

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

ROUND 5 - SUPERANNUATION

WRITTEN SUBMISSIONS ON BEHALF OF SUNCORP

A INTRODUCTION

1. The written submissions of Counsel Assisting allege that there are six findings of potential misconduct open to the Commissioner against Suncorp Portfolio Services Limited (SPSL) in relation to the Suncorp Master Trust (SMT) and its members. The first four allegations relate to the payment of contributions tax surplus amounts by SPSL to Suncorp Life & Superannuation Limited (SLSL) pursuant to a Services Deed, the fifth relates to the time at which SPSL transferred accrued default amounts (ADAs) and the sixth relates both to the ADA transfer and to communications with financial advisers.¹ Each of the six “open findings” is serious. Some may amount to a breach of trust and some would carry with them an implicit finding of breach of duty by the non-executive directors of SPSL.
2. For the reasons which follow, none of the six findings ought be made. In short:
 - (a) there is insufficient evidence to support any of the findings and some of the findings are directly contradicted by what evidence there is before the Commission;
 - (b) the payment by SPSL to SLSL of contributions tax surplus amounts under the Services Deed was a proper exercise of a trustee’s right of indemnity by way of exoneration in respect of properly-incurred expenses;
 - (c) the evidence shows the independent directors of the SPSL Board to have applied appropriate scrutiny to that payment;
 - (d) no misleading or deceptive conduct has been established – at best, Counsel Assisting have suggested ways in which disclosure could be made clearer, but no conduct which would lead a member into error or misconception has been identified;
 - (e) the unchallenged evidence before the Commission is that the ADA transfer occurred when it did so as to reduce risks to members inherent in the transfer; and

¹ Counsel Assisting’s Written submissions at [289]-[291].

- (f) no improper communications with advisers have been identified.
3. Counsel Assisting's submissions make no reference to the Trust Deed of the SMT and scant reference to the history of the SMT. It is necessary to consider both in some detail in order to understand the operation of the Services Deed and to assess the propriety of payments made under it. These submissions address:
- (a) in Section B, the factual background and legal documents;
 - (b) in Section C, the oral evidence; and
 - (c) in Section D, the findings said to be open to the Commission.

B FACTUAL BACKGROUND AND LEGAL DOCUMENTS

History of the Suncorp Master Trust

4. SPSL is the trustee of the SMT, a registrable superannuation entity under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**). SPSL is an RSE Licensee under the SIS Act and has authority to offer a MySuper product known as the Suncorp Lifestage Fund.² The SMT is established and governed by its Trust Deed.³
5. The SMT succeeded several predecessor funds with a number of successor fund transfers occurring between 2008 and 2011 (most on 30 June 2008).⁴ The preceding funds included the Tyndall Superannuation Plan, Connelly Temple Public Superannuation Fund, Suncorp Easy Super, Suncorp Staff Superannuation Plan, Optimum Superannuation Master Plan, Optimum Professional Superannuation Plan and Workforce Superannuation Plan. These successor fund transfers occurred through the transfer of the assets of each of the funds above into the Asteron Life Superannuation Fund (which was renamed the "Suncorp Master Trust" on 30 June 2008). At the time of the transfers, the terms of the SMT Trust Deed were amended to establish divisions (and sub-divisions) within the fund representing the assets, liabilities and membership of the preceding funds. For example:

² Statement of Edward Austin Cooley, 25.07.18; Exhibit 5.320, SUN.9999.0008.0001 at 0002, [9].

³ SMT Trust Deed; Exhibit 5.320.1.4; SUN.1506.0001.0007.

⁴ Cooley; Exhibit 5.320 at 0035, [82].

- (a) the assets of the Tyndall Superannuation Plan were transferred into the newly-established Tyndall Superannuation Division of the SMT (Division 3);⁵ and
 - (b) the assets of the Optimum Superannuation Master Plan were transferred into the newly-established Optimum Superannuation Master Division of the SMT (Division 8).⁶
6. The Asteron Life Superannuation Fund continued as the renamed SMT, however on 30 June 2008, the ALSF Division (Division 1) was established within the SMT representing the assets, liabilities and membership of the fund prior to the transfers which occurred on that date. Divisions 1, 3 and 8 will be referred to as “**the three relevant divisions**” below.
7. Prior to the 30 June 2008 consolidation, many of the preceding funds were themselves the product of earlier consolidations. For example, the Asteron Life Superannuation Fund (which became the SMT):
- (a) originated as the Sun Alliance Investment Fund established by deed dated 22 June 1979;
 - (b) received by successor fund transfer on 14 May 2001 the members and assets of the Royal Sun & Alliance Workforce Superannuation Fund and the Royal Sun & Alliance Personal Retirement Fund (which were, in fact, divisions of the Strategy One Master Trust, established in 1987 as the National Benefits Master Fund); and
 - (c) received by successor fund transfer on 1 July 2003 the members and assets of the Oceanic Life Retirement Fund (first established by deed dated 20 June 1980).
8. As a product of its history, from 2008 the SMT had a large number of classes of members, whose benefits were defined by a variety of current and historic product-types. This included not only traditional accumulation and account-based pension superannuation accounts, but a variety of other product types including products with no investment component (i.e. “risk-only” superannuation products which provided insurance cover but had no investment balance).

⁵ Division 3, SMT Trust Deed; Exhibit 5.320.1.4; SUN.1506.0001.0007 at 0064.

⁶ Division 8, SMT Trust Deed; Exhibit 5.320.1.4; SUN.1506.0001.0007 at 0135.

Relevant provisions of the Trust Deed

9. The Trust Deed contains general “Governing Provisions”⁷ which apply to all divisions, and then specific rules applicable to each division.⁸ The following Governing Provisions are relevant for the purposes of this submission:
- (a) clause 2.2(i) provides that the requirements of the “Relevant Law” (including the SIS Act) prevail to the extent of any inconsistency with the Trust Deed;
 - (b) clause 3.5 provides that SPSL has complete management and control of the SMT;
 - (c) clause 3.6 provides that SPSL has absolute and uncontrolled discretion in the exercise of any “Power” at any time, except as otherwise expressly provided in the Trust Deed;
 - (d) clause 3.7 provides that SPSL may charge for the administration and operation of the Fund an amount disclosed in a “Disclosure Document” (**right of remuneration**);
 - (e) clause 3.8 provides that SPSL is exempted from any liability and may be indemnified from the SMT in respect of a liability (including a “Fund Expense”), incurred while acting as Trustee (**right of indemnity**);
 - (f) “Fund Expenses” are defined to mean “*the costs and expenses of and incidental to the establishment, operation, management, administration, investment and termination of the Fund, including Tax, insurance costs and any fees or charges imposed on, or paid by, the [SPSL]*”;
 - (g) clause 3.9 confers a power upon SPSL to delegate powers and duties (**delegation power**);
 - (h) clause 3.12 confers a power upon SPSL to determine how to deal with amounts in the SMT which are not allocated or are not payable, “*including for the reduction of contributions of a Participating Employer or to pay Fund Expenses*”;
 - (i) clause 4 provides generally for the establishment and operation of Divisions, Sub-Divisions and Plans within the SMT, with:

⁷ SMT Trust Deed; Exhibit 5.320.1.4; SUN.1506.0001.0007 at 0028-0048.

⁸ SMT Trust Deed; Exhibit 5.320.1.4; SUN.1506.0001.0007 from 0049.

- i. clause 4.3 conferring a power on SPSL to transfer a Member's interests in the SMT or benefit between Divisions, Sub-Divisions or Plans or classes of members in a Division, Sub-Division or Plan (**intra-fund transfer power**); and
 - ii. clause 4.4 conferring a power on SPSL to segregate the assets, liabilities and members of each Division, Sub-Division or Plan; and
- (j) clause 5.6(c) provides that SPSL may establish a "Reserve Account" for each Division, Sub-Division or Plan and credit specified amounts (i)-(iv) (including (iv) reasonable provisions for the payment of tax), provided that the Reserve Account can only be applied for specified purposes (v)-(viii) (including (vii) payment of Fund Expenses).

Services Deed

10. SPSL (then known as Asteron Portfolio Services Limited) and SLSL (then known as Asteron Life Limited) entered into a Services Deed with an effective date of 3 December 2003,⁹ which has been amended by Deed dated 22 August 2014.¹⁰
11. Recitals D and E state that the Services Deed records and varies "Existing Arrangements" in respect of the Asteron Life Superannuation Fund, the Optimum Superannuation Master Plan, and the Tyndall Superannuation Plan entered into between 1 July 1994 and 26 June 1998 whereby SPSL agreed to transfer, or otherwise make available, to SLSL certain amounts held in the tax reserves of each of the Funds to reimburse SLSL for expenses incurred in providing administration services in addition to the administration services provided under policies issued by SLSL and held by SPSL (**Additional Services**).
12. The following provisions of the Services Deed are also relevant to these submissions:
- (a) the definition of "Additional Services" to mean the services listed in Schedules 1 to 6 "*but excluding those services provided to the Trustee under the terms of the Policies*";
 - (b) the definitions of "Services" to mean both (a) the Additional Services, and also (b) the administration services provided to the Trustee under the Policies "*including (but not limited to): (i) the maintenance of Member records; (ii) the issuing of annual statements;*

⁹ Exhibit 5.320.1.30; SUN.1506.0016.0176.

¹⁰ Exhibit 5.320.1.31; SUN.1505.0001.0866.

(iii) the administration of insurance claims; and (iv) the calculation and payment of benefits”;

- (c) the definitions of “Contributions Tax Provision” and “Service Level Agreement”;
- (d) clause 2.3, which provides that the Additional Services will be provided in compliance with agreed service standards;
- (e) clause 3 which obliges SPSL to pay to SLSL “*in respect of each Fund*” the Contributions Tax Provision less specified amounts;
- (f) clause 4.3(b)(ii) which provides that SPSL’s liability to SLSL is limited to the amount actually received by SPSL in exercise of its right of indemnity from the Fund and which is expressed by clause 4.3(c) to override any other provision of the Services Deed;
- (g) clause 6 which allows SPSL to audit SLSL’s compliance with its obligations under the Services Deed; and
- (h) clause 8.1(c) which allows the Services Deed to be terminated on 30 days’ written notice.

Deed of Delegation

13. In exercise of its delegation power, SPSL has executed Deeds of Delegation from time-to-time. The current deed was executed on 19 September 2017¹¹ and provides (inter alia) that SLSL acts as administrator of the ALSF Division, the Tyndall Superannuation Division and the Suncorp Personal Super Division of the SMT, whereas SPSL acts as administrator of the Wealth Smart Division, the Asteron Superannuation Division and the Suncorp Superannuation Division of the SMT.¹² No administrator is listed for the Optimum Superannuation Master Division as that division no longer has members for reasons explained immediately below. SLSL was previously appointed as administrator of the Optimum Superannuation Master Division and was named as such in prior Deeds of Delegation.

Super Simplification Program

14. From 2015 to 2017, SPSL engaged in a “Super Simplification Program” (SSP) which sought to simplify the products offered within the SMT and ultimately resulted in the intra-fund

¹¹ SUN.1201.0701.0144.

¹² SUN.1201.0701.0144 at 0151.

transfer of members from 39 to 8 product offerings, 6 of which were products open to new members.¹³ In addition to the 6 open product offerings which hold over 70% of the total SMT membership, there are in excess of 50 legacy products remaining in the SMT, most of which are underpinned by individual life insurance contracts – these legacy products cannot readily be simplified by intra-fund or successor fund transfer in the absence of individual member consent. The SSP transfer occurred in two tranches on 3 December 2016 and 27 May 2017. As part of the second tranche, members of the Optimum Superannuation Master Division were transferred to the Suncorp Superannuation Division of the SMT, of which SPSL is the administrator.

Transfer of Accrued Default Amounts

15. ADAs within the SMT were transferred to the Suncorp Lifestage Fund between 9 and 19 June 2017 following completion of the SSP. Mr Pinto gave evidence that this was “*a deliberate strategy to reduce the implementation risk of the transfer of approximately \$790 million of members' funds*”.¹⁴

16. That evidence is confirmed by a submission presented to the Board of SPSL in September 2016,¹⁵ which stated:

As planned, Wealth Product and Portfolio is intending to move ADA amounts during May 2018 after the completion of the SSP program of work. The rationale for this approach is:... The complexity of the movement of these ADA amounts will be much simpler given that all ADA impacted customers will be in one product, Brighter Super (rather than nine prior to SSP) which will de-risk the activity.

17. The submission also contained the following statement alongside the words “RISK CONSIDERATION”:

SSP will substantially simplify and de-risk the execution of the ADA transfer. B&W [Banking & Wealth] Operational Risk has been consulted and supports the approach outlined in the paper.

¹³ Cooley; Exhibit 5.320 at 0037 [87]-[88]. A small number of products referred to in Mr Cooley’s statement were within the Pooled Superannuation Trust and not the SMT, which accounts for the small discrepancy in the numbers.

¹⁴ Statement of Maurizio Pinto, 5.8.18; Exhibit 5.164; SUN.9999.0010.0001 at 0030 [32].

¹⁵ SUN.1501.0005.3522.

Payments under the Services Deed in 2017

18. Counsel Assisting's submissions contain brief reference (at [264]) to the written submissions made to the SPSL Board in 2013, 2014, 2015, 2016 and 2017 recommending that contributions tax surplus amounts be paid to SLSL pursuant to the Services Deed and focus in a little more detail upon "*the 2017 Board Paper*" as an exemplar.
19. A more detailed examination of what occurred in 2017 serves to highlight the limitations of Counsel Assisting's approach and to indicate that Counsel Assisting's submissions provide an inadequate basis for the findings said to be open.
20. First, Counsel Assisting's reference to "*the 2017 Board Paper*" is apt to mislead.¹⁶ Two papers were in fact presented to the Board in 2017 in relation to the payment to SLSL. A **first** submission dated 5 June 2017 was provided to the Board ahead of its meeting on 13 June 2017,¹⁷ which (inter alia):
 - (a) recorded (at 5446) that the Contributions Tax Surplus arising in respect of the three relevant divisions (each described by the name of their predecessor fund) in FY16 was \$8,720,008 (\$7,159,975 arising in the ALSF Division; \$1,557,669 arising in the Optimum Superannuation Master Division; and \$2,364 arising in the Tyndall Superannuation Division);
 - (b) stated (at 5446) that "*Consultation and validation included review by EM Operational Risk B&W, B&W Financial Control, Wealth Product and Group Finance. Additionally,*

¹⁶ The following factual errors in Counsel Assisting's submissions are also of relevance: **[255] second and third sentences** – assets of the SMT are also invested in a third way, with external managers – see Pinto at [28], [49]; **[258] final sentence** – "SPSL" is presumably intended to be "SLSL"; **[260] first and second sentences** – "SLSL" is presumably intended to be "SPSL" and *vice versa*; **[260] first sentence** – a variety of fee structures exist across current and legacy products, some but not all of which will include "administration fees" disclosed in PDSs (the operation of these fees is explained to an extent in Exhibit 5.320.2.14; SUN.1506.0015.0045); **[261] first sentence** – "SPSL" / "SLSL" error; **[261] second sentence** – the second "SPSL" is presumably intended to be "SLSL"; **[262]** – the only life insurance policy adverted to is the one in respect of the Optimum Superannuation Master Division which no longer has any members; **[264]** – deductions for payments of life premiums in respect of members *are* "credited" back and accounted against those members where those members have contributions which gave rise to a contributions tax liability. The surplus primarily results from further deductions arising from legacy "risk-only" accounts (where there is no investment balance to which the surplus could be allocated) or to accounts where no taxable contributions are received (the SMT's on-sale "risk-only" product passes on the tax deduction in the form of reduced premiums).

¹⁷ SUN.1501.0005.5446.

KPMG were consulted and have undertaken an agreed upon procedures engagement. This process ensures the appropriateness and accuracy of the calculations”;

- (c) set out an assessment of the value of the Additional Services (Appendix 1 – at 5447), the assumptions and methodology by which that assessment was formed (Appendix 2 – including an identification of costs specifically excluded in accordance with SPSL’s Trustee Reserve Policy – at 5448), and an historic comparison of the assessed value of the Additional Services against the quantum of the Contributions Tax (Appendix 3 – at 5449):

Description	FY10	FY11	FY12	FY13	FY14	FY15 ¹	FY16
Contribution Tax Surplus	8.4	8.3	8.1	10.1	11.0	9.7	8.7
Additional service value	14.7	7.2	7.6	17.4	16.2	15.4	12.3
Amount payable	8.4	7.2	7.6	10.1	11.0	9.7	8.7

¹The FY15 Contribution Tax Surplus of \$12.4m presented to the Board in June 2016 inadvertently excluded the premium discount of \$2.7m in relation to the Asteron Life Complete (ALC) product. This reduced the final payment to \$9.7m for FY15.

and

- (d) recommended (at 5446) that the Board resolve to approve the payment of \$8.7m to SLSL.
21. The minutes of the meeting of 13 June 2017 record that¹⁸:
- (a) Mr Carroll (Manager Financial & Regulatory Reporting) presented on the submission, after which discussion ensued;
- (b) the Board requested that management provide further detail relating to the value of the additional services provided by SLSL; and
- (c) the Board did not resolve to approve the payment as had been recommended, but instead, with the Executive Directors abstaining, the Non-Executive Directors resolved to receive and note the submission.
22. A **second** submission dated 22 June 2017 was provided to the Board ahead of a further meeting on 26 June 2017, which (inter alia):¹⁹

¹⁸ SUN.1526.0100.0015 at 0017, Item 7. Mr Pinto, who was present at the meeting, was asked no questions about this meeting. Mr Cooley (one of the Executive Directors who was present at the meeting but abstained from voting on this issue) provided a written statement to the Commission and was issued a summons to attend the Commission’s hearings, but was ultimately not required to attend. Evidence was not sought or required by the Commission from any other director of SPSL.

¹⁹ Exhibit 5.320.2.24; SUN.1501.0005.5563.

- (a) noted (at 5563) that the “*value of [the Additional Services] for the prior six years has a cumulative cost above the received [contributions tax] surplus of \$22.9m*”;
 - (b) contained an assurance (at 5563) from management that “*there is no ‘double dipping’ of fees received by SLSL*” notwithstanding the administration fee SLSL received;
 - (c) expanded upon the 5 June 2017 submission in various respects, including by noting (at 5566) that there were a number of Additional Services which could not be accurately valued but would have resulted in the value of Additional Services being significantly higher if there was a reliable methodology for their allocation; and
 - (d) appended a copy of the Services Deed (at 5576) and legal advice (at 5617) in respect of which SPSL maintains legal professional privilege.
23. The minutes of the meeting of 26 June 2017 indicate that:
- (a) the meeting was attended by three non-executive directors (including the Chairman), Mr Pinto, a number of other Suncorp personnel, Mr Kells of KPMG and Mr Vrisakis of Herbert Smith Freehills;
 - (b) the only substantive item of business was the proposed payment to SLSL;
 - (c) the matters discussed included SPSL’s right of indemnity and the reasonableness of SLSL’s fees;
 - (d) the calculations of management had been verified by KPMG; and
 - (e) the three non-executive directors resolved to approve the payment of \$8,720,008 to SLSL pursuant to clause 3 of the Services Deed.
24. Mr Pinto was not asked any questions about this meeting. None of the three directors who voted in favour of the resolution was required or requested to give evidence to the Commission.

C MR PINTO’S EVIDENCE

25. Mr Pinto is the Executive Manager of the Office of the Superannuation Trustee within SPSL, having been appointed on 18 April 2016.²⁰ Mr Pinto provided two final statements to the Commission, one in response to Rubric 5-42 and the second in response to Rubric 5-67. Both

²⁰ Pinto; Exhibit 5.164 at 0001 [1].

were tendered and address more than thirty questions and topics concerning the operation of the SMT.

26. Mr Pinto appeared before the Commission in answer to a summons and gave oral evidence before the Commission on 13 and 14 August 2018. Mr Pinto gave careful, considered and responsive evidence. He did not seek to embellish his answers or to pre-empt lines of questioning or criticism. Mr Pinto qualified his evidence appropriately where he was uncertain.

The construction of the Services Deed

27. Mr Pinto was asked a series of questions about the Services Deed and its proper construction. Mr Pinto noted at the outset of this examination that “*I’m not close to the agreement, but I have seen it before*”.²¹ Mr Pinto’s evidence was initially imprecise as to whether the services provided and the contributions tax surplus related just to the three relevant divisions or to the whole of the SMT. At the conclusion of hearing on 13 August, Mr Pinto gave evidence that the services related to the three relevant divisions.²² Mr Pinto was then asked to consider the Services Deed and its Amending Deed overnight and conceded at the commencement of hearing on 14 August that his belief was not reflected in those documents. Mr Pinto further accepted Counsel Assisting’s suggestion that “*the deed must apply to the entirety of the [SMT]*”, though maintaining that “*at a practical level, SLSL provides administration services to the three former super funds which are now divisions of the [SMT]*” and that “*[i]n practical terms, [the additional services] apply to the three divisions of the [SMT]*”.²³
28. Without criticising Mr Pinto, his acceptance of Counsel Assisting’s proposition that “*the deed must apply to the entirety of the [SMT]*” cannot safely be relied upon. Mr Pinto is not a lawyer and was being asked questions about the construction of a document with which he disavowed close familiarity. The 30 June 2008 successor fund transfer occurred before Mr Pinto was in his current role and the potential significance of the creation of the ALSF Division (representing the pre-existing Asteron Life Superannuation Fund) was not adverted to by Counsel Assisting. The Services Deed ultimately speaks for itself and the fact is that neither the Services Deed nor its Amending Deed clearly comprehend or address the effect of that successor fund transfer.

²¹ Transcript, Maurizio Pinto, 13 August 2018, 4810.45.

²² Transcript, Maurizio Pinto, 13 August 2018, 4814.36-41.

²³ Transcript, Maurizio Pinto, 14 August 2018, 4820.19-4821.33.

29. The two 2017 Board Submissions support Mr Pinto's understanding that, as a matter of practice, the Services Deed is treated as relating to the three relevant divisions. Those two submissions make very clear that the contributions tax surplus at issue is only that arising in respect of the three relevant divisions, and not the other divisions of the SMT.

The second 2017 Board Submission

30. Mr Pinto was asked questions about the assessment of the value of the Additional Services contained in the second 2017 Board Submission, and in particular the attribution of \$2.7m for calculations of unit prices. It was suggested by Counsel Assisting that that service was already provided for by the Optimum Superannuation Master Plan group insurance policy.²⁴ In broad terms, the propositions contained in Counsel Assisting's submissions that "*members may be paying twice for certain administration services provided to the fund*" and that "*members may be being charged for the calculation of the unit price under the applicable insurance policy, as well as effectively paying the tax surplus for the same calculation as part of the 'additional services'*" were put to Mr Pinto.²⁵ Mr Pinto fairly disclaimed expertise in this area stating "*I'm not close to how that particular figure was... calculated*" and "*I'm not sure exactly how that – how that has been calculated*", conceding that he did not know how he could be certain that the member was not paying twice.²⁶
31. Beyond his professed lack of close familiarity with the calculations, Mr Pinto was at a disadvantage in this exchange for two reasons. First, Mr Pinto did not have a physical copy of the second 2017 Board Submission in front of him, and was not taken specifically to the passage containing an assurance from management that "*there is no 'double dipping' of fees received by SLSL*".
32. Second, and more importantly, the questions put to Mr Pinto proceeded on a false premise. Counsel Assisting's questions and (more clearly) written submissions suggested that there was one insurance policy - "*the applicable insurance policy*" - specifying the primary services to which the Additional Services are "additional". The Services Deed makes clear that this is not so and that there are different policies in respect of each of the three relevant divisions. Mr

²⁴ Exhibit 5.167.

²⁵ Counsel Assisting's submissions at [271]-[272].

²⁶ Transcript, Maurizio Pinto, 14 August 2018, 4830.28-4831.12.

Pinto sought to make this point,²⁷ yet Counsel Assisting took Mr Pinto to one only of the policies. A second group insurance policy exists in respect of the ALSF Division²⁸ - the division in respect of which the significant majority of the contributions tax surplus arises and the division which still has members. That policy was drawn to the attention of the Office of the Solicitor Assisting the Commission on the evening before Mr Pinto commenced his evidence.²⁹ Mr Pinto was not taken to that policy. That policy provides only for death or total disablement cover and does not contain an investment policy or provide at all for things like the calculation of unit prices of members of the ALSF Division administered by SLSL.

The Everyday Super PDS

33. Mr Pinto was asked a number of questions about the Everyday Super PDS³⁰ and Product Guide³¹ (which is expressed to form part of the PDS – at 3212). The relevance of much of this evidence was unclear as, first, the Everyday Super product does not sit within one of the three relevant divisions and, second, the PDS speaks for itself.
34. Counsel Assisting's written submissions refer (at [278]) to Mr Pinto's acceptance that members would not understand from the Everyday Super PDS and Product Guide that the tax surplus is paid to SLSL in exchange for the additional services. That is as may be, but the Product Guide (as Mr Pinto identified) contains express statements that excess amounts deducted for contributions tax are retained and may be used to cover expenses incurred in the proper administration, management and maintenance of the Fund as Mr Pinto identified. That is an accurate description of SPSL's right of indemnity and the provisions of clause 5.6(c) of the Trust Deed. It is not made unclear or misleading by the omission to identify service providers, nor was that proposition put to Mr Pinto.
35. Counsel Assisting's written submissions then refer (at [279]) to Mr Pinto's acceptance that a hypothetical proposal of Counsel Assisting would represent "*a clear approach in terms of disclosing the administration arrangements*" and that Suncorp did not adopt that approach. That

²⁷ Transcript, Maurizio Pinto, 14 August 2018, 4826.11-20.

²⁸ SUN.1513.0005.0539.

²⁹ RCD.9999.0066.0001.

³⁰ Exhibit 5.168; SUN.1504.0001.3195.

³¹ Exhibit 5.169; SUN.1504.0001.3211.

different approaches might be taken does not establish that the approach adopted by SPSL was unclear or misleading, nor was that proposition put.

D THE FINDINGS SUBMITTED TO BE OPEN BY COUNSEL ASSISTING

36. Each of the six findings said to be open is addressed in turn below by reference to the paragraph at which it appears in Counsel Assisting's written submissions. Before doing so, three general points should be made.
37. First, Counsel Assisting has not identified which limb of the definition of "misconduct" in the Letters Patent is said to support each "open finding". In the case of the fourth "open finding" ([289.4]), misleading or deceptive conduct (limb (b)) is plainly invoked, however the position is less clear in respect of the other "open findings". No offence has been alleged and so limb (a) may be excluded. As noted in the introduction to these submissions, "breach of trust" or "breach of duty" (limb (c)) may be implicit in some of the "open findings", but a breach of either kind ought to have been plainly put. As to limb (d), no professional standard is mentioned by Counsel Assisting, nor is any widely adopted benchmark for conduct identified.
38. Second, the open misconduct findings are presented in the subjunctive mood as findings of potential misconduct – a finding that SPSL "may have contravened" – whereas the open finding in relation to community standards and expectations is presented in definite terms ([290]).
39. Third, the community standards and expectations said to have been departed from are not identified. This "open finding" is not addressed separately below.

First "Open Finding" – Failure to prioritise interests of members – [289.1]

40. The proper exercise by a superannuation trustee of a right of indemnity involves no breach of ss 29E(1)(a) or 52(2)(c), (d)(i) or (iii) of the SIS Act as alleged. Indeed, the superannuation trustee's right of indemnity is enshrined by s 56 of the SIS Act. This topic was addressed in some detail by Adjunct Professor Joseph Campbell QC (formerly of the NSW Court of Appeal) in a recent article.³² SPSL adopts the analysis in that article and commends it to the Commission. For present purposes the following passages may be quoted:

³² "Some aspects of the civil liability arising from breach of duty by a superannuation trustee", (2017) 44 Aust Bar Rev 24.

3.2.6.1 Breach of s 52(2)(c) by claiming indemnity?

The effect of s 56 is that the trustee is given a full right of indemnity from the assets. If the effect of s 52(2)(c) was that the trustee could not actually exercise that right of indemnity there would be a conflict between the two provisions. As a more specific provision, s 56 would prevail over s 52(2)(c). [Footnote omitted] Quite apart from that, the effect of s 56 is that the trustee is required to have a right of indemnity. For the trustee to exercise the right of indemnity that the statute requires it to have would be no more a breach of s 52(2)(c) than if a trustee who had a right to be paid fees from the trust fund actually paid itself those fees.

3.2.6.2 Breach of s 52(2)(d) by claiming indemnity?

In one sense, when a trustee is required to decide whether to claim an indemnity from the fund for a liability or pay the liability from its own pocket, there is a conflict between the interests of the beneficiaries and the interests of the trustee. However I doubt that that is a conflict within the meaning of s 52(2)(d). Section 52(2)(d) would be read so as to operate consistently with the pre-existing general law concerning trustee's duties, and in particular with the general law about when a trustee is in an impermissible situation of conflict...

[I]f a trustee has a positive right, under the rules governing the trust, there is no impermissible conflict involved in the trustee exercising that right. The interests of the beneficiaries are ones that exist subject to the rights conferred on the trustee by the trust instrument. The general law would not say that there was any impermissible conflict of interest when a trustee is deciding whether to exercise its right of indemnity for a liability properly incurred. Indeed if there were an impermissible conflict in that situation it would be impossible for anyone to accept the position of being the trustee of a trust that gave the trustee such a right of indemnity. Neither is there any impermissible conflict when a superannuation trustee is deciding whether to exercise the expanded right of indemnity that arises under s 56.

41. Implicit in Counsel Assisting's submissions appears to be an assumption that the express administration fees payable by members to SPSL should be comprehensive and exhaustive of all administration expenses of the SMT. There is no basis for this assumption. Under the Trust Deed, SPSL has both a right of remuneration and a right of indemnity. Both are clearly explained to members in relevant PDSs, albeit that the right of remuneration is capable of precise quantification in the form of fees whereas the right of indemnity, by its nature, is not.
42. Counsel Assisting's submissions do not provide any basis for concluding that payments to SLSL under the Services Deed are not proper exercises of SPSL's right of indemnity. Indeed that issue is not expressly addressed.
43. The obligation of SPSL to pay to SLSL a fee in the amount of the contributions tax surplus of the three funds is an express provision of the Services Deed. That Services Deed was entered into by SPSL as trustee of the three funds and the obligation to pay the fee is properly

characterised as an expense of those funds. The reporting to SPSL's Board assesses the value of the Additional Services provided under the Services Deed to exceed by \$28.1m the amount of fees paid by SPSL to SLSL under the Services Deed for the period from FY2010 to FY2016, noting that the SPSL Board has not resolved to make any payment to SLSL under the Services Deed in respect of FY2017. No proper basis has been established for gainsaying that assessment of value or doubting management's assurance that no "*double dipping*" had occurred. That Mr Pinto, answering questions under examination and beyond his expertise, was not able to exclude a potential instance of double-counting is not surprising. Even were that item to have represented double counting, the value attributed to the other services (excluding that item) still exceeded the quantum of the fee paid to SLSL.

Second "Open Finding" – Failure to exercise care, skill and diligence – [289.2]

44. Far from a failure to exercise care, skill and diligence, the facts outlined at paragraphs 18-24 above indicate that the independent directors of SPSL applied proper scrutiny to payments under the Services Deed. Those directors were evidently not satisfied by the first submission with which they were presented, and requested further information which was considered at a subsequent special-purpose meeting of the Board attended by the company's management, accountants and lawyers. The suggestion by Counsel Assisting (at [270] and [289.2]) that the Board papers ought to have descended to a greater level of detail than was contained in those two papers is unfounded. There is no requirement for a board to be provided with an accountant's work papers.
45. Further, Counsel Assisting did not seek to explore in evidence what occurred at any relevant Board meeting, let alone call a Board member who voted to approve a payment to SLSL. Yet the adequacy of the Board Papers could only properly be assessed in light of the other information made available to the Board at those meetings.

Third "Open Finding" – Prudential Standard SPS 231 – [289.3]

46. Counsel Assisting's submissions ignore Mr Pinto's uncontradicted evidence that the Additional Services provided under the Services Deed are subject to:
 - (a) quarterly reporting to the SPSL Board;
 - (b) monitoring for satisfactory service delivery; and

- (c) service level requirements which apply specifically to the Additional Services.³³
47. That evidence answers the alleged contraventions of clauses 21 and 30(b) of the Prudential Standard SPS 231.
48. As for the alleged contravention of clause 16, the “Partnering Policy” applicable to SPSL is exhibited to Mr Cooley’s statement.³⁴ Prudential Standard 231 strictly came into effect after the Services Deed was executed, but, in any event, the best interests of the beneficiaries are established by the excess of the value of the Additional Services over the amount of the fees paid, and the “arm’s length” basis is maintained in light of the scrutiny applied by the non-executive directors of SPSL’s Board.

Fourth “Open Finding” – misleading or deceptive conduct – [289.4]

49. Counsel Assisting puts this allegation in two ways:
- (a) *“representations in the Everyday Super PDS regarding the use of the amount of the administration fees which would be charged to members”*; and
- (b) *“the omission of information which would inform members that the cost of administering the fund included the payment of the tax surplus to SLSL”*.
50. As to the first, the representations are not specified in Counsel Assisting’s submissions. In fact, the Everyday Super PDS contains no representation as to the use to which administration fees will be put once paid to SPSL. This allegation must fail.
51. As to the second, none of the elements necessary to establish misleading conduct by omission have been identified in Counsel Assisting’s submissions. For example, no reasonable expectation that such matters would be disclosed has been shown.³⁵ In any event, the fact that excess contributions tax amounts may be used to pay expenses of the SMT *is* disclosed in plain terms in the Product Guide in the passages quoted at [277] of Counsel Assisting’s submissions. The fact that SLSL is not mentioned does not render the statement misleading, nor would such a mention be sensible in circumstances where the Everyday Super product does not sit within one of the three relevant divisions.

³³ Transcript, Maurizio Pinto, 13 August 2018, 4812.45-4813.6.

³⁴ Exhibit 5.320.2.33; SUN.1201.0501.0005.

³⁵ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [17]-[21].

Fifth “Open Finding” – ADA transfer – [291.1]

52. This submission is answered in large measure by the uncontroverted evidence referred to at paragraphs 15-17 above, which is not addressed in Counsel Assisting’s written submissions. No proposition was put to Mr Pinto that SPSL could or should have effected the ADA transfer at an earlier point in time.
53. At a more basic level, Counsel Assisting’s submission does not identify with any precision which power SPSL ought to have exercised, when SPSL ought to have exercised the power or how SPSL ought to have exercised the power. Presumably, the submission is that the intra-fund transfer power should have been exercised at some earlier date to transfer ADAs from commission-bearing products to a MySuper product, on the premise that MySuper products may bear lesser fees and no commissions, and the unstated assumption that the commission-bearing product is not more suited to the members’ needs. That premise is not established by any evidence nor was it put to Mr Pinto. Nor is the premise that such an intra-fund transfer *could* have occurred at an earlier date established by any evidence. Such a transfer is not a matter of flicking a switch, but instead requires the redemption of investments and the reinvestment of the redeemed funds. Given the complexity of the product offering within the SMT prior to the completion of the SSP, the decision to effect the ADA transfer following the SSP was reasonable and cannot be said to constitute misconduct.
54. SPSL effected the ADA transfer within the time stipulated by legislation. It has not been shown that the transfer could have been effected earlier, nor has it been shown that members generally would have been better off had the transfer been effected earlier.

Sixth Open Finding – Communications with advisers and ADA transfer – [291.2]

55. Counsel Assisting’s submission has two elements: first, the “*delayed transition*” of ADAs which has been addressed above, and, second, “*assistance provided in respect of communications*” to the clients of financial advisers “*to take steps to ensure they would not be moved into the fund’s MySuper product*”.
56. At the outset, it should be noted that the only step that could be taken to ensure that a member would not be moved into the SMT’s MySuper product was for the member to give an investment direction to SPSL.

57. The communications relied upon by Counsel Assisting are specified at [283] and [284] of the written submissions. None of those communications constitute misconduct or fall below community standards.
58. The email referred to at [283] recommended that advisers call or write to MySuper customers “*and encourage them to make an investment decision*”. The meaning of that statement is made clear by the attachment to the email which contains the following.³⁶

What are the options for clients affected by MySuper?

If your client **has not** previously provided us with a written investment direction, they **will be impacted** by the MySuper changes and we will be writing to them with detailed information in November. Here is a quick summary of the options available to them.

Client's intention	What they need to do
Client is happy for their contributions to be directed to a MySuper account from 1 January 2014	No action required. From 1 January 2014 we will direct their contributions to our MySuper product.
Client wants to continue to have their contributions invested in their current investment option i.e. they do not want their super contributions to be directed to a MySuper account from 1 January 2014	Complete and return the Investment Choice Form on our MySuper web page at www.suncorp.com.au/mysuper
Client wants to make a new investment selection in one or more of the investment options available in the fund	Complete and return the Investment Change Form for their super product found on the forms page of our website.

59. In other words, one of the potential investment decisions which could be made by a client was to be invested in the MySuper product, in which case no action was required. Mr Pinto was not taken to this attachment, and his acceptance that an “*investment decision*” necessarily meant continuing to pay commission was incorrect. That this was the effect of Suncorp’s communications with advisers is made more clear by the form letter sent to advisers in late 2013.³⁷

³⁶ Exhibit 5.165.2.3; SUN.1508.0007.4238 at 4244.

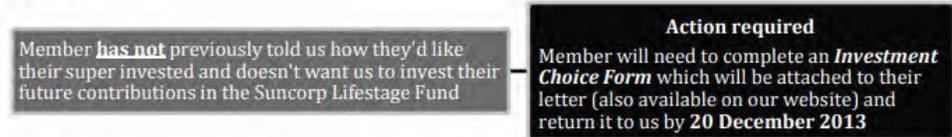
³⁷ ASIC.0040.0002.0080 at 0082.

Do I need to do anything for my clients?

Option 1



Option 2



60. As for [284], the provision of information to financial advisers about the membership status of clients of those financial advisers cannot be described as misconduct. This submission is based on an implicit assumption that SPSL ought to have apprehended that some financial advisers might encourage their clients to act against their own financial best interests and that those clients might do so. No basis for that assumption has been established.

31 AUGUST 2018

JK KIRK SC

ELEVEN WENTWORTH CHAMBERS