

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

HEARING ROUND 6: INSURANCE

SUBMISSIONS ON FINDINGS CONCERNING CASE STUDIES INVOLVING REST

INTRODUCTION AND OVERVIEW

1. Retail Employees Superannuation Pty Limited (**Rest**) is the trustee of the Retail Employees Superannuation Trust (**Fund**). Rest makes these submissions in response to findings submitted by Counsel Assisting in Round 6 Closing Submissions as being open in relation to:
 - (a) the minimum balance and employment related conditions of the group life, total and permanent disablement (**TPD**) and income protection (**IP**) policies offered to members of the Fund; and
 - (b) the requirement to provide written reasons to a person who complains to Rest about the proposed payment of a death benefit.¹
2. The gravamen of Counsel Assisting's criticisms of Rest appears at P-6488.19 to P-6489.25 and consists of:
 - (a) first, a general complaint about the continued deduction of premiums when a person is subsequently determined to be no longer covered by insurance, which is said to be a failure to perform in accordance with section 52C of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*. The reference to 'section 52C' appears to be in error and is taken for the purpose of these submissions to be a reference to section 52(2)(c);
 - (b) second, a specific complaint about a particular member who became a paraplegic and made a claim, the handling of which is submitted by Counsel Assisting to be in contravention of section 52(7)(d) of the SIS Act;
 - (c) third, the same complaint as (a) but with specific reference to the member referred to in (b);
 - (d) fourth, the deduction of IP premiums from unemployed members who were unable to claim on their policies; and
 - (e) fifth, failing to have sufficient systems in place to detect when a member was unemployed and, therefore, at risk of losing cover.
3. Rest wishes to respond at a general level at the outset with more detailed submissions developed below.

¹ Transcript P-6485 to P-6489.

4. Simply stated, Rest submits that, whether viewed against the provisions of the SIS Act identified by Counsel Assisting or community standards more generally, **Counsel Assisting's** submissions should not be accepted as:
- (a) the matters in paragraphs 2(a), (c), (d) and (e) are, in effect the same criticism, namely an inability on the part of Rest to maintain a perfect understanding at all times of the Fund's members' employment status. **Counsel Assisting's submissions pay no or insufficient regard to the reality in which Rest provides benefits to the members, namely the employer/employee relationship in which Rest has no involvement or influence. Nor does Rest, or as far as Rest is aware any other superannuation fund trustee, have the means to establish any other mechanism by which it can legally compel a member or their former employer to ensure a particular member's employment status as recorded by the trustee is constantly and accurately updated in real time. In this respect, the quality of information held by Rest is dependent on the steps taken by their members and former employers; and**
 - (b) the matter in 2(b) represented a less than optimal outcome in terms of the claims process but arose in the unusual circumstances of that claim and an admitted data processing error made not by Rest but by its administrator. In other words it turned on its own facts and does not represent a systemic issue. This submission also overlooks **the fact the member's claim was ultimately paid in full.**
5. These submissions:
- (a) set out a summary of the evidence which, in the submission of Rest, is relevant to the findings that Counsel Assisting has submitted are open; and
 - (b) address whether or not each of those findings is open on the basis of that evidence.

MINIMUM BALANCE AND EMPLOYMENT CLAUSES

Summary of evidence

Relevant contextual evidence

6. The Fund is a not-for-profit fund that has approximately 2 million members.² It has historically focused on, and has a significant proportion of its members from, the retail industry, many members of whom work in part-time or casual employment and may frequently change jobs.³
7. An insurance objective of Rest is 'cover for all', which promotes insurance being able to be offered to all members regardless of age, employment status or life-stage.⁴ Other objectives are 'meets members' needs' and 'cost'. With these objectives, Rest provides low-cost default death, TPD and IP cover to around 1.5 million members.⁵ Many of the Fund's members would

² Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [4], [9].

³ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [8]. As stated therein, for example, one of Rest's largest participating employers, Woolworths, employs approximately 80% of its employees on a part-time or casual basis.

⁴ Statement of Natalie Samantha Binns dated 31 August 2018 in response to Rubric 6-41, [13].

⁵ As stated in the statement of Natalie Samantha Binns dated 31 August 2018 in response to Rubric 6-41, [14], Rest has an obligation under section 68AA of the SIS Act to make available death and TPD cover.

be unable to access equivalent cost of cover if they were not provided with insurance cover through the Fund.⁶

8. Rest balances the desirability of broad cover with the need to have clear and appropriate rules demarcating when cover ceases. During the period July 2013 to June 2018, notwithstanding the operation of rules including the minimum balance requirement and employment related conditions, Rest paid over 20,800 claims⁷ and had very high acceptance rates for claims:

	Death	TPD	IP
Acceptance rate for claims	98.1%	83.2%	91.6% ⁸

9. The numbers of declined claims in the same five-year period due solely to the minimum balance requirement were minimal:

	Death	TPD	IP
Notified claims	4,566	4,725	13,534 ⁹
Claim denials due to prescribed minimum balance requirement	11	36	37 ¹⁰

Evidence of application of clauses

10. Between 1 October 2004 and 1 April 2005 the group life policies held by Rest provided default cover to members on commencement of their membership of the Fund. Under the terms of the policies, that cover would terminate within a prescribed period after the member ceased

⁶ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [4]-[5].

⁷ See statement of Natalie Samantha Binns dated 31 August 2018 in response to Rubric 6-41, [7B]. As stated therein, in this five-year period, the total number of notified death claims was 4,566, TPD claims was 4,725 and IP claims was 13,534. With the acceptance rates set out in paragraph 8, the total number of accepted claims is 20,808.

⁸ Statement of Lachlan Gambier Ross dated 31 August 2018 in response to Rubric 6-41, [9], [10], [51](c).

⁹ Statement of Natalie Samantha Binns dated 31 August 2018 in response to Rubric 6-41, [7B].

¹⁰ Statement of Lachlan Gambier Ross dated 31 August 2018 in response to Rubric 6-41, [7], [51](a); statement of Natalie Samantha Binns dated 31 August 2018 in response to Rubric 6-41, [7C]. The numbers of declined claims due to the prescribed employment status clause, through the application of a different policy condition, were similarly small (even though most of these denials relate to pre-existing conditions, which is not an issue that was explored by Counsel Assisting): see statement of Lachlan Gambier Ross dated 31 August 2018 in response to Rubric 6-41, [32], [51](b).

employment. Initially that period was the period that ended on the first Friday falling 62 days after the member was last at work.¹¹ Later it was 72 days after the member was last at work.

11. With effect from 1 April 2005 the group life policy was amended to include continuing death cover for a member who ceased employment on the condition that the member had an account balance of more than \$1,200.¹² With effect from 5 December 2008 the group life policy was amended to include continuing TPD cover for a member who ceased employment on the condition that the member had an account balance of more than \$3,000.
12. The minimum balance and prescribed employment clauses were explained to members in the insurance booklet and members were told that it was important to contact Rest if their employment terminated.¹³ Furthermore, the front page of each annual member statement identified the 'Current employer', and asked in a separate box 'are your details correct'.¹⁴ In addition, Rest has used recent technology advances to communicate more effectively with members — for the year ending 30 June 2016, Rest provided the Fund's members with digital statements. This included a pop up warning message for all insured members, displaying the account balance and continued cover rules for the year ending 30 June 2016. Rest also consciously moved information about insurance to the top of member statements, and has continued to include a pop up message in online statements.¹⁵ Rest employers were also asked to notify Rest when a member ceased their employment with the employer.
13. However, Rest was not always notified when a member ceased employment with an employer.¹⁶ This led to occasions where Rest continued to deduct premiums from a member's account after the cessation of their employment. As soon as Rest became aware that a member had ceased employment when their account balance was less than the minimum required by the policy at the relevant time, the premiums that had been deducted were credited to the member's account together with interest.¹⁷
14. Mr Ross provided evidence to the Commission about a member whose TPD claim was declined because she was not insured under the policy at the date of disablement.¹⁸ The member had ceased employment and did not meet the minimum account balance condition in the policy prior to the date of disablement. Despite this, because Rest had not been notified of the termination of the member's employment at that time, Rest had continued to deduct premiums from the member's account. Consistent with its practice, those premiums were refunded by AIA and credited to the member's account. In any event, a TPD benefit was

¹¹ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [21].

¹² Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [20]–[23].

¹³ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [43] and [56].

¹⁴ See, for example, RST.0013.0001.0049; transcript P-5821, line 20.

¹⁵ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [44](d).

¹⁶ Rest's membership comprising many young people working in casual, part-time or seasonal employment, many of whom take time off work to look after their children is relevant. In Rest's experience such employees may stop working for periods of time without knowing whether they will recommence working at a later time. For the same reason, and for the reason that there may be seasonal changes in worker demand, employers too may not know whether such employees have ceased employment.

¹⁷ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [45].

¹⁸ Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [5]–[58].

subsequently paid based on a separate claim that related to disablement that occurred while the member continued to be employed and insured under the policy.¹⁹

Proposed findings of breaches of law in relation to minimum balance clause

15. Counsel Assisting said in his closing submissions that, on the evidence, it is open to the Commissioner to find that Rest may have engaged in misconduct in the following respects:
- (a) first, Rest's conduct in continuing to deduct insurance premiums when a person is no longer covered by insurance **may constitute a failure to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries as required by section 52(2)(c) of the SIS Act;**²⁰ and
 - (b) second, Rest's conduct in relation to the member who became paraplegic may have demonstrated a failure to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary if the claim has a reasonable prospect of success in breach of section 52(7)(d) of the SIS Act.²¹
16. Rest submits that the evidence does not support either finding and addresses each of these matters separately below.

Deduction of insurance premiums is a breach of section 52(2)(c) of the SIS Act

17. Counsel Assisting did not provide any analysis to support his submission on section 52(2)(c) of the SIS Act. The section is difficult and it has been the subject of much consideration by the Courts and academics. For the reasons set out below in paragraphs 18 to 37:
- (a) Rest submits that it is not open to the Commission to make any finding that that Rest may have breached the obligation; and
 - (b) on the basis of the case law, Rest denies that it has breached section 52(2)(c) of the SIS Act,
- by deducting premiums from a member's account when the member was no longer covered by the policy following termination of the member's employment without Rest's knowledge. These are the only circumstances considered in the evidence.
18. Section 52(1) of the SIS Act provides that the governing rules of a registrable superannuation entity are taken to contain the covenants in section 52(2) if the governing rules of the entity do not contain covenants to the effect of the covenants set out in the section. The governing rules of the Fund do not include rules to the effect of the covenants, and therefore the covenants in section 52(2) (including the covenant in section 52(2)(c)) are deemed to be included in the Fund's governing rules.
19. The effect of section 52(2)(c) is that Rest is required 'to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries'. Counsel Assisting did not undertake any analysis of what is required by this obligation and Rest submits that the obligation does not have anything to say about the specific conduct referred to by Counsel

¹⁹ Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [53]-[57].

²⁰ Transcript P-6488, lines 20-24.

²¹ Transcript P-6488, lines 26-30.

Assisting (deducting premiums from members who had ceased employment in circumstances where Rest did not know that they had done so) as breaching this obligation.

20. In **Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck** (2016) 334 ALR 692; [2016] NSWCA 218, Bathurst CJ (with whom Macfarlan and Gleeson JJA relevantly agreed) noted at [136] that it was common ground between the parties that the covenant in section 52(2)(c) did not expand the general law. The Chief Justice also referred to the statement of Giles JA in **Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd** (2011) 282 ALR 167; [2011] NSWCA 204 that section 52(2)(c) does not materially add to the general law duty of the trustees to act in the best interests of the fund. Similarly, the authors of *Jacobs' Law of Trusts in Australia* have expressed the view that the covenant in section 52(2)(c) corresponds with the general law.²² As to what the general law position is, there are various formulations in the case law.
21. In a decision that is frequently quoted by Australian courts, Sir Robert Megarry V-C in **Cowan v Scargill** [1985] 1 Ch 270 said the following:

The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.

22. The covenant in s 52(2)(c) was considered by Byrne J in **Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd** (2006) 15 VR 87 [2006] VSC 112 at [102]-[109], with reference to **Cowan v Scargill**. His Honour said at [107]:

The covenant inserted into the trust deed appears to be an amalgam of two distinct obligations said to be imposed by law upon trustees of a superannuation fund. The first, which is sometimes referred to as the duty of loyalty or the duty of fidelity to the trust, is that to act in the interests of the beneficiaries; that their interests are paramount and must certainly be placed ahead of the trustee's own interests. Nor may the trustee have regard to considerations which are extraneous to the trust. The second is to pursue to the utmost with appropriate diligence and prudence the interests of the beneficiaries. This will commonly come into play where it is a question whether the trustee of a trust whose objective is to confer financial benefits on beneficiaries has sufficiently pursued these financial interests. And so, in **Cowan v Scargill**, Megarry V-C said this:

...The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries.

and later:

Trustees must do the best they can for the benefit of their beneficiaries and not merely avoid harming them.

²² Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, 2006), [2922]; Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (8th ed, LexisNexis Butterworths, 2016), [29-21].

23. In **Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd** (2010) 239 FLR 159; [2010] NSWSC 363, Rein J expressed the following views as to the scope and content of section 52(2)(c) at [51]:

I do 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 interests of all members in mind. Another way of describing this approach is to say that s 52(2) is concerned with process, not outcome. [Counsel for the plaintiff's] argument entailed, or came close to, a submission that the trustee was subjected to a regime of strict liability, and I do not accept that the legislative regime intended to create such a radical departure from the existing law. The wording does not suggest such an outcome, and the comments made by the Parliamentary Secretary referred to in Byrne J's judgment provide no support for such an approach: see *Invensys* at [102].

24. These cases say that the trustee's covenant in section 52(2)(c) requires it to put the interests of the members of the Fund first and before its own interests and to do the best it can for the benefit of beneficiaries. They also say that if the trustee puts the interests of the members first and does the best it can for their benefit, it will not breach its duties because the outcome of its exercise of power turns out not serve the interests of an individual member.
25. As noted above, the Fund has approximately 2 million members.²³ In exercising its powers and discharging its duties, Rest must act in the best interests of those 2 million members as a whole. In putting in place its group life, TPD and IP policies and negotiating the terms of the policies with AIA, Rest did put the interests of the Fund's members first and it did 'do the best [it could] for the benefit' of members. Mr de Bruyn's evidence in his witness statement (which was unchallenged as he was not cross-examined) provides evidence of Rest's efforts to do that not only when the 2004 policies were put in place, but on an ongoing basis as their terms were amended.²⁴ In doing so, Rest was required to take into account a range of different considerations and sometimes what might be the competing interests of members. Again, Mr de Bruyn's statement provides evidence of the matters that were and continue to be taken into consideration by Rest, including the nature of Rest's membership.²⁵
26. Ms Binns' evidence in her witness statement (which was also unchallenged as she was not cross-examined) provides further evidence of Rest's efforts to act in the best interests of all members in this context. Ms Binns identifies Rest's insurance product strategy including the purposes of 'maintaining quality of product coverage and design including which beneficiaries are to be covered, commencement and cessation of cover terms, to meet the expectations of members as a whole'. Other purposes and insurance objectives she identifies at [12] and [13] provide further evidence.
27. Many of Rest's members are young people working in casual, part-time or seasonal employment, and many will take time off work to look after their children.²⁶ This means that members may have continued in employment during periods in which, due to wage payments being below the statutory threshold, no contributions were received by the Fund. Many of Rest's members have dependants and Rest considered and considers that low cost group life,

²³ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [4].

²⁴ See, for example, statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [26]-[29].

²⁵ See, for example, statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [140].

²⁶ Transcript P-5830, lines 23-40; statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [8], [19].

TPD and IP cover is an important and valuable benefit provided by the Fund to members.²⁷ This is reflected in Rest's decision to provide group life, TPD and IP to employed members on a default basis. Relevantly, with Rest's broad member demographic, the insurance cover it makes available is designed to extend coverage beyond traditional policies which require the member to be permanently employed or work a strict number of hours per week. In addition, in relation to the amount of cover, salary definitions are averaged over periods of employment, including prior to extended periods of leave, to ensure those who are on maternity leave or extended leave maintain their insurance based on what they were earning.²⁸

28. Historically, Rest paid for a member's insurance cover only when it received employer contributions for the member.²⁹ Given the nature of many of the Fund's members' employment, employers did not always make regular contributions for their employees with the result that employed members were not always covered by insurance.³⁰
29. To mitigate the unintended, and sometimes unsatisfactory, outcomes for some of these members, Rest changed its practice so that premiums were deducted from members' accounts (and not contributions).³¹ This allowed members in employment to continue to be covered by insurance while they were in employment despite their employer not making regular contributions to the Fund for them. By doing so, Rest relied on employers and members to notify it when a member ceased employment.³²
30. Such notification did not always happen and, again, to mitigate the unintended poor outcomes for members, Rest further changed its practice. In this instance it agreed with AIA that continuing death cover be made available to members after they ceased employment under the group policies with effect from 1 October 2004. The reasons are set out in Mr de Bruyn's witness statement at paragraph 24.
31. Furthermore, the front page of each member statement identified the 'Current employer', and asked in a separate box 'are your details correct'.³³ This provided a simple opportunity for members to correct their employment details if their employer failed to do so.
32. However, continuing cover was subject to the minimum account balance conditions. At that time the minimum account balance for death cover was \$1,200.³⁴ The minimum balance condition was introduced when the SIS Regulations contained rules protecting member balances of less than \$1,000. In general terms the member protection standards prohibited the administration fees and costs deducted from a member's account to exceed the

²⁷ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [18].

²⁸ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [42], exhibit JDB-7 (RST.0006.0001.0514 at pages .0525 and .0529); see also RST.0009.0002.3642 at pages .3630, .3636, .3637 and .36242).

²⁹ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [19].

³⁰ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [19].

³¹ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [20].

³² Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [43].

³³ See, for example, RST.0013.0001.0049.

³⁴ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [61].

investment return to that account for a member with an account balance of less than \$1,000. While these rules did not prevent Rest deducting insurance premiums from a member's account, the effect of doing so would increase the number of members with low balances and increase the burden of meeting the administration costs of the Fund to those members with higher balances and to whom the member protection standards did not apply.

33. The member protection standards were repealed with effect from 1 July 2013³⁵ and Rest and AIA have amended the group policies to remove the minimum balance condition.³⁶
34. These decisions were all taken in the best interests of beneficiaries. The fact that from time to time premiums were deducted from a member's account when they were subsequently determined to be no longer covered by a policy does not mean that Rest has failed to exercise its powers and discharge its duties in the best interests of beneficiaries. To the contrary, Rest's ongoing efforts to tailor the insurance it makes available to members to meet their needs, and its efforts to notify members of the terms of their coverage including by providing the booklet given to members when they commenced their membership of the Fund and as described in paragraph 12 above, is evidence that Rest has complied with its duty to exercise its powers and discharge its duties in relation to insurance in the best interests of beneficiaries.
35. The complaint must also be viewed against the practical reality that Rest can only act to **update a member's employment status upon receiving notification from the member or their former employer**. Rest does not have the means to establish any other mechanism by which it can legally compel a member or their **former employer to ensure a particular member's** employment status as recorded by the trustee is constantly and accurately updated in real time. As Mr Ross made plain at P-5818.23, Rest was and is reliant upon the employer or the member in this respect.
36. The cross-examination of Mr Ross did not suggest to him any legal or practical means by which Rest could, by its own actions, address any deficit in information about individual members which may arise from time to time. Nor is any such means obvious.
37. Bearing in mind that section 52(2)(c) is not a strict liability provision, this is a powerful argument against Counsel Assisting's **submission**.

Failure to pursue claim in breach of section 52(7)(d) of the SIS Act

38. Counsel Assisting did not identify any evidence in support of his submission that Rest's conduct in relation to the member who became paraplegic may have demonstrated a breach of section 52(7)(d) of the SIS Act.
39. Rest submits that it is not open to the Commission to make a finding that Rest may have breached this obligation. Rest denies that it has breached section 52(7)(d) of the SIS Act in relation to this member.
40. Section 52(2)(7)(d) of the SIS Act provides that the trustee of the registrable superannuation entity include a covenant in the governing rules of the fund 'to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success.'

³⁵ Superannuation Legislation Amendment Regulation 2013 (No. 2), which commenced on 1 July 2013.

³⁶ Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-41, [6].

41. Again, Counsel Assisting provided no analysis of what is required by section 52(7)(d) in the circumstances of the case study in question and it is Rest's submission that it is not self-evident. It requires a determination of what is reasonable in the circumstances of the particular trustee and particular claim.
42. Mr Ross was cross-examined about this claim at P-5819.46 to P-5843.43 and P-5849.9 to P-5851.22. The proposition that Rest had not pursued this claim for the benefit of a beneficiary was put to Mr Ross at P-5837.13 to 33 and P-5849.41 to P-5850.10. Mr Ross rejected this proposition and explained his basis for doing so, especially at P-5850.1 to 10. This explanation was reasonable and rational and was not the subject of challenge by Counsel Assisting.
43. Rest submits that the evidence of Mr Ross should be accepted.
44. Rest assists members to make claims under the group policies.³⁷ It does this in large part through the administrator, AAS, that is engaged by Rest to answer calls and emails about claims and to assist with applications and forms. AAS is also engaged to collect evidence about a member's employment.³⁸ Rest also reviews all decisions by the insurer to decline a member's claim and if it forms the view that the decision was made prematurely or wrongly made it raises this with the insurer.³⁹ This conduct is consistent with its obligations under section 52(7)(d) of the SIS Act.
45. Counsel Assisting's submission that Rest has breached the section appears to be based on two matters:
- (a) first, AAS's request that AIA reconsider its decision to approve the member's claim in circumstances where AAS had made an error about the member's employment at the relevant time;⁴⁰ and
 - (b) second, by not considering, at an earlier point, the alternative claim based on the member's mental health condition (which was ultimately successful).⁴¹
46. As to the first matter, AAS had made an administrative error in recording the member's employment status.⁴² One of AAS's responsibilities as Rest's administrator was to provide information about a member's employment status to the insurer when a claim was made. AAS's error led to AAS providing incorrect information to AIA in relation to the member's claim. When AAS identified this error, on or about the time AIA admitted the claim and paid the proceeds to AAS for Rest, AAS notified AIA of its error and asked it to reconsider the claim based on the correct information.⁴³ Rest was not involved in the decision to correct this error. However, Rest submits that the decision was entirely appropriate and consistent with community standards. It would have been improper and contrary to community standard for

³⁷ Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [18]-[19].

³⁸ Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [21].

³⁹ Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [2] and [38].

⁴⁰ As set out in the statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [34].

⁴¹ Transcript P-5849, lines 44-46.

⁴² Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [29]-[32].

⁴³ Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [34].

AAS to remain silent, when it knew that the insurer was admitting a claim on the basis of incorrect information provided by AAS.⁴⁴

47. Furthermore, section 52(7)(d) does not have anything to say in circumstances where the insurer makes a decision, inconsistently with the policy, to pay a benefit. The section requires the trustee to do what is reasonable to pursue a claim. At the same time, Rest, including as part of its duty of utmost good faith in dealings with AIA, has an obligation to provide (including through its administrator) correct information to AIA. This extends to providing correct information after Rest (or its administrator) is made aware that information it has previously provided to AIA was incorrect. AIA relies on Rest (and its administrator) to provide such correct information. In Rest's submission, it is not consistent with this obligation nor reasonable for it (or its administrator) to withhold such correct information once it becomes aware that information it has previously provided to AIA was incorrect. It is also not consistent with this obligation nor reasonable for it to pursue an insurer for payment of a claim that is not in fact payable under the terms of the policy.
48. As a general proposition, it is not in the interests of members as a whole for benefits to be paid by the insurer where the claimant is not insured under the policy or where the claimant has not met the conditions under the policy. An important part of Rest's considerations in agreeing the terms of the policies with an insurer is the cost of that cover. Eligibility and conditions are a fundamental part of being able to offer insurance cover at a reasonable cost. The premiums paid by all insured members are directly affected by the prior claims paid to members. Having agreed the terms of the insurance policies with AIA, Rest considers that it is its duty to ensure that claims are paid, and only paid, in accordance with the terms of the policies. It also considers that performance of this duty is entirely consistent with its obligation to act in the best interests of the Fund's members.
49. As to the second matter, Rest does not accept that section 52(7)(d) required it to suggest an alternative basis for the member's claim for a TPD benefit based on her mental health. It is not reasonable for Rest, as the trustee of a fund with approximately 2 million members to consider the individual circumstances of any member to determine whether they may have a claim to a TPD benefit that is entirely different from the claim being put forward. This is especially the case where the member had lawyers acting for her throughout the entire claims process, and this was a highly unusual situation in which the insurer determined that the member became totally and permanently disabled for work notwithstanding that she was in fact working.
50. It is submitted that there is no basis for finding that it may have breached section 52(7)(d) of the SIS Act.

Proposed findings of failure to meet community standards and expectations in relation to minimum balance clause

51. Counsel Assisting also said in closing submissions that, on the evidence, it is open to the Commissioner to find that Rest may have engaged in conduct falling below community standards and expectations in the following respects:

⁴⁴ It is true that AAS went one step further and, in addition to correcting its mistake, drew the insurer's attention to an exclusion that might apply now that the mistake had been corrected. Rest only became aware of this correspondence some time later. Whether or not it was appropriate for AAS to take this extra step, it would have made no practical difference to the member's claim, as the application of the exclusion was an obvious issue for the insurer to consider in light of the corrected information.

- (a) first, by failing to communicate with members about key exclusions such as the prescribed minimum balance exclusion in annual statements;⁴⁵
 - (b) second, by continuing to deduct premiums from members, such as the paraplegic member, when they were not covered by the policy;⁴⁶
 - (c) third, by deducting IP premiums from unemployed members who were unable to claim on their policies;⁴⁷ and
 - (d) fourth, by failing to have sufficient systems in place to detect when a member was unemployed and, therefore, at risk of losing cover.⁴⁸
52. Counsel Assisting also submitted that this conduct can be attributed to the inadequacies of Rest's systems, including a lack of systems to detect **changes in members' circumstances that** materially affect their insurance cover and that it may also be attributable to systems which have an overreliance on hardcopy claim forms and which carry with them a greater risk of human processing errors.⁴⁹
53. Counsel Assisting also said that some of Rest's conduct would constitute a breach of various provisions of the Insurance in Superannuation Code of Conduct when it comes into effect.⁵⁰ The inference appears to be that the Code of Conduct reflects community standards and expectations at this point in time. Counsel Assisting did not provide any basis for this proposition and it is submitted that it would be unfair to Rest for its conduct to be judged by a standard that has not yet been introduced.
54. It is Rest's contention that the community, properly informed, would expect a trustee to take into account what was reasonable at the relevant times having regard to the methods available to Rest for communicating with members and the complexity of insurance.
55. Having regard to these things, Rest considers that it did all that was reasonable to bring the attention of the exclusions in insurance to members. Rest did provide information to members about the terms and conditions of their insurance cover in the Fund.⁵¹ Rest acknowledges that members will not necessarily review all of the exclusions in a booklet given to members when they commenced their membership of the Fund.⁵²
56. However, there are many provisions of an insurance policy which will potentially be of critical importance to members, and there is no obvious means of communicating all of these provisions in another, easier to understand manner. This is a problem which is easy to

⁴⁵ Transcript P-6488, lines 32-34.

⁴⁶ Transcript P-6488, lines 37-41.

⁴⁷ Transcript P-6488, lines 41-42.

⁴⁸ Transcript P-6488, lines 42-46.

⁴⁹ Transcript P-6489, lines 1-5.

⁵⁰ Transcript P-6488, lines 31-35.

⁵¹ See, for example, Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [53]-[68A].

⁵² Transcript P-5831, lines 26-28.

identify but a perfect solution is elusive. Indeed, none was put to Mr Ross during cross-examination.

57. Rest submits there is good reason for this, namely it cannot compel members to take an **interest in their insurance arrangements much less seek to manage each member's** individual coverage. It is hoped and assumed that members will appreciate the value of the insurance cover provided to them by Rest and take an active interest in its management.
58. In any event, Rest did undertake an exercise to rewrite its disclosure and redesign its products.⁵³ Rest used its customers to better understand how to articulate key concepts, including in correspondence with members, to make the language more simplified and incorporate 'plain English'. However, beyond that, all that Rest can do is inform the Fund's members about the cover they have and implore them to take such an interest. Whether a member will take that interest is a matter for the individual member.
59. Nevertheless, Rest did take many other steps to bring to members' attention the importance of notifying Rest when they ceased employment, including warnings in the member statements and on its website.⁵⁴ It now includes information in texts and apps about their members' insurance cover.
60. Mr Ross gave some explanation of this at P-5826.37 to 46.
61. Rest also responded to the difficulties it encountered in obtaining information from members and employers by varying the terms of the policies with AIA. With the agreement of AIA, it introduced continuing cover to reduce its reliance on being notified about a member's employment status⁵⁵ and on 1 December 2017 it removed the minimum account balance requirement from the policies altogether.⁵⁶
62. Rest acknowledges that it did from time to time deduct premiums from a member's account in circumstances where it was subsequently determined that the member was no longer covered by a policy.⁵⁷ This occurred because of the terms on which insurance cover was provided to members, the failure of the employer to inform Rest that the member's employment had ceased and, in some cases, the failure of the member to correct the current employment information shown on their statements and letters sent to them. For the reasons outlined above, Rest considers that the terms of the insurance cover served the interests of members. While in Rest's view it is not possible to say what the community standards or expectations would be on such a matter, Rest does not think that those standards and expectations would require Rest's conduct to be considered in isolation. Rest considers again that its conduct was reasonable in all of the circumstances.⁵⁸

⁵³ See, for example, statement of Natalie Samantha Binns dated 31 August 2018 in response to Rubric 6-41, [41]-[42]; statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [61]-[64].

⁵⁴ See, for example, Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [53]-[68A].

⁵⁵ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [20].

⁵⁶ Statement of Lachlan Gambier Ross dated 7 September 2018 in response to Rubric 6-65, [66].

⁵⁷ Statement of Joseph de Bruyn dated 12 September 2018 in response to Rubric 5-64, [44].

⁵⁸ These circumstances include Rest's membership, comprising many young people working in casual, part-time or seasonal employment, many of whom take time off work to look after their children. In Rest's experience such employees may stop working for periods of time without knowing whether they will recommence working at a later

63. Counsel Assisting did provide a submission about what the community would expect in relation to the third and fourth matters that he says may have fallen below community standards and expectations, being the deduction of premiums for IP from unemployed members and Rest's inability to identify when a member was unemployed. It is said the community would expect Rest to have sufficient systems in place to detect when a member was unemployed and, therefore, at risk of losing cover and systems that are capable of detecting when a member is in this position.⁵⁹ Rest submits there is no basis for this submission, which does not have regard to the large number of Rest's members who have casual, part-time or seasonal work or who take leave to care for children (or other relatives). In any event, as described in Mr de Bruyn's statement at [44] Rest implemented various steps to mitigate the risk that a member may have continued to have premiums deducted even though cover was not available to that member as they had ceased employment.
64. Rest maintains that it is very likely that community standards and expectations would have regard to what steps and information are reasonably available to a trustee of a very large industry fund of which a significant proportion of the members are employed on a part-time or casual basis, as well as the expense that should be incurred on systems and administration. Counsel Assisting seems to suggest that the community expects Rest to maintain a perfect understanding at all times of the Fund's members' employment status. Rest does not accept that this is the case.
- (a) Rest has no involvement or influence in the employer/employee relationship;
 - (b) Rest has no means to establish any mechanism by which it can legally compel a **member or their former employer to ensure a particular member's** employment status (including part-time and casual employees' employment status) as recorded by Rest is constantly and accurately updated in real time; and
 - (c) as far as Rest is aware, no other superannuation fund trustee has established such a mechanism.
65. In this respect, the quality of information held by Rest is dependent on the steps taken by their members and former employers. Rest has, in any event, (as described in Mr de Bruyn's statement at [44] and at paragraph 12 above) implemented various steps to mitigate the risk that a member may have continued to have premiums deducted even though cover was not available to that member as they had ceased employment. In Rest's submission, other steps to mitigate (although not remove entirely) that risk are conceivable but the cost of developing and administering such systems must be met by members of the Fund. In Rest's submission the community would also likely expect Rest's efforts to mitigate this risk to be reasonable and proportionate, consistent with its obligation to perform its duties in the best interests of all members, including insured and uninsured members (who are not in fact covered by the group policy) and working and non-working members. The community would not expect, and Rest's insurance objectives are designed to prevent, such disproportionate cross-subsidisation of costs among different groups of members.

time. For the same reason, and for the reason that there may be seasonal changes in worker demand, employers too may not know whether such employees have ceased employment.

⁵⁹ Transcript P-6488, lines 44-46.

GIVING REASONS

Summary of evidence

66. Rest tendered evidence in the form of statements by Mr Howard about Rest's compliance with section 101(1)(c) of the SIS Act.⁶⁰ That section requires a trustee to include written reasons for a decision in relation to a complaint received by the trustee in relation to the proposed distribution of a death benefit.
67. In correspondence with ASIC, ASIC has alleged that Rest has not provided written reasons. In Mr Howard's statement of 7 September 2018, he said that Rest does give written reasons and denied any breach of section 101(1)(c) of the SIS Act except on two occasions.⁶¹
68. Subsequent to that statement being provided to the Commission, Rest identified that the template letter used by its claims team to provide written notice to complainants in relation to a death benefit had been changed and that from 15 March 2017 letters did not include express reference to reasons. This issue has been notified to ASIC and APRA and the full circumstances of the change are currently being investigated. Mr Howard provided a supplementary statement to the Commission on 20 September 2018 stating that from 15 March 2017 until 13 September 2018, through the use of that different template, Rest had engaged in a breach of section 101(1)(c) of the SIS Act by not having taken reasonable steps to ensure that there were at all times in force arrangements under which a complainant about a death benefit was given written reasons for a decision made by the trustee in relation to the complaint when the person is given notice of the decision.⁶²

Proposed findings

69. Counsel Assisting the Commission said that it is open to the Commissioner to find that Rest has engaged in misconduct by breaching:
- (a) sections 29E(1)(a) and 101(1)(c) of the SIS Act;⁶³ and
 - (b) sections 912A(1)(b) and (c) of the *Corporations Act 2001* (Cth).⁶⁴
70. Counsel Assisting also made a submission about why the alleged misconduct occurred saying that: 'Those breaches are also attributable to RESTs systems, specifically to its template letter for conveying decisions in response to complaints about the proposed payment of death benefits.'⁶⁵
71. Rest accepts that the failure to provide written reasons to complainants on 184 occasions between 15 March 2017 and 13 September 2018 through the use of the different template indicates that Rest did not take reasonable steps to ensure that there were at all times in force arrangements under which a complainant was given written reasons for a decision made

⁶⁰ Statements of Paul Bryan Howard dated 7 September 2018 and 20 September 2018 in response to Rubric 6-65.

⁶¹ Statement of Paul Bryan Howard dated 7 September 2018 in response to Rubric 6-65, [11].

⁶² Statement of Paul Bryan Howard dated 20 September 2018 in response to Rubric 6-65, [3].

⁶³ Transcript P-6488, lines 17-20.

⁶⁴ Transcript P-6488, lines 17-20.

⁶⁵ Transcript P-6488, lines 22-24.

by the trustee in relation to the complaint about a death benefit. This is a breach of section 101(1)(c) of the SIS Act. Rest submits the breach was neither intentional nor reckless.

72. Rest also accepts that a breach of section 101(1)(c) is a breach of its RSE⁶⁶ licence conditions that require, in section 29(1)(a) that it comply with RSE licensee law. RSE licensee law includes the provisions of the SIS Act.
73. With an abundance of caution Rest reported this breach to ASIC, given the timing requirements in the Corporations Act and its acknowledgment that it did breach sections 29E(1)(a) and section 101(1)(c) of the SIS Act. However, Rest does not accept that it has breached sections 912A(1)(b) or (c) of the Corporations Act and does not consider that the evidence allows the Commission to making a finding that it has.
74. Section 912A(1)(b) requires a financial services licensee to comply with the conditions on the Australian financial services licence. Rest submits that its AFS licence contains a number of conditions and that Counsel Assisting has not identified which licence condition or conditions he submits Rest has breached. Having considered Rest's licence conditions, Rest submits there is no obvious candidate and the submissions made by Counsel Assisting invite the Commission to speculate on this matter.
75. Section 912A(1)(c) requires a financial services licensee to comply with financial services laws. These are defined relevantly to include 'any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services'. While the SIS Act is a Commonwealth law, it is not clear that section 101(1)(c) or section 29E(1)(a) are provisions dealing with conduct relating to the provision of financial services. The financial services that Rest provides are limited to issuing interests in the Fund and providing general advice about the Fund. Rest is not aware of any case law considering the breadth of the definition of financial services laws nor any cases considering what 'conduct relating to the provision of financial services' means. In the absence of any case law and in the absence of any submissions on the point, Rest submits that it is not open to the Commission to find that Rest may have breached financial services laws because of a breach of section 101(1)(c) of the SIS Act which in turn lead to a breach of section 29E(1)(a).
76. Finally, Rest does not accept Counsel Assisting's submission that the breach is attributable to Rest's systems, insofar as this suggests some systemic shortcoming. Rest maintains that it has appropriate compliance systems and processes which work effectively. As stated above, in paragraphs 6 and 8, Rest has around 1.5 million insured members and in the past five years has paid over 20,800 claims. A failure to identify the use of the different template over the period between 15 March 2017 to 13 September 2018 does not provide evidence of a systemic problem with Rest's processes and systems, and there is no other evidence of any systemic issue.

⁶⁶ 'Registrable superannuation entity'.