a suitable MySuper product into which contributions

[12] Counsel Assisting's Closing Submissions, 24 August 2018, [340].
[13] T5191.06 – T5192.02.
[14] T4887.01-28.
[15] Counsel Assisting's Closing Submissions, 24 August 2018, [342].

could be accepted where no investment direction was held for a member.[16] This recommendation and decision related to those of the approximately 15,000 member accounts, in respect of which a contribution had been received after 1 January 2014; and

(b) separately, APRA had asked CFSIL to consider accelerating the transfer of all ADA account balances within FirstChoice Personal to Essential Super (despite the fact that ADA balances were not required to be transferred until 1 July 2017). This would have affected approximately 60,000 member accounts, which had not received any contributions (including superannuation guarantee contributions) in the prior 2 years and in respect of which CFSIL did not expect to receive future contributions in contravention of s.29WA. In that scenario, the Board determined not to accelerate the transfer of the ADA balances of those members to Essential Super, in light of:

(i) the potential operational risk (in the context of CFSIL's risk appetite statement) associated with undertaking a transfer on that scale at that point in time with the number of regulatory reform projects then underway;

(ii) the fact that the transfer may not be in the members' best interests and they may be adversely affected if the transfer were brought forward;

(iii) the low probability of future breaches of s.29WA given that a number of these members had not made a contribution for some time and other checks which had been introduced to monitor contributions had, by that time, been put in place; and

(iv) the work CFSIL had already planned in order to engage with members and advisers regarding their intentions.[17]

17. The evidence does not support a finding (contended for by Counsel Assisting at [342]) that the CFSIL Board rejected a recommendation of management and instead opted to identify tranches of members who ought to be transferred to a MySuper product reactively upon a breach of s.29WA. Rather, the evidence is that the CFSIL Board recognised the risk in transferring *en masse* the ADA account balances of 60,000

[16] Exhibit 5.197 (CBA.1004.0020.1247) Board Pack for Colonial First State Investments Limited, at pp.2-3.
[17] Exhibit 5.198 (CBA.0001.0451.0267) Email Colonial First State to APRA, 4 July 2014.

members to a MySuper product, in circumstances where that transfer was not required by law until 1 July 2017, but carried with it operational risks and the potential for members to be adversely affected.[18]

Further conflation

18. A further conflation of different events is found in Counsel Assisting's summary of the evidence at [342]. It is put that the CFSIL Board made its decision (being the decision not to accelerate the transfer of the ADA account balances of 60,000 FirstChoice Personal members into a MySuper product), "*even though it did not know that only nine percent of members would have been worse off moving into a MySuper product, a fact it only later came to determine*".[19]

19. The MySuper Transition Plan relied upon in Counsel Assisting's submissions as demonstrating that only 9% of members would have been worse off moving into a MySuper product does not in fact contain any statement to that effect.[20] Therefore, CFSIL cannot be sure as to how Counsel Assisting has settled on the figure of 9% as being the number of members who would be "worse off" moving to a MySuper product (and it is important to note that Ms Elkins rejected the notion that the result of the transfers could be categorically described as "better" or "worse", and that some transfers would simply result in a "different" investment choice for a member).[21]

20. Counsel Assisting may have had in mind the CFSIL Board Paper (No. CFSIL 08) for the Board meeting on 10 June 2016 (at CBA.1004.0059.0797_0069), which contains references to "91%" and "9%" (in the page ending _0083). If that is the case, CFSIL submits that: first, that document was not adduced in evidence; and, second that Board paper was concerned with the migration of ADAs of FirstChoice Employer members to the FirstChoice Lifestage product (within the Fund), as opposed to the transfers of ADAs of FirstChoice Personal members to Essential Super. In other words, Counsel Assisting's criticism of the CFSIL Board's decision (not to accelerate the transition of ADA account balances in FirstChoice Personal to Essential Super) appears to have drawn upon an analysis of the migration of a different cohort of members into a different MySuper product (which analysis was performed 2 years after the Board had made its decision in any event).

[18] T4899.27 – T4890.08.
[19] Counsel Assisting's Closing Submissions, 24 August 2018, [342].
[20] Exhibit 5.218 (CBA.1004.0079.0014), CPSL MySuper Transition Plan, 7 January 2014.
[21] T4942.31-38.

Communications with advisers in relation to transition to MySuper

21. Although it was Ms Elkins' evidence that, on its face, an email sent to advisers (to which Ms Elkins was not party), "*encouraged the advisers to stop the ADAs transferring over to a MySuper product by obtaining an investment direction*",[22] it was also Ms Elkins' evidence that the email also served a different purpose to that, namely, to get the financial advisers to engage with members.[23]

22. It mischaracterises Ms Elkins' evidence to state that she accepted that *"even though only nine percent of members would have been worse off moving into a MySuper product, moving ADAs into the MySuper Product early may have affected the relationship between CFSIL and its aligned advisers."*[24] Considered properly, it is plain that Ms Elkins' evidence was that, whilst she understood that the transfer to a MySuper product would have an impact on an adviser, the Board never discussed or considered the issue from the point of view of whether CFSIL's relationships with advisers (aligned or otherwise) would be affected, and CFSIL's management's purpose in bringing the issue to the attention of advisers was to ensure members had access to information.[25]

(b) Trailing commissions and grandfathering

Failure to rebate

23. Counsel Assisting's submissions in relation to retained commissions have focussed upon evidence given by Ms Elkins in response to an email exchange with an adviser, concerning a managed investment scheme (**MIS**) of which CFSIL acts as responsible entity. The email does not deal with any of the superannuation products in respect of which CFSIL is a trustee. The reason why rebating in that scenario is particularly difficult is because, as explained in the email itself, the fee from which commission would otherwise be passed on is built into the unit price for the scheme.[26]

24. CFSIL is aware that there are superannuation products in respect of which a like issue arises. That is to say, as explained by Ms Elkins,[27] in certain circumstances, trail commission has ceased, but the fee charged to the member's account (out of which

[22] Counsel Assisting's Closing Submissions, 24 August 2018, [347].
[23] T4911.10-18.
[24] Counsel Assisting's Closing Submissions, 24 August 2018, [347].
[25] T4946.15-37.
[26] This is apparent from the terms of the email chain, being Exhibit 5.207. See also Exhibit 5.205 (CBA.0001.0457.4183), Emails between January and March 2018, Jopling, Tully and Others, concerning MIF MER Questions at .3460.
[27] T4915.5-11.

trail commission was previously paid) has not been reduced and CFSIL has not rebated to the member an amount equal to the trail commission that has been turned off. However, no evidence to that effect has been adduced or explored by Counsel Assisting during the examinations of Ms Elkins or Mr Chun.

Use of the expression "commission free"

25. Counsel Assisting's submissions focus on the suggestion that such products have been referred to as "commission free" (at [349]). It is important to consider what the evidence before the Commission is in that regard:

(a) the reference to a product being "commission free" is contained in a single document, being an email chain between an adviser and CFSIL in connection with an MIS;[28]

(b) in that email chain, it is the adviser who introduces the expression, enquiring about the management expense ratio on these "commission free" accounts;[29]

(c) upon being provided with the management expense ratio for each account, it is again the adviser who states "the accounts mentioned are designated as commission free accounts"[30] (emphasis added);

(d) CFSIL explains that the designation of "commission free" is adopted because no commission is paid in respect of the account;[31] and

(e) the fact that CFSIL does not pay commission does not alter the fee payable by an investor in the product under consideration because the fee is struck as part of the unit price in the MIS and the fee cannot be differentiated depending on whether or not CFSIL then pays, out of the fees it has collected, trail commission.

26. Taken as a whole, the communication suggests that the use of the designation "commission free" is one which is confined to communications between CFSIL, as responsible entity of the scheme, and advisers, for the purpose of determining what

[28] Exhibit 5.205 (CBA.0001.0457.4183), Emails between January and March 2018, Jopling, Tully and Others, concerning MIF MER Questions .
[29] Exhibit 5.205 (CBA.0001.0457.4183), Emails between January and March 2018, Jopling, Tully and Others, concerning MIF MER Questions at p.9.
[30] Exhibit 5.205 (CBA.0001.0457.4183), Emails between January and March 2018, Jopling, Tully and Others, concerning MIF MER Questions at p.7.
[31] Exhibit 5.205 (CBA.0001.0457.4183), Emails between January and March 2018, Jopling, Tully and Others, concerning MIF MER Questions at p.7.

payments CFSIL ought to make, out of revenue it has collected, by way of commission to advisers.

The effect on grandfathered commissions of a member transitioning from accumulation to pension phase

27. Counsel Assisting has submitted that the Commission has heard evidence of CFSIL's decision to maintain grandfathered commissions when a member moves from the accumulation to the pension phase in relation to their superannuation (at [350]). In fact, the decision of CFSIL, which is consistent (it is submitted) with the better interpretation of the regulations, was to cease grandfathered commissions when a member transitions from the accumulation to pension phase.

28. In this regard, Commonwealth Bank of Australia and its associated Australian entities (**CBA Group**) wrote to ASIC in May 2015, seeking guidance on the operation of certain *Corporations Regulations* which, in the CBA Group's view, seemed to draw distinctions between platform operators and non-platform operators, the effect of which was uncertain.[32] The letter noted that *"despite the ambiguities",* CFSIL had made an interim decision not to treat commissions in respect of transitioned members as exempt from the FOFA ban on conflicted remuneration[33] subject to any further discussion with ASIC. It was in that context that the CBA Group requested a "no-action letter" or extension of the facilitative compliance period:

(a) by 3 months to 1 October 2015 to enable its businesses to transition out of commissioned arrangements in an orderly and staged manner; or, alternatively

(b) to 31 July 2015 to permit further engagement between the CBA Group and ASIC.[34]

29. Ms Elkins explained that the earlier meeting with Treasury officials and others which occurred in 2013 (before the relevant legislation was enacted) was intended to obtain clarity and consistency across the industry so that the ban on commissions did not apply in a differentiated manner based upon the structure of the superannuation product.[35]

[32] Exhibit 5.210 (CBA.0001.0456.0953) Letter CBA to Commissioner Tanzer of ASIC, 29 May 2015.
[33] Exhibit 5.210 (CBA.0001.0456.0953) Letter CBA to Commissioner Tanzer of ASIC, 29 May 2015 at p. 8.
[34] Exhibit 5.210 (CBA.0001.0456.0953) Letter CBA to Commissioner Tanzer of ASIC, 29 May 2015 at pp.9-10.
[35] T4926.23 - 27

(c) Contribution fees

30. Similar to the position in respect of trailing commissions as explained in paragraph 24 above, in circumstances where contribution fees are grandfathered after FOFA, those fees may still be payable (as described in paragraph 72) even after a member has been delinked from an adviser. In that situation, CFSIL will retain the contribution fees received.

31. As part of a whole of business review, CFSIL's management has been considering and intend to recommend to the Board the removal of contribution fees from certain products. Ms Elkins gave evidence on that review and the proposed recommendation.[36]

32. Separately, in relation to trailing commissions, Ms Elkins was tested as to whether CFSIL's position would be governed or determined by CBA's policy. Notwithstanding what was recorded in the minutes of the CFS Product Governance Forum on 21 June 2018, when questioned about the reality of the situation, Ms Elkins' evidence was that she did not think CFSIL's decision (as to whether it would cease paying trail commissions) would depend upon CBA's strategic position on this issue.[37] Further, when asked whether there was any sensible possibility that she, as a director of CFSIL in its capacity as trustee, would move in favour of removing trail commission if that was not the agreed position of CBA, Ms Elkins' evidence was that "[t]*hat could definitely happen*".[38]

33. Although Counsel Assisting's submission emphasises that the recommendation to remove certain fees and commissions was made by a CFSIL management group four days before CBA's public announcement to demerge its wealth arm (at [353]), when asked how the CFSIL management recommendation related to the CBA announcement, Ms Elkins' evidence was that she did not believe there was any relationship between the two events.[39]

(d) Adviser service fees charged to deceased member accounts

34. The error of deducting adviser service fees from deceased member accounts without appropriate authorisation was self-identified and reported by Avanteos to APRA and ASIC. Contrary to Counsel Assisting's submission at [359], in its notice of 11 May

[36] T4950.09-47.
[37] T4952.28-35.
[38] T4954.15-17.
[39] T4953.23-25.

2018, Avanteos did not state that the amount of fees to be refunded was in the range of $200,000 - $300,000. Rather, it stated that at that time the amount of fees identified as amounts to be refunded for current, open accounts was $200,000 - $300,000 and that the amount to be refunded would increase as Avanteos worked to identify accounts that were affected by this issue and which were now closed.[40]

35. The notices lodged by Avanteos with APRA and ASIC identified breaches of, relevantly:

(a) the condition that Avanteos comply with RSE licensee law (s.29E(1)(a) of the SIS Act);

(b) the covenant, in relation to all matters affecting Avanteos, to exercise the same degree of care, skill and diligence as a prudent trustee of a superannuation entity (s.52(2)(b) of the SIS Act);

(c) the duty to do all things necessary to ensure that the financial services covered by its licence were provided honestly, efficiently and fairly (s.912A(1)(a) of the *Corporations Act* 2001 (Cth) (**Corporations Act**));

(d) the duty to comply with financial services laws (s.912A(1)(c) of the Corporations Act); and

(e) the obligation to report a significant breach of financial services laws to ASIC (s.912D of the Corporations Act).[41]

(e) Cash returns

36. CFSIL accepts that differences in cash investment returns are attributable to the differences in fee structures across different products. However, the difference in returns was not a consequence of CFSIL having intentionally applied a preferential fee structure for CBA staff compared to the fee structure applicable in its public offer funds and nor is it something which CFSIL only became aware of following the publication of an article in The Australian in June 2018 as inferred by Counsel Assisting at [361] of the Closing Submissions.[42] Further, a key reason for the difference in fees, is that commissions payable to advisers, which result in higher fees (compared to other cash products) were struck on legacy products, which are now

[40] Exhibit 5.182.2 (CBA.0002.2558.7264) Exhibit LME-2 to Witness Statement of Linda Elkins in response to Rubric 5-78 dated 7 August 2018, Letter from AIL to APRA, copied to ASIC, dated 11 May 2018 at p.2.
[41] See, for example, Exhibit 5.182.2 (CBA.0002.2558.7264) Exhibit LME-2 to Witness Statement of Linda Elkins in response to Rubric 5-78 dated 7 August 2018, Letter from AIL to APRA, copied to ASIC, dated 11 May 2018 at p.2.
[42] Exhibit 5.220 (CBA.0001.0421.2819) Summary of Page 1 Article 11 June 2018, The Australian at p.2.

closed and which, to the extent that grandfathered commissions are included in the fee, CFSIL continues to be contractually obliged to pay.

(f) Related party benchmarking

CFSGAM

37. Colonial First State Global Asset Management (**CFSGAM**) is one of a number of investment managers appointed by CFSIL to MISs in respect of which CFSIL is the responsible entity.

38. Ms Elkins was shown a series of papers presented to the CFSIL Board relating to fees charged by CFSGAM to CFSIL at a time when she was not a member of the Board, having been seconded to another area of the CBA Group.[43]

39. It was not Ms Elkins' evidence, in response to a benchmarking report from ChantWest (which showed CFSGAM's fees to be outside of a benchmarked range), that *"this did not reveal anything about the adequacy of the negotiations between the parties".*[44] Rather, Ms Elkins' evidence was that the benchmarking was to confirm the need to undertake the arms' length negotiations between the parties.[45] In fact, the benchmarking report had been prepared for the very purpose of enhancing CFSIL's position in those negotiations.

40. Counsel Assisting's submissions do not refer to the evidence given by Ms Elkins as to the independence demonstrated by CFSIL in its dealings with CFSGAM. That evidence includes, for example, the decision by CFSIL to replace CFSGAM with two alternative investment managers, external to CBA Group, in circumstances where CFSGAM's capabilities, in CFSIL's view, no longer met the interests of members.[46]

41. CFSIL has also provided the Commission with evidence concerning its conflicts management framework that is applied in connection with related party dealings, the structure of its Board (with its emphasis on independence both in Board composition and in relation to the Chair), the use of separate teams for related party transactions and disclosures given in respect of related party transactions.[47]

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[43] T4955 – T4966.
[44] Counsel Assisting's Closing Submissions, 24 August 2018, [364].
[45] T4956.6-13.
[46] Exhibit 5.181 (CBA.9000.0102.1000) Witness Statement of Linda Elkins in response to Rubric 5-37 (A to H), 30 July 2018, [115] - [118].
[47] Exhibit 5.179 (CBA.9000.0091.0001) Witness Statement of Linda Elkins, 26 July 2018 in response to Rubric 5-17, [54] – [67], [155] – [164] and [174] – [179]; Exhibit 5.181 (CBA.9000.0102.1000) Witness Statement of Linda Elkins in response to Rubric 5-37 (A to H), 30 July 2018, [91], [125] – [129].

CommInsure

42. In relation to the independent expert's report obtained by CFSIL in order to facilitate a review of its arrangements with CommInsure and, ultimately, to enhance CFSIL's position in its negotiations with that insurer, Counsel Assisting has overlooked the fact that the question of whether CommInsure's product is suitable for a member depends, not only on the rate of premium charged, but also on other terms and conditions of the insurance policy. Additionally, claims experience of the membership will impact the premium calculation by the insurer. This impact cannot be benchmarked but is taken into account by the insurer and trustee. Importantly, Counsel Assisting ignored the key finding of the report, namely:

> *"Our key conclusions [sic] from this analysis is that* [Essential Super] *has a package of death, TPD and IP features that is competitive with the peer group of products."*[48]

43. Although Counsel Assisting has set out various cohorts in respect of which CommInsure's product may be more expensive for certain types of cover,[49] the question of whether or not that information suggests the product is better or worse for members compared to other products available on the market cannot be assessed without knowing the cohort of members within Essential Super or the claims experience of members with that insurer.

44. While Counsel Assisting notes that CFSIL continues to use CommInsure "despite" the outcome of one of the benchmarking reports obtained (which concluded that the product was competitive for certain subsets of members and uncompetitive for others), consideration should also be given to the evidence of Ms Elkins that, on a number of occasions, the CFSIL Board has discussed whether or not to continue to use CommInsure.[50] Counsel chose not to ask any questions as to the substance of those discussions and the matters, other than the benchmarking report, considered by the Board in the course of those debates.

45. Also relevant to consideration of this issue is the evidence of Ms Elkins that, upon becoming aware of media reports concerning CommInsure's conduct in 2016, CFSIL implemented a range of processes designed to ensure that the existing insurance arrangements it had in place with CommInsure were in members' best interests. Steps taken by CFSIL included:

[48] Exhibit 5.224 (CBA.0001.0430.083) RiceWarner Insurance Benchmarking Review, 4 November 2017, at p5.
[49] Counsel Assisting's Closing Submissions, 24 August 2018, [365].
[50] T4962.10-15.

(a) requiring presentations to the CFSIL Board by the Executive General Manager of CommInsure to discuss CMLA's response to the concerns raised and CMLA risk culture;

(b) the establishment of a forum to track and review any insurance complaints or concerns raised by members;

(c) a continued phased review of CommInsure's performance, which included a five year trend analysis of acceptances and declines (and the reasons for declines), a five year complaints review, a targeted declined claims review and benchmarking of terms and conditions; and

(d) a further review of the parties' contract terms.[51]

(g) Distribution and selling practices

46. In respect of this case study, there is one minor point to clarify. Counsel Assisting's submission incorrectly refers to "Commonwealth Essential Super" becoming known as the product established by CFSIL and sold by CBA in its branches. CES is in fact the name of the superannuation fund, of which CFSIL is the trustee. The product issued by CES is known as Essential Super.

H.2 Submissions concerning available findings of misconduct, or conduct falling below community standards and expectations

47. Before concluding that any of the findings advanced against CFSIL or Avanteos were available, the Commission would need to be satisfied that each of the legal elements of the relevant misconduct are clearly identified and established on the evidence.

48. To assist the Commission with this analysis, set out below is a summary of the legal elements of a number of alleged breaches or contraventions of the SIS Act and Corporations Act referred to in Counsel Assisting's Closing Submissions.

49. Section 52(2) of the SIS Act sets out covenants which bind trustees (ie, the RSE licensee) and which must be included in the governing rules of a regulated superannuation fund. The Closing Submissions of Counsel Assisting assert that it is open to the Commission to find that CFSIL and/or Avanteos as trustees have, variously, breached the following covenants: to act honestly (s 52(2)(a))[52]; to exercise

[51] Exhibit 5.181 (CBA.9000.0102.1000) Witness Statement of Linda Elkins in response to Rubric 5-37 (A to H), 30 July 2018, [112] – [114].
[52] Counsel Assisting's Closing Submissions, 24 August 2018, [393.6].

care, skill and diligence (s 52(2)(b))[53]; to perform duties and exercise powers in the best interests of beneficiaries (s 52(2)(c))[54]; and to prefer the duties to and interests of beneficiaries over the duties to and interests of other persons, where there is a conflict (s 52(2)(d))[55]. In respect of some conduct, such as, for example, CFSIL's charging of trail commissions, multiple covenants are rolled up and said to have been breached collectively.[56]

50. This global approach to the duties disregards the distinct features of each, their origins in general law duties, the applicable standards by which conduct is to be assessed, and how each duty has been considered and applied by the Courts. Before analysing the specifics of the misconduct alleged, and whether or not it could be said that that conduct constituted a breach of the RSE licensee's duties as a trustee, it is necessary to isolate each duty and briefly state some of the considerations that apply in respect of it:

(a) **Section 52(2)(a)**: The covenant requiring trustees to act honestly in all matters concerning the RSE has its origins as a feature of the "irreducible core" of the trustee's obligation to act honestly and in good faith.[57] It is well-established that whether a trustee has acted honestly is a question of fact for the court to determine in light of all of the circumstances of each case.[58] Accordingly, it is necessary to precisely identify the trustee's impugned conduct and how it is said that that conduct demonstrates a failure to act honestly. For the reasons expressed by Megarry VC in *Cowan v Scargill* [1985] Ch 270 at 287, this duty may not be co-extensive with that in equity, unless, when read with s 52(2)(c), it is to be construed as being so.

(b) **Section 52(2)(b):** the required standard is that of a prudent superannuation trustee – that is, a prudent person whose profession, business or employment is or includes acting as a trustee of a superannuation entity and investing money on behalf of beneficiaries. The conduct of CFSIL and/or Avanteos cannot, therefore, be assessed in a vacuum; the relevant standard must be defined and the respects in which the trustee is alleged to have fallen short of that standard must be articulated. This standard aligns with the considerations expressed by

[53] Counsel Assisting's Closing Submissions, 24 August 2018, [388.2] and [390].
[54] Counsel Assisting's Closing Submissions, 24 August 2018, [388.2], [392.1], [393.6], [398] and [399].
[55] Counsel Assisting's Closing Submissions, 24 August 2018, [388.3] and [393.6].
[56] Counsel Assisting's Closing Submissions, 24 August 2018, [393.6].
[57] *Leerac Pty Ltd v Garrick E Fay* [2008] NSWSC 1082.
[58] LA Sheridan, "Excusable Breaches of Trust" (1955) 19 *The Conveyancer and Property Lawyer* 420 at 437.

Jessel MR in *Re Speight* (1883) 22 Ch D 727 at 739-740 (affd *Speight v Gaunt* (1883) 9 App Cas 1 at 19 per Lord Blackburn) and by Finn J in *ASC v AS Nominees Ltd* (1995) 133 ALR 1 at 18-19. Further, in evaluating whether a trustee was in breach of the duty to exercise reasonable care in a particular case, the court is not to judge what the trustee did or failed to do with the benefit of hindsight.[59] Focusing on the outcome of a particular decision is apt to confuse what is the relevant inquiry under s 52(2)(b): namely, whether the trustee *exercised* its powers in accordance with the applicable standard, assessed at the time the power was exercised.

(c) **Section 52(2)(c):** six matters can be noted by way of example of the complex considerations that arise in determining whether a trustee has complied with its duty to act in the best interests of members. *First,* while it is generally accepted that the covenant in s 52(2)(c) mirrors the general law duty of a superannuation trustee to act in the best interests of its fund members,[60] it has been suggested that the duty is in fact an amalgam of two general law duties: the duty of loyalty or the duty of fidelity to the trust, and to pursue with appropriate diligence and prudence the interests of the beneficiaries.[61] Identifying with precision the content of the duty is therefore a necessary first step in determining whether it has been properly discharged by a trustee in a given case. *Secondly*, in considering the content of the covenant, it is important to have regard to the superannuation context, as emphasised by the High Court in *Finch v Telstra Super Pty Ltd*.[62] *Thirdly*, the way in which the covenant operates will depend on the facts and circumstances of the particular case, and it is difficult to define in advance the precise scope of the covenant.[63] *Fourth*, the best interests covenant is activated only in respect of the performance of a trustee's duties and the exercise of a trustee's powers, and does not apply to the exercise of a trustee's rights. *Fifth*, the best interests covenant is concerned with the *process* of decision-making, not outcome, given the latter is something that necessarily involves the application of hindsight.[64] *Sixth, t*he "best interests" of members, in

[59] *Elder's Trustee and Executor Co Ltd v Higgins* (1963) 113 CLR 426 at 448.

[60] *Manglicmot v Commonwealth Bank Officers Superannuation Corporation* (2010) 239 FLR 159; [2010] NSWSC 363 at [121]; *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* (2016) 334 ALR 692 at [136].

[61] *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87.

[62] (2010) 242 CLR 254 at [33]. Thus, while the covenant may reflect general law duties, the superannuation context needs to be taken into account in construing the covenant.

[63] Thomas G, "Challenging the Exercise of Powers by Trustees" in Donald MS and Beatty LB (eds), *The Evolving Role of Trust in Superannuation* (The Federation Press, 2017), p 192.

[64] In *Manglicmot v Commonwealth Bank Officers Superannuation Corporation* (2010) 239 FLR 159; [2010] NSWSC 363 at [51]-[53] Rein J at first instance did not accept that the trustee is made liable for any outcome which turns out to be unbeneficial to members, even if the original decision which led to that outcome was taken with the best

the context of a superannuation fund, are normally treated as their best financial interests.[65] These matters demonstrate that mere assertion of a failure to act in the best interests of members is problematic, and that care must be given to identifying the content of the duty and the respects in which the trustee's decision-making process is said to have failed. An enquiry which is focused on the outcome of the decision, without proper regard to the trustee's process, is misdirected.

(d) **Section 52(2)(d):** the statutory covenants relating to conflicts of interest must be read in conjunction with s 58B of the SIS Act which modifies the general law conflicts rules in relation to certain actions of the trustee that would attract the fiduciary proscriptions. Where s 58B does not apply, the relationship between the covenant in s 52(2)(d) and the fiduciary 'no conflicts' rule is not clear.[66] Again, this illustrates that the conflict of interest covenants in the SIS Act raise complex questions of construction and application and a mere assertion of breach that fails to articulate how the so-called conflict infringes upon the particular covenant in question is unlikely to assist. The covenant plainly permits the "management" of conflicts of interest or of duty, rather than the prohibition of them. It does not reflect a strict application of the general law "no-conflict" rule. In that context, it may buttress the duty to act in the best interest of beneficiaries. In order to found an allegation on the provision, it need be identified if it extends beyond that, and the scope of any such extension.

(e) **Section 62:** The sole purpose test, in s 62 of the SIS Act, provides that the trustee of a regulated superannuation fund must ensure that the fund is maintained solely for one or more of the stated core purposes, or alternatively one or more of the core purposes and stated ancillary purposes. Whether a trustee complies with the sole purpose test is to be assessed objectively, and will turn on the particular circumstances of each case: *Montgomery Wools Pty Ltd as Trustee for Montgomery Wools Pty Ltd Super Fund v Cmr of Taxation* [2012] AATA 61 at [102].

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interests of all members in mind. Rein J said that another way of describing this approach is to say that s 52(2) is concerned with process, not outcome.

[65] See, eg, *Commonwealth Bank Officers Superannuation Corp Pty Ltd v Beck* (2016) 334 ALR 692 at [140].

[66] See generally, Pamela F Hanrahan 'Conflicts of Duties in Statutory Contexts: Managed Investments, Superannuation and Financial Services' Presentation to the Supreme Court of New South Wales Annual Commercial and Corporate Law Conference, Sydney, 15 November 2017.

51. In terms of the Corporations Act:

(a) **Section 912A(1)(a)**: this provision provides that a financial services licensee must "do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly". The words "efficiently, honestly and fairly" must be read compendiously.[67] Together, they connote a requirement not only of reasonable competence, but also ethical soundness and commercial morality.[68] Whether the requisite standard has been breached is to be determined objectively, having regard to the licensee's conduct as a whole. Mere knowledge of a risk of non-compliance, or knowledge of an instance or instances of non-compliance, in some aspect of the licensee's operations does not in and of itself establish a failure to comply with s 912A(1)(a). In such circumstances, whether the licensee's conduct on the whole falls short of the requisite standard will depend upon matters such as the licensee's approach to managing the known risk, the licensee's response to the known instances of non-compliance, and the licensee's transparency with the regulator regarding such matters. Plainly enough, s 912A(1)(a) should be understood as encouraging licensees to become aware of potential or actual non-compliance in their operations, rather than rewarding their ignorance thereof.

(b) **Section 912A(1)(c)**: this is a general obligation imposed on a financial services licensee to comply with the financial services law. The provision picks up a vast number of sections of the Corporations Act and ASIC Act together with any other legislation that covers conduct relating to the provision of financial services. The breadth of the potential application of s 912A(1)(c) requires precise identification of the financial services law that is said to have been breached before the question of any contravention of s 912A(1)(c) can be properly evaluated.

(c) **Section 963F:** requires financial service licensees to take reasonable steps to ensure that its representatives do not accept conflicted remuneration. The obligation here is not for the licensee to "ensure" that its representatives do not receive conflicted commissions; rather , the obligation is for the licensee to take reasonable steps towards that end. Accordingly, regard must be had to the

[67] *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 (***Story***) at 672; 13 ACLR 225 at 234-5 (Young J).
[68] *Story* at 672, 679; *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* [2012] FCA 414; (2012) 88 ACSR 206 at [69] (Foster J); *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 at 110 (Bollen J).

processes and procedures that a licensee had in place in relation to the prevention of receipt of conflicted remuneration by its representatives with an assessment then made as to their reasonableness.

(a) Available findings of misconduct in relation to ADAs

52. CFSIL has already accepted that it contravened s.29WA of the SIS Act by accepting contributions into a non-MySuper superannuation product for the cohort of members in FirstChoice Personal, in respect of whom CFSIL did not hold an investment direction. In the same notice, CFSIL accepted that it had breached its obligation to comply with financial services laws and RSE licensee laws.[69]

53. Counsel Assisting has noted that the contravention of s.29WA of the SIS Act is a strict liability offence. However, it should be noted that in determining whether or not an offence has actually occurred, consideration would need to be given to the defence of mistake of fact available in section 6.1 of the *Criminal Code* in respect of strict liability offences. This is particularly the case here where CFSIL was genuinely of the belief that the members for whom the s.29WA breach occurred were in fact "choice" members who fell outside the requirements of s.29WA as discussed in paragraph 10 above, and that it was only after engagement with APRA that it understood that the regulator was of a different view.

54. In answer to Counsel Assisting's submission that it is open to the Commission to find that additional breaches occurred,[70] CFSIL responds as follows.

55. **First**, CFSIL does not accept that its conduct in respect of this event evidences the necessary degree of moral obloquy to constitute a breach of s.912A(1)(a) of the Corporations Act.[71] There is no evidence before the Commission to suggest that the failure to pay contributions of a subset of FirstChoice Personal members into a MySuper product was anything other than a genuine misunderstanding about the scope of s.29WA and its impact on particular cohorts of members, which CFSIL came to learn APRA did not agree with. CFSIL believed that these members of FirstChoice Personal were choice members, to whom s.29WA did not apply. That honest mistake does not excuse CFSIL's breach of the SIS Act provisions and s.912A(1)(c) of the Corporations Act as it has properly conceded, but it does tell against a finding of a failure to do all things necessary to provide services efficiently, honestly and fairly.

[69] Section 912A(1)(c) of the Corporations Act and s.29E(1)(a) of the SIS Act were identified in Exhibit 5.184 at p.3.
[70] Counsel Assisting's Closing Submissions, 24 August 2018, [388]
[71] *Story v NCSC* (1988) 13 NSWLR 661; *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206.

56. **Second**, insofar as it is put that, in contravening s.29WA of the SIS Act, CFSIL failed to exercise its powers as trustee in the best interests of the affected members, thereby breaching s.52(2)(c) of the SIS Act, the evidence does not support such a finding and, having regard to the legal principles outlined above weighs heavily against that conclusion. The evidence demonstrates that in respect of this cohort of members, CFSIL pursued, with appropriate diligence and prudence, the interests of those beneficiaries. The "best interests" of those members, in the context of a superannuation fund, are normally treated as their best financial interests.[72] In the context of the s.29WA breach, it is clear that, CFSIL considered that it was acting in members best interests by raising its concern about the application of s.29WA of the SIS Act. Once it recognised that there was a subset of FirstChoice Personal members whose contributions ought to have been paid into a MySuper product, it sought at all times to act in those members' best financial interests by taking steps to transfer them to a MySuper offering if they did not provide a direction, and otherwise remediating them.

57. Counsel Assisting's submissions point to, not only the failure to transfer contributions on time, but also CFSIL's communications to members and advisers "*in respect of ADAs and the MySuper transition, which Ms Elkins* [allegedly] *agreed were misleading*",[73] as a breach of its duty to act in members' best interests. It is necessary to consider, separately, each of the relevant communications (which were reviewed and authorised as part of CFSIL's standard process for approving external communications):

(a) whilst Ms Elkins' evidence accepted Counsel Assisting's characterisation of the communications issued to members in 2014 in relation to the s.29WA issue as "misleading", that is not a characterisation with which CFSIL, and the other witness who gave evidence on those communications, agree;[74]

(b) Ms Elkins did not concede, and CFSIL does not accept, that CFSIL's communications to advisers in relation to the s.29WA issue were misleading;

[72] See, eg, *Commonwealth Bank Officers Superannuation Corp Pty Ltd v Beck* (2016) 334 ALR 692 at [140].
[73] Counsel Assisting Closing Submissions, 24 August 2018, [388.2].
[74] Exhibits 5.189 (CBA.0001.0451.0218 and CBA.0001.0451.0218.0217) Email Sutherland to APRA and attached template letter, 4 April 2014; and Exhibit5.187 (CBA.0001.0451.0203 and CBA.0001.0451.0204) Email CBA to APRA and attached call script, 26 March 2014, and see paragraph 13 of these submissions.

(c) Ms Elkins did not concede, and CFSIL does not accept, that CFSIL's communications to members in relation to the broader transition of ADA balances to a MySuper product were misleading;

(d) Ms Elkins did not concede, and CFSIL does not accept, that CFSIL's communications to advisers in relation to the broader transition of ADA balances to a MySuper product were misleading; and

(e) CFSIL does not accept that CFSIL's communications to members and advisers, either in relation to the s.29WA issue or the broader transition of ADA balances, amount to a breach of its duty to act in members' best interests.

58. In relation to sub-paragraph (a), whether a communication is misleading needs to be considered in the context in which it is received. Here, CFSIL considered these members to be choice members who were at risk of having that choice overridden unless a confirmation by them of their investment choice was received by CFSIL. In this regard, APRA's approval of these communications is significant, as is Mrs Rowell's rejection of the proposition that the communications were misleading.[75]

59. In relation to sub-paragraph (b), no evidence was adduced on CFSIL's communications to *advisers* in relation to the s.29WA issue, and neither Ms Elkins nor Mr Chun was questioned on any such communications.

60. In relation to sub-paragraph (c), Ms Elkins' evidence in relation to CFSIL's communications to members concerning the broader ADA transition was that the first page of the letter to members[76] "*was not balanced*",[77] but the flyer enclosed to that letter[78] provided the necessary comparative information to members to enable an informed decision to be made as to whether to stay in the choice product or to transition across to the MySuper product. Regarding the call script (for calls to members),[79] Ms Elkins' evidence was that different scripts were developed for different cohort of members and CFSIL was identifying particular cohorts and calling them based on what they were.[80] Further, her evidence was that the statements in the script (at Exhibit 5.203) identified by Counsel Assisting, and on which she was

[75] T5191.06 – T5192.02, T4986.34-39.
[76] Exhibit 5.204 (CBA.0001.0436.5386) Template Letter to CFSIL Members, 29 April 2016.
[77] T4914.14-16.
[78] Exhibit 5.214 (CBA.0001.0436.5478) Letter to Member in relation to transition from FirstChoice Personal Super to MySuper, 29 April 2016.
[79] Exhibit 5.203 (CBA.0001.0479.0817) Call Script Outbound Call Guide ADA Campaign, 29 June 2016.
[80] T.4912.21-23; T4913-8-10.

questioned, would only be "problematic" if it was applied to the wrong cohort.[81] Lastly, Mr Chun was also questioned at a generic level about CFSIL's communications to members in connection with the broader ADA transfers, and he did not accept Counsel Assisting's assertion that those communications were misleading.[82]

61. In relation to sub-paragraph (d), Ms Elkins' evidence in respect of the sample email from CFSIL to a financial adviser sent in July and September 2016, which concerned the upcoming transfers of ADA accounts to MySuper products,[83] is summarised in paragraphs 21 and 22 above, namely, that one of the purposes served by the email was to get financial advisers to engage with members on this topic. No concession was made by Ms Elkins to the effect that that communication was misleading.

62. In relation to sub-paragraph (e), CFSIL considers that it took reasonable steps to further, members' interests when producing the communications in question. More specifically:

(a) the communications to members, including both the call script and the letters sent in 2014, in relation to the s.29WA issue were produced based on an honest belief of CFSIL that the subset of members were 'choice' members, and the purpose of those communications was to obtain the necessary written confirmation so as to enable CFSIL to honour the members' choice. In other words, it was CFSIL's intention to serve the best interests of members when communicating with them on this issue;

(b) where there is no evidence concerning communications from CFSIL to advisers in relation to the s.29WA issue, there is no basis for finding that CFSIL failed to act in members' best interests by reason of such communications (if any);

(c) the communications to members in relation to the broader ADA transfer were not misleading and contained the necessary information prescribed by law. Further, there is no evidence of the call-out campaign being applied to a wrong cohort. In those circumstances, there can be no basis for finding that CFSIL failed to act in members' best interests by reasons of those communications; and

[81] T.4912.25-29; T.4913.06.
[82] T4986.34-38.
[83] Exhibit 5.202 (CBA.0001.0459.1839) Email CFSL to Financial Planner, 16 September 2016.

(d) the communications to advisers in relation to the broader ADA transfer were, as explained above, not misleading; but served a legitimate purpose of encouraging advisers' engagement with members on this topic (given the importance of the choice the member needed to make). It follows that, again, CFSIL did not breach its duty to act in the members' best interests when communicating with advisers in the manner that it did in 2016.

63. Counsel Assisting also submits that, because CFSIL had adequate notice of the upcoming transition, and did not take steps to invest in systems required to ensure that it could comply with s.29WA of the SIS Act, it failed to exercise the degree of care, skill and diligence as a prudent superannuation trustee would exercise, in contravention of s.52(2)(b) of that Act. That submission is rejected. The s.29WA issue arose for a subset of the FirstChoice Personal members, not because CFSIL failed to invest in systems, but because it had formed a view (with which APRA ultimately did not agree) that s.29WA did not apply to the subset of FirstChoice Personal members.

64. **Third**, CFSIL does not accept that its conduct in respect of the s.29WA breach and the broader ADA transfers constitutes a failure to prioritise the interests of members over those of advisers. Although one of the practical consequences of some members staying in choice products or not having their contributions directed to a MySuper product, was that commissions continued to apply to their accounts, that consequence was never discussed by the CFSIL Board. In her evidence, Ms Elkins strongly denied the proposition that a possible explanation for the approach taken by CFSIL was that it wished to maximise the period of time that the ADAs remained as ADAs, so as preserve the commissions paid to advisers for as long as possible.[84] It is therefore incorrect for Counsel Assisting to characterise CFSIL's approach as giving advisers "*the opportunity to maintain those fees by diverting clients from the MySuper product within the time afforded by CFSIL*".[85]

65. The true purpose of, and the belief underlying, CFSIL's communications in 2014 and 2016, in respect of the s.29WA issue and the broader transitions of ADA balances respectively, are explained in paragraphs 13, 21, 22 and 58 to 62 above. In that regard, it is important to note that there was no 'one size fits all' answer to the question of whether or not a MySuper product was suited to an individual member's needs – that is, it is not the case that MySuper products are always "good" and choice products are always "bad" for a member. In those circumstances, members were

[84] T4884.06-23.
[85] Counsel Assisting's Closing Submissions, 24 August 2018, [388.3].

notified of the importance of seeking advice on the question. It is accepted that some of those communications might have over-emphasised particular aspects for particular members. However, the motivation for CFSIL's correspondence as a whole was not to advance advisers' interests; rather, it was consistent with the view held by CFSIL that members' interests were best served by them turning their minds to the question of how they wish to invest their superannuation contributions.

66. Finally, CFSIL accepts that, by reason of its contravention of s.29WA, it contravened s.29E(1)(a) of the SIS Act. The contravention of s.29E(1)(a) was acknowledged in CFSIL's breach notice to APRA of 19 March 2014.[86]

(b) Available findings of misconduct in relation to Avanteos

67. Avanteos considers that the deduction of adviser service fees from deceased member accounts without appropriate authorisation is properly characterised as contraventions of the laws which it identified to ASIC and APRA as having been breached by it in its breach notifications.[87] Avanteos is currently implementing a remediation programme to compensate member representatives affected by this breach.

68. Avanteos accepts that deduction of adviser service fees from deceased member accounts without appropriate authorisation (and, even if appropriate authorisation does exist in respect of deceased member accounts) is conduct which does not now meet the standards and expectations of the community which is why it has ceased the practice. However, Avanteos rejects the additional allegations of misconduct advanced by Counsel Assisting:

(a) as to the best interests duty, Avanteos believed at the time that services could be provided to the estate or beneficiaries of the deceased by an adviser following the death of the member. The breach, the subject of the notice to ASIC and APRA dated 11 May 2018, arose because, although members had originally authorised the deduction of adviser service fees from their accounts, there was a failure to disclose that adviser service fees would continue to be deducted from members' accounts following death; and

[86] Exhibit 5.184 (CBA.0001.0451.0190) Breach Notice Colonial First State to APRA, 19 March 2014, p.1.
[87] Exhibit 5.182.2 (CBA.0002.2558.7264) LME-2 to Witness Statement of Linda Elkins in response to Rubric 5-78 dated 7 August 2018, Letter from AIL to APRA, copied to ASIC, dated 11 May 2018.

(b) Avanteos does not consider that this incident gives rise to a finding of a contravention of s.62 of the SIS Act, because that provision is directed to the purpose of a superannuation fund as a whole, which purpose was complied with and not altered by reason of a failure, in these particular instances, to terminate the deduction of fees following the notification of death.

(c) Available findings of misconduct in relation to commissions

69. CFSIL understands that the **first** finding contended for by Counsel Assisting is that CFSIL contravened the obligation to do all things necessary to ensure that its financial services are provided efficiently, honestly and fairly because it permitted grandfathered commissions to be paid in respect of members' accounts, where the member had transitioned from an accumulation phase to a pension phase after the disallowance date of 1 July 2014 but during ASIC's facilitative period. CFSIL contends that a review of the correspondence between the Group and ASIC, and the correspondence between ASIC and CFSIL, reveals that CFSIL worked with the regulator to try and understand the complex regime of regulations which applied to platform providers, and to act in a manner that was consistent with those obligations. Contrary to the suggestion that CFSIL acted in a commercially unethical manner in relation to the grandfathering of commissions for transitioning members, CFSIL had made an interim decision (subject to dialogue with ASIC) that the better interpretation of the regulations was that, by virtue of its product structure, it would be subject to a ban on commissions for transitioning member accounts, whilst certain of its competitors would not.[88] CFSIL implemented that interpretation of the law (which was least favourable to it), despite the consequences it would have for its relationships with advisers. CFSIL did so recognising that was the sound course to follow from a commercially ethical point of view.

70. Avanteos understands that the **second** finding contended for is that it contravened the obligation to do all things necessary to ensure that its financial services are provided efficiently, honestly and fairly because it permitted grandfathered trailing commissions to be paid in respect of a deceased member's account, if the member had nominated a reversionary beneficiary prior to the effective date of FOFA. Avanteos refutes this finding. This is because the only commissions payable by Avanteos in its superannuation products are permissible life insurance commissions. As the nature of

[88] Exhibit 5.210 (CBA.0001.0456.0953) Letter CBA to Commissioner Tanzer of ASIC, 29 May 2015, p.8.

a reversionary beneficiary's benefit is a pension, insurance commission is not payable as insurance cannot be held by a member in pension phase.

71. The **third** misconduct alleged is that CFSIL contravened s.912A(1)(a) by charging trailing commissions to unadvised members (which CFSIL retained) even though its products were described as "commission free". The evidence before the Commission on this topic (comprising primarily the email exchanges at Exhibits 5.205, 5.206 and 5.207)[89] is deficient to enable such a finding to be made for at least three reasons:

(a) the product in question, that was the subject of those email exchanges, was not one of CFSIL's superannuation products, but rather a MIS. It is subject to different considerations and legislative rules than is the case for superannuation products;

(b) although the description of "commission free" is used in the emails between the adviser and CFSIL, there is no suggestion it was used in communications with members; and

(c) the mechanism by which the amount previously treated as commission was prevented from being rebated to the investor has not been the subject of evidence beyond the reference, in those email chains, to the difficulty presented by reason that the commission amount was incorporated in the unit price of the product and rebating was not able to be effected for that particular scheme.

72. In instances where CFSIL has ceased paying commissions in relation to superannuation products, and an amount equivalent to the commission has not been rebated to the member but has instead been retained by CFSIL, CFSIL accepts that such conduct may have fallen short of community standards and expectations, even though it is legally permissible. The reason why it is legally permissible is because:

(a) CFSIL is permitted under the relevant trust deed to charge fees from members' accounts and it does so in accordance with the requirements of the trust deed;

(b) upon receipt from the members, those fees become corporate funds of CFSIL, which CFSIL may use and apply at its discretion;

[89] Exhibit 5.205 (CBA.0001.0457.4183), Emails between January and March 2018, Jopling, Tully and Others, concerning MIF MER Questions; Exhibit 5.206 (CBA.0001.0457.4183), Emails between Jopling and Tully March - May 2018; Exhibit 5.207 (CBA.0001.0457.3756), Emails between Swetland-Busuttil, Tully and Others 22 April 2018.

(c) prior to the FOFA ban on conflicted remuneration coming into effect, CFSIL had used part of those fees in payment of commissions to advisers;

(d) after the FOFA ban came into effect, CFSIL ceased to pay commissions which were not preserved by the grandfathering arrangements; and

(e) in doing so, CFSIL has not engaged in any conduct that might constitute a contravention of s.912A(1)(a) of the Corporations Act.

73. The **fourth** alleged contravention appears to relate to the same conduct as identified in the first alleged contravention (that is, CFSIL continuing to pay grandfathered commissions during the facilitative compliance period in relation to transitioning member accounts). It is put that such conduct is a contravention of the trustee's duty to act in the members' best interests. For the reasons identified in paragraph 69, CFSIL contends that its conduct in relation to this issue was consistent with members' best interests, despite the competitive disadvantage it imposed on CFSIL.

74. The **fifth** alleged contravention, being that Avanteos failed to act in members' best interests by permitting trail commission where a reversionary beneficiary had been appointed within the time period permitted under FOFA rules, is not accepted for the reasons identified in paragraph 70 above.

75. The **sixth** allegation put against CFSIL relates to alleged contraventions of the SIS Act in connection with the same incident in which an adviser complained about CFSIL retaining an amount that was no longer paid as commission. As explained above:

(a) the issue raised in the email exchange with the adviser relates to a MIS. It is not governed by the SIS Act and, as such, cannot constitute a contravention of ss.52(a), (c) or (d) of that legislation; and

(b) in any event, to the extent that CFSIL "retains" amounts that are no longer paid as commissions in superannuation products, CFSIL does so lawfully and as permitted by the trust deed.

76. The **seventh** allegation put against Avanteos is that it engaged in conduct that was misleading or deceptive in contravention of s.12DA of the ASIC Act and s.1041H of the Corporations Act, by charging commissions on deceased member accounts and grandfathering those commissions where a reversionary beneficiary had been nominated and such charges did not contravene the FOFA rules. The substance of this allegation is addressed in paragraph 70 above and is not accepted by Avanteos.

This is a topic distinct from that dealt with in relation to the payment of adviser service fees, and raises different issues not explored at hearing. As such, Avanteos considers that there is no basis for a finding of contravention of s.12DA of the ASIC Act or s.1041H of the Corporations Act.

77. In respect of the **eighth** allegation, to the extent it is alleged that by use of the description of "commission free" in an email chain between CFSIL and an adviser (in circumstances where it was the adviser who introduced the use of the expression "commission free"[90] and it is unclear how, if at all, CFSIL otherwise uses the expression with any other party), CFSIL misled or deceived, the allegation is rejected. CFSIL's response to the third allegation set out in paragraphs 71 to 72 are repeated here. There is no basis for drawing any conclusion as to whether any members of superannuation funds (for which CFSIL is the trustee) were misled as to the manner in which their unit price was calculated in this regard and no consideration has been given to the disclosure accompanying CFSIL's superannuation product.

78. The **ninth** allegation put against CFSIL, that it contravened s.912A(1)(c)[91] rests upon the earlier made allegations. CFSIL's position on each of those allegations is as outlined above. Since CFSIL does not admit that breach, it also does not admit any breach of s.912D(1B) which requires it to report the breach to the regulator within 10 business days.

79. Likewise, in the case of the **tenth** allegation, being that Avanteos contravened s.912A(1)(c) and s.912D(1B),[92] Avanteos refers to and repeats its response outlined above.

80. In relation to the **eleventh** allegation against CFSIL in respect of s.963F of the Corporations Act, CFSIL denies any breach of that section. The first point to note is that CFSIL does not have any adviser representations, but in any event there is no evidence that any representative of CFSIL has accepted conflicted remuneration in contravention of FOFA laws. Further, there is no evidence of any inadequacy in CFSIL's processes and procedures that were put in place to prevent its representatives from receiving conflicted remuneration that is banned under FOFA.

[90] Exhibit 5.205 (CBA.0001.0457.4183), Emails between January and March 2018, Jopling, Tully and Others, concerning MIF MER Questions at .3460.
[91] Assuming that there is a typographical error, and the reference intended is s.912A(1)(c).
[92] Assuming that there is a typographical error, and the reference intended is s.912A(1)(c).

(d) Available findings of misconduct in relation to the distribution of Essential Super in branches

81. Counsel Assisting submits that it is open to the Commissioner to find that CBA or CFSIL may have engaged in misconduct in respect of CBA's selling of the CES product, Essential Super, in branches pursuant to the Distribution and Administration Services Agreement (**Distribution Agreement**) entered into with CFSIL in June 2013.

Selling of Essential Super - CBA contravention

82. Counsel Assisting submits that the sale of the CES product, Essential Super, through CBA branches in circumstances where it was known from September 2013 that one or more branch staff were not complying with obligations in respect of general advice and this was an inherent risk associated with the branch sales model, may have entailed a contravention by CBA of its general obligation to ensure that the financial services covered by its AFSL are provided efficiently, honestly and fairly in accordance with section 912A(1)(a).[93]

83. CBA submits that although it knew, from the outset, of inherent risks in the Essential Super branch sales model, and that it detected instances of non-compliance in the course of its monitoring of the distribution of Essential Super, it does not accept, as Counsel Assisting submits, that these matters alone are capable of establishing a contravention of s 912A(1)(a). To the contrary, CBA's conduct as a whole in relation to the distribution of Essential Super was consistent with reasonable standards of competence, ethics, and commercial morality. That conclusion is supported by the following matters.

84. First, CBA was utterly transparent with the regulator, ASIC, about the inherent risks that CBA perceived in the Essential Super branch sales model (namely, that personal rather than general advice might potentially be provided, or that general advice might be provided without the requisite statutory disclosures), and about the steps that CBA proposed to take to address and manage those risks.[94] CBA involved ASIC from the outset in the design of the Essential Super distribution model, and implemented feedback and suggestions provided by ASIC throughout that process.[95] Following the

[93] Counsel Assisting Closing Submissions, 24 August 2018, at [395].
[94] See Counsel Assisting Closing Submissions, 24 August 2018, at [369]-[370].
[95] Exhibit 5.232 (CBA.9000.0108.0001) Witness statement of Peter Chun in response to Rubric 5-37 dated 31 July 2018 3 [18]; Exhibit 5.232.21 (CBA.0517.0176.2019) Powerpoint presentation 'Follow-up meeting with ASIC' dated February 2013; Exhibit 5.232.22 (CBA.0517.0176.2047) Powerpoint presentation 'Simple Super - ASIC meeting' dated 3 May 2012; Exhibit 5.232.23 (CBA.0002.0496.0643) ASIC s 30 Notice issued to CBA dated 28 August 2014; Exhibit 5.310.4 (ASIC.0041.0005.0407) CBA document entitled "Response to ASIC Position Paper dated 20

launch of Essential Super, ASIC did not raise with CBA any specific concerns in relation to the distribution of Essential Super until around February 2017.[96] CBA was aware that ASIC had been keeping a close watch on the distribution of Essential Super since 2014.[97]

85. Secondly, having identified risks in the Essential Super branch sales model, CBA adopted a risk management process to manage those risks and identify non-compliance where it arose. In particular, CBA engaged KPMG to conduct three rounds of 'mystery shopping' exercises.[98] Consistent with its approach of complete transparency with ASIC in relation to the CES product, upon the conclusion of the 'mystery shopping' program of work, CBA provided a good governance notification to ASIC, which informed ASIC of KPMG's findings, particularised the non-compliance that was identified, and set out CBA's proposed remedial actions.[99] Another measure taken by CBA to identify, manage and monitor risks in relation to the distribution of Essential Super included the establishment in December 2013 of the Essential Super Risk and Compliance Committee, one purpose of which was to review risks around the distribution of Essential Super and ensure that the risk and control framework was appropriate and consistently applied.[100]

86. Thirdly, in response to the non-compliance identified through the 'mystery shopping' exercises in September 2013 and thereafter, CBA took immediate actions to redress the identified non-compliance, and thereafter continued to revise and strengthen compliance controls.[101] By way of example, CBA required frontline staff to undergo mandatory ongoing training in order to remain accredited to sell Essential Super,

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February 2017 at .0420-.0421 and .0422-0423 (Exhibit TM-4 to the Witness Statement of Tim Mullaly, 3 August 2018).

[96] T4992-3; Exhibit 5.310.4 (ASIC.0041.0005.0407) CBA document entitled "Response to ASIC Position Paper dated 20 February 2017 at .0421. ASIC did raise at this time its concerns in relation to the sale of Essential Super in branches, including that the offer of Essential Super in conjunction with a Financial Health Check might amount to CBA staff providing personal advice: Exhibit 5.310 (ASIC.0800.0014.0001) Witness Statement of Tim Mullaly, 3 August 2018 at [41].

[97] Exhibit 5.232.24 (CBA.0001.0463.0629), ASIC s 30 Notice issued to CFSIL dated 28 August 2014.

[98] Exhibit 5.232 (CBA.9000.0108.0001), Witness statement of Peter Chun, 31 July 2018 4 [28]; Exhibit 5.232.27 (CBA.0001.0463.6783) KPMG Essential Super Mystery Shopper Report Round 1 dated September 2013; Exhibit 5.232.28 (CBA.0001.0463.6838) KPMG Essential Super Mystery Shopper Report Round 2 dated December 2013; Exhibit 232.29 (CBA.0001.0463.6720) KPMG Essential Super Mystery Shopper Report Round 3 dated September 2014.

[99] Exhibit 5.232 (CBA.9000.0108.0001), Witness statement of Peter Chun, 31 July 2018 8 [32]; Exhibit 5.232.35 (CBA.0001.0466.0675) Good governance letter sent from CBA to ASIC dated 17 December 2014. The good governance letter was issued promptly, two weeks after CBA received KPMG's report on the third and final round of mystery shopping on 3 December 2014 (Exhibit 232.29 (CBA.0001.0463.6720) KPMG Essential Super Mystery Shopper Report Round 3 dated September 2014).

[100] Exhibit 5.310.4 (ASIC.0041.0005.0407) CBA document entitled "Response to ASIC Position Paper dated 20 February 2017 at .0427.

[101] Exhibit 5.232 (CBA.9000.0108.0001), Witness statement of Peter Chun in response to Rubric 5-37, 31 July 2018 4 [29]; Exhibit 5.232.32 (CBA.0002.0482.6598) Minutes of the Retail Banking Services Distribution Forum meeting dated 6 March 2015; Exhibit 5.232.35 (CBA.0001.0466.0675) Good governance letter sent from CBA to ASIC dated 17 December 2014 at.0678; T4991-2.

made improvements to sales scripts and the delivery of the general advice warning, implemented various system changes to the application process for Essential Super, and enhanced the way in which documentation about Essential Super was provided to customers.[102]

87. Fourthly, there is no evidence that any customer detriment resulted from the identified instances of non-compliance.

88. Fifthly, the Essential Super branch sales model reflected a reasonable, transparent and honest attempt to interpret difficult statutory distinctions between personal and general advice and the prevailing regulatory guidance thereon, in particular RG 244, which stated, "[i]f *you have personal information about a client, this will not, by itself, mean that the general advice you give them is personal advice*..." and "[y]ou *can use personal information about a client to give general advice that is more relevant to a client*".[103]

89. Sixthly, the Essential Super branch sales model was objectively (and subjectively) well-intentioned. It served to promote accessible and affordable general advice about superannuation, consistent with the objectives of the FOFA reforms.[104] The benefit to consumers was being able to access advice about a simple superannuation product without the need to see (or pay for) a financial planner. The CES product itself was compliant with MySuper statutory requirements, was competitively priced (falling in the top quartile for fees when compared to all available MySuper products), and has exceeded its investment objectives since launch.[105]

90. For the reasons given above, CBA submits that it is not open to the Commission to find that CBA breached s 912A(1)(a), and thereby engaged in misconduct, in relation to the distribution of Essential Super through the branch sales model.

Conflicted remuneration

91. Counsel Assisting submits that it is open to the Commission to find that the Distribution Agreement between CBA and CFSIL may have contravened the conflicted remuneration provisions of the Corporations Act. This is because the Distribution Agreement provides for a benefit (an annual fee of 30% of the total net revenue earned by the trustee in relation to the fund) given to an AFS licensee (CBA)

[102] Exhibit 5.310.4 (ASIC.0041.0005.0407) CBA document entitled "Response to ASIC Position Paper dated 20 February 2017 at .0424-.0428; T4992.6-11.
[103] ASIC RG 224.46 - 224.47.
[104] T4989.
[105] T4988-9.

which, in Counsel Assisting's submission, could reasonably be expected to influence the financial product advice given by CBA to its retail clients.[106] Counsel Assisting therefore submits that it is open to the Commissioner to find that CBA may have contravened section 963E of the Corporations Act by accepting conflicted remuneration (namely, the fees provided to it under the Distribution Agreement), and that CFSIL may have contravened section 963K by giving CBA conflicted remuneration.[107]

92. Contrary to Counsel Assisting's submission, the fee arrangement in the Distribution Agreement could not reasonably be expected to influence either the choice of financial product recommended by CBA branch staff, or the financial product advice given by CBA branch staff, to retail customers of CBA.

93. The fee arrangement in the Distribution Agreement was entirely different from the remuneration arrangements in place for frontline branch staff tasked with selling and advising upon the CES product. Under the applicable remuneration arrangements, frontline branch staff were not directly rewarded for sales of Essential Super.[108] Incentive remuneration for frontline branch staff was determined upon the basis of a balanced scorecard.[109] Although a staff member's contribution to branch performance was an aspect of this balanced scorecard, revenue from the sale of Essential Super accounted for such a miniscule percentage of branch revenue (0.47% to 1.10%, across all branches) that individual sales of Essential Super by a branch staff member could have only a negligible (and, in any event, indirect) effect on the incentive remuneration earned by that staff member.[110] Understood in this context, the fee arrangement in the Distribution Agreement could not reasonably be expected to influence the advice given by branch staff to retail clients.

94. As Mr Chun explained, the revenue-sharing arrangement was not designed to incentivise CBA to sell Essential Super, but rather to remunerate CBA in a fair, equitable and arm's length manner for the distribution services that CBA provided to CFSIL.[111] The Distribution Agreement was designed such that CBA's share of revenue would approximate its share of costs in relation to the distribution of Essential

[106] Counsel Assisting Closing Submissions, 24 August 2018, at [396].
[107] Counsel Assisting Closing Submissions, 24 August 2018, at [397.1], [397.2].
[108] Exhibit 5.325 (CBA.9000.0097.0001), Witness Statement of Gareth Robin William Russell in response to Rubric 5-37, 26 July 2018 5 [32].
[109] Exhibit 5.325 (CBA.9000.0097.0001), Witness Statement of Gareth Robin William Russell in response to Rubric 5-37, 26 July 2018 5 [30]-[31]; Exhibit 5.325.2 (CBA.0517.0174.2000) CBA Group Remuneration Policy as at 7 May 2018.
[110] Exhibit 5.325 (CBA.9000.0097.0001), Witness Statement of Gareth Robin William Russell in response to Rubric 5-37, 26 July 2018 5-6 [36]-[38].
[111] T4988 and T4993.

Super, ie 30%—which characteristic further distinguishes the fee arrangement in the Distribution Agreement from conflicted remuneration.

95. For the reasons given above, CBA and CFSIL each submit that the fee arrangement in the Distribution Agreement is not properly characterised as conflicted remuneration, and therefore that it is not open to the Commission to find that CFSIL or CBA contravened the prohibitions in ss 963E (in respect of CBA) and 963K (in respect of CFSIL) on giving or accepting conflicted remuneration.

(e) Available findings of misconduct or conduct falling below community standards and expectations in relation to cash fund performance

96. The error in referring to this issue as one in which members of the CBA staff fund are treated differently from members of the public offer funds, has been dealt with in paragraph 36 above.

97. Given that the trail commissions paid (on these cash options) are permitted by law, and in light of Ms Elkins' evidence that the trustee is actively reviewing the question of the payment of commission on all its products (including cash investment options), CFSIL does not accept that it has breached its duty to act in the best interests of members or s.29E(1)(a) of the SIS Act. It is actively pursuing the question of what steps can lawfully be taken in this regard, which advice will have to grapple with the question of how advisers' contractual entitlements, which are lawfully permitted, can be terminated.

(f) Available findings of misconduct or conduct falling below community expectations and standards and relation to benchmarking of CommInsure and CFSGAM

98. CFSIL does not accept that its conduct in relation to the use of benchmarking reports concerning CommInsure and CFSGAM could constitute misconduct.

99. To rely only on parts of a benchmarking report in connection with the question of whether CFSIL has acted properly in its negotiations and entry into agreements with related parties is too restrictive an analysis. There are a range of further matters that ought to be taken into account in order to develop a holistic picture of CFSIL's conduct.

100. Matters that ought to be considered in that regard include the examples provided by CFSIL of circumstances in which it has asserted its independence in relation to each entity. Also relevant is the fact that CFSIL has a majority-independent board and an

independent Chair[112] and an Office of Trustee, each of which serves as a check on the negotiations CFSIL undertakes with related parties.[113] The conflicts management framework developed and adopted by CFSIL for related party dealings is a further factor to be considered.[114] In the case of CommInsure, the finding of an independent expert that the insurance contained in Essential Super is, on balance, a competitive offering tells against a finding of misconduct. In the case of CFSGAM, benchmarking was obtained for the very purpose of negotiating investment manager fees with CFSGAM.

101. CFSIL maintains that its conduct in dealing with related parties has met the community's standards and expectations for the reasons identified above.

(g) Available findings of conduct falling below community standards and expectations in relation to lobbying

102. CFSIL accepts that, in its meeting in 2013 with Treasury officials and others to seek clarification on the issue of grandfathering of commissions by platform providers in respect of member accounts that have transitioned to a pension phase in 2013, it may have failed to meet current community standards and expectations.

(h) Available findings of misconduct and conduct falling below community standards and expectations in relation to intra-fund advice

Provision and supervision of intra-fund advice - Financial Wisdom Limited

103. Counsel Assisting submits that it is open to the Commission to find that, by providing intra-fund advice and supervising such advice in the manner described in paragraphs [380]-[387] of Counsel Assisting's Closing Submissions (and the relevant evidence tendered before the Commission), Financial Wisdom Limited (**Financial Wisdom**) may have breached s 912A in failing to do all things necessary to ensure that financial services covered by its licence were provided efficiently, honestly and fairly. The response to this submission is provided by Financial Wisdom.[115]

104. The relevant facts set out at [380]-[387] of Counsel Assisting's Closing Submissions, in so far as they relate to Financial Wisdom, are as follows:

[112] See, for example, Exhibit 5.179 (CBA.9000.0091.0001) Witness Statement of Linda Elkins in response to Rubric 5-17, 26 July 2018, including at [54] – [67].
[113] T4961.46 – T4962.8.
[114] See, for example, Exhibit 5.181 (CBA.9000.0102.1000) Witness Statement of Linda Elkins in response to Rubric 5-37 (A to H), 30 July 2018 at [91] and [125] – [129].
[115] Letter from the Solicitor Assisting the Royal Commission to CBA dated 30 August 2018.

(a) The financial adviser, as an authorised representative, provided intra-fund advice to members.

(b) As part of the intra-fund advice provided to members, the financial adviser sent communications to members which:

(i) were potentially misleading;

(ii) were *'crafted'* in a manner designed to influence members to elect to retain their existing (non-MySuper) product; and

(iii) did not disclose the financial adviser's conflict of interest in respect of trail commissions.

105. Financial Wisdom accepts, as Mr Ballantyne accepted in his statement, that the communications in issue were not appropriate, including by reason of each of the issues articulated in Counsel Assisting's Closing Submissions.[116]

106. However, Financial Wisdom contends that it has not breached section 912A(1)(a) of the Corporations Act.

107. The legal principles concerning section 912A(1)(a) are set out in paragraph 51(a) above. Having regard to those principles, FWL makes the following observations.

108. There are five reasons Financial Wisdom contends that it has not breached section 912A(1)(a) of the Corporations Act.

109. Firstly, there is no suggestion, either in the evidence or in Counsel Assisting's Closing Submissions, that Financial Wisdom has acted dishonestly.

110. Secondly, Financial Wisdom had in place a number of processes directed towards ensuring communications by its authorised representatives were appropriate. Specifically:

(a) Financial Wisdom required its authorised representatives to submit all marketing material (a term which was defined to include all 'form' or general

[116] Witness Statement of Mark Robert Ballantyne dated 1 August 2018 [CBA.9000.0089.1000] (Ballantyne Statement) at [108(b)].

communications to members) to Financial Wisdom for approval prior to the material being issued;[117]

(b) In some instances (including with respect to the financial adviser in question) Financial Wisdom required examples of documents issued by the authorised representative to be provided to Financial Wisdom as part of the attestation process; and[118]

(c) Financial Wisdom conducted audits of intra-fund advisers.[119]

111. Each of the above processes were in place, and were applied, to the financial adviser in question at the time the communications were issued. However, these processes did not detect the problematic communications before or after they were issued.

112. The communications were not detected, and were issued by the financial adviser, as a consequence of:

(a) the financial adviser not obtaining the prior approval of Financial Wisdom before issuing the communications; and

(b) the relevant communications not coming to light during the course of either the attestation process or the audit process applied by Financial Wisdom to the financial adviser.

113. Financial Wisdom submits that a failure to detect the problematic communications does not establish that Financial Wisdom's processes were inadequate. The failure to detect the problematic communications also does not constitute ethically unsound conduct or conduct falling well short of a reasonably acceptable standard, of a kind which would constitute a breach of section 912A(1)(a) of the Corporations Act.

114. Thirdly, there was no fact or circumstance which placed Financial Wisdom on notice that there was any potential issue with the financial adviser, prior to the communications becoming known to Financial Wisdom in January 2018 and March 2018.

[117] Ballantyne Statement at [82(b)]
[118] Ballantyne Statement at [105]-[106]
[119] Ballantyne Statement at [79]-[80]

115. In this respect:

(a) The number of clients of the financial adviser that made the relevant election was not disproportionate to the percentage of Financial Wisdom's clients who made similar elections.[120] Accordingly, there was no reason for Financial Wisdom to suspect that the financial adviser was engaging in any conduct which was aimed at (improperly) influencing members to elect to remain in a non-MySuper product.

(b) Whilst it is correct that ASIC issued a notice in relation to the financial adviser on 31 October 2017, that notice did not seek production of the relevant communications. Rather, it was primarily directed toward determining whether there were any complaints against the relevant financial adviser (which there were not). It was not until 22 December 2017 that ASIC first requested example communications issued by the financial adviser.

116. The evidence does not establish that, prior to January 2018, Financial Wisdom failed to make reasonable enquiries with respect to the financial adviser, or that Financial Wisdom was on notice of any issue with respect to the financial adviser which it failed to properly investigate or address.

117. Fourthly, Financial Wisdom identified the problems with the communications relatively promptly, without any directive by ASIC. The communications issued by the financial adviser were reviewed by Financial Wisdom in March 2018 and were considered not balanced and otherwise problematic.[121]

118. Fifthly, since determining the communications issued by the financial adviser were problematic, Financial Wisdom has commenced taking appropriate steps to address the issues arising as a consequence of the communications.[122]

119. Financial Wisdom accepts that it did not act as promptly or urgently as it could have, in investigating and addressing the problematic communications issued by the financial adviser, and that such delays may constitute conduct falling below community standards. However, any delay is not of sufficient magnitude to constitute

[120] Annexures A and B of the Ballantyne Statement (specifically, the percentage of the financial adviser's client's that made the relevant election was 23.67%, as compared to 19.95% across the entire Financial Wisdom client base)
[121] Ballantyne Statement at [104] and [108].
[122] Ballantyne Statement at [108]

a breach of Financial Wisdom's obligations under section 912A(1)(a) of the Corporations Act.

120. In all of the circumstances, the evidence does not establish Financial Wisdom has breached its obligations under section 912A(1)(a) of the Corporations Act.

Failure to ensure that intra-fund advice services were offered to members

121. CFSIL does not accept, as Counsel Assisting submits, that by:

(a) allegedly failing to ensure that intra-fund advice services were offered to members; and/or

(b) failing to refund fees to clients where CFSIL had been, or ought to be, reimbursed by advisers for their failure to provide intra-fund advice,

CFSIL has engaged in misconduct, namely a breach of s 912A(1)(a), in failing to do all things necessary to ensure that financial services covered by its licence were provided efficiently, honestly and fairly.[123] CFSIL also does not accept, as Counsel Assisting submits, that its conduct in this regard may have fallen below community standards and expectations.[124]

122. As an initial matter, the premise of Counsel Assisting's submission is not borne out by the evidence before the Commission. The evidence before the Commission does not establish that intra-fund advice services were unavailable, or were not offered at all, to any member to whom such services ought to have been offered. CFSIL offers intra-fund advice services to each and every member of FirstChoice Employer through CFSIL's Customer Guidance Team and/or Relationship Managers, regardless of whether that member also has access to intra-fund advice from an adviser linked to the employer plan.[125] Accordingly, to the extent that an adviser failed in any given year to offer intra-fund advice services to members of the employer plan(s) advised by that adviser, intra-fund advice services were nevertheless offered to those members by CFSIL.

123. Moreover, CFSIL had reasonable systems and controls in place to ensure that intra-fund advice services had been offered to members by advisers who were paid to offer such services. This was the very purpose of the Annual Confirmation of Services Attestation required from licensees, and the Bi-annual Adviser Questionnaire required

[123] Letter from the Solicitor Assisting the Royal Commission to CBA dated 30 August 2018 at (b).
[124] Letter from the Solicitor Assisting the Royal Commission to CBA dated 30 August 2018 at (c).
[125] Exhibit 5.234 (CBA.9000.0090.3000), Witness statement of Peter Chun in response to Rubric 5-68, 12 August 2018 at [13]-[18].

from advisers.[126] As Mr Chun acknowledged in his evidence, CFSIL has recently become aware that in a very limited number of cases, certain advisers of FWL failed to offer intra-fund advice services to members of employer plans in respect of which the adviser was paid intra-fund advice fees (which fees amounted to $48,000 over a four year period).[127] But CFSIL does not accept that these isolated instances reflect a failure on CFSIL's part reasonably to ensure that advisers offered intra-fund advice services to members. Nor does it reflect some moral obloquy of the kind at which section 912A(1)(a) is directed.

124. As such, CFSIL does not accept that it failed to ensure that intra-fund advice services were offered to members and thereby either contravened s 912A(1)(a) or engaged in conduct falling below community standards and expectations. CFSIL does accept, however, as Mr Chun acknowledged in his written evidence, that the payment by CFSIL of intra-fund advice fees to advisers for intra-fund advice services that were not offered is conduct that falls below community standards and expectations.[128]

125. As Mr Chun further acknowledged in his written evidence, CFSIL will require intra-fund advice fees paid to advisers who did not offer intra-fund advice services to members to be refunded.[129] CFSIL does not propose, however, to "give money back" to members in proportion to this refund.[130] This is because the intra-fund advice fees are paid by CFSIL as flat dollar fees from the revenue it receives from the Fund. In his oral evidence, Mr Chun explained that: (i) the cost to CFSIL of intra-fund advice fees is effectively borne collectively by members to the extent that it is reflected in their administration fee;[131] (ii) intra-fund advice is just "one of many different types of services that the trustee provides to …members", the cost of which many services are also reflected in the administration fee;[132] (iii) although CFSIL "always look[s] at fee reductions to [its] members in line with overall cost reductions", the amount of intra-fund advice fees that CFSIL proposes to claw back from advisers is so small that it would result in only a negligible overall cost saving to CFSIL; and accordingly (iv) there will be "no explicit reduction in [a member's administration] fee" as a result of the claw-back. On that basis, CFSIL rejects Counsel Assisting's submission that in failing

[126] Exhibit 5.234 (CBA.9000.0090.3000), Witness statement of Peter Chun in response to Rubric 5-68, 12 August 2018 at [53]-[63]; [71]-[75].
[127] Exhibit 5.234 (CBA.9000.0090.3000), Witness statement of Peter Chun in response to Rubric 5-68, 12 August 2018 at [117].
[128] Exhibit 5.234 (CBA.9000.0090.3000), Witness statement of Peter Chun in response to Rubric 5-68, 12 August 2018 at [117].
[129] Exhibit 5.234 (CBA.9000.0090.3000), Witness statement of Peter Chun in response to Rubric 5-68, 12 August 2018 at [117].
[130] T4985.34; T4986.15.
[131] T4986.3-7.
[132] T4986.13-16.

to “refund fees to clients”, CFSIL contravened s 912A(1)(a) or engaged in conduct that may have fallen below community standards and expectations.

Advisers' interactions with ADA members

126. CFSIL accepts, as Counsel Assisting submits, that it may have engaged in conduct that fell below community standards and expectations by:

(a) failing to bring to the attention of ADA members that their advisers may have had a relevant conflict of interest in relation to an election to a product from which they would continue to receive trail commissions;

(b) failing to ask advisers to identify that conflict of interest in their communications with clients; and

(c) failing to act sooner to investigate the relevant adviser's interactions regarding ADA members.[133]

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[133] Letter from the Solicitor Assisting the Royal Commission to CBA dated 30 August 2018 at (d).