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TRANSCRIPT OF PROCEEDINGS

O/N H-919878

THE HONOURABLE K. HAYNE AC QC, Commissioner

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

MELBOURNE

9.30 AM, WEDNESDAY, 15 AUGUST 2018

Continued from 14.8.18

DAY 47

**MS R. ORR QC appears with MR M. HODGE QC, MR A. DINELLI and MS E. DIAS
as Counsel Assisting with MR T. FARHALL**

MR S. FINCH SC appear with MS Z. HILLMAN for Colonial First State

MR C. SCERRI QC appears with MR P. MEAGHER for Peter Chun

MR J. BRERETON appears for Catholic Super

MR I. PIKE SC appears with DR M. COLLINS QC for ANZ

MR R. AUSTIN appears for SCS Super

THE COMMISSIONER: Yes, Mr Hodge.

MR HODGE: Commissioner, Ms Elkins is continuing her evidence.

5 THE COMMISSIONER: Ms Elkins, would you be good enough to come back into the witness box please.

10 <LINDA MAREE ELKINS, ON FORMER OATH [9.30 am]

<CROSS-EXAMINATION BY MR HODGE

15 THE COMMISSIONER: Thank you. Yes, Mr Hodge.

MR HODGE: Thank you, Commissioner.

20 Ms Elkins, I just wanted to tidy up a few things from yesterday. Your counsel have helpfully directed the Commission to a couple of documents that were referred to by you in evidence. So you will recall we were discussing yesterday an issue about a letter that was sent out, and you thought that there was an attachment to it that might have provided some sort of comparison. Could we bring up CBA.0001.0436.5478. If it helps the operator, I'm told it was – these would be documents that CBA have provided this morning – last night. So Ms Elkins, this is the covering letter, which is the same or similar to the template covering letter we were looking at yesterday?---Yes.

30 And if we then go to page .5480. Do you see this is the form that was attached to the letter for the relevant member, where all they needed to do was sign it and date it and they would have made their investment election and they wouldn't be transferred to MySuper?---Yes.

35 And then if we go to page .5481. This is then the two-page pamphlet that was attached called:

What will happen to your super?

40 ?---Yes.

And there's a table on the left-hand column of text which is:

The difference in insurance cover and premiums estimated on 11 August 2016.

45 ?---Yes.

Is that the table you were thinking of?---Yes.

And so that we can understand what this table means, it's showing that for that member they presently hold no insurance cover?---Yes.

5

And if they go over into the MySuper product, the default level of cover will be \$100,000 for death and \$100,000 for total and permanent disability?---Yes.

10 And if they had gone over, were they able to opt out of that default cover?---They would have been able to opt out of it, and they would have had to have opted out of default insurance at some time prior to being in that situation in the first place.

Okay. So they would have opted out at some earlier time under FirstChoice?---Probably, yes.

15

And I just want to be – make sure we've understood. There's – in terms of any comparison of the fees, if we go over to page .5482. So this is, on the second page in text, we're able to see that the member would be charged \$21.84 as a transaction cost for the transfer?---Yes.

20

Just on that, did that transaction cost arise because it was necessary to move them from one fund into another fund?---From the investment option into another. It's the – I – I'm pretty sure that's the buy/sell spread.

25 I'm just wondering if the member was being moved to a MySuper product within the fund?---I think that would still apply.

I see. There still might be a buy/sell spread?---That's my understanding. Yes.

30 And it then explains in text that the present estimate of annual fees and costs in FirstChoice is \$155?---Yes.

And the equivalent fees in cost would be \$128.79?---Yes.

35 So this member is estimated to pay less fees if the member moves over into the MySuper product?---Well, it depends. The investment options are also different. Yes. Yes. In – yes. Well, not if you add back in the insurance but yes.

They're estimated to pay less fees and costs?---Yes.

40

They would automatically go into an insurance premium but they could opt out in the way that they had presumably already done?---Yes, they could do that.

All right. I tender that document, Commissioner.

45

THE COMMISSIONER: What do I describe it as, Mr Hodge?

MR HODGE: Can we describe it, Commissioner, as letter to member dated 29 April 2016 in relation to transition from FirstChoice Personal Super to MySuper.

5 THE COMMISSIONER: Document with that description CBA.0001.0436.5478 is exhibit 5.214.

10 **EXHIBIT #5.214 LETTER TO MEMBER IN RELATION TO TRANSITION FROM FIRSTCHOICE PERSONAL SUPER TO MYSUPER DATED 29/04/2016 (CBA.0001.0436.5478)**

15 MR HODGE: And then you also gave some evidence yesterday, Ms Elkins, in relation to a cohort analysis that you thought had been performed?---Yes.

And can we bring up CBA.0001.0474.0647. So this is a template of a communication to an adviser. Is that right?---Yes.

20 And it's communicating to the adviser about the fact that unless the clients – certain clients make an investment direction or give an investment direction, they will be transferred over to the MySuper product?---Yes.

25 And we see, consistent with some of the documents that we looked at yesterday, in the second bullet point under the subject line:

Any impacted clients need to confirm their investment direction by 4 August to prevent their account being transferred.

30 ?---Yes.

And we can see from the first bullet point that the impacted clients are clients who are in FirstChoice Personal Super accounts with an accrued default amount who are to be transferred over to CES, which is the MySuper product on 11 August 2016?---Yes.

35 And we see under the heading Why is This Happening, again, consistent with the things that we looked add yesterday, this explanation about:

40 *...a change to legislation requires us to hold an investment direction from investors. Otherwise we must transfer their accrued default balances to a MySuper product*

?---Yes.

45 And the last sentence:

MySuper products do not pay commission.

?---Yes.

And then if we go over the page to .0648, the counsel for CBA have pointed out this section which is Insurance Campaign?---Yes.

5

And is this, what's explained here, what you were thinking of in relation to some cohort analysis?---Yes, I was – yesterday I was recalling that there was cohort analysis, yes.

10 And were you recalling that there was cohort analysis on the basis of what's written here under insurance - - -?---Insurance, yes.

I see. And so the – what's explained here is:

15 *We will be tailoring our communications to ensure that any clients who will lose or have decreased insurance cover if their account moves to Essential Super are aware of this impact and understand that they can opt out of the transfer.*

20 ?---Yes.

Continuing:

25 *These impacted investors will receive a different version of the 90 day letter.*

?---Yes.

30 So your recollection is for customers whose insurance was either going to decrease or they were going to have no insurance – it's not clear why you would have no insurance, but in any event let's assume you would have no insurance – that there would be a special letter for those identified customers?---I'm not remembering the specific details, just that there was cohort analysis.

35 All right. I tender that document, Commissioner.

THE COMMISSIONER: Template communication to advisers
CBA.0001.0474.0647 exhibit 5.215.

40 **EXHIBIT #5.215 TEMPLATE COMMUNICATION TO ADVISERS
(CBA.0001.0474.0647)**

45 MR HODGE: Thank you. Now, there's one other thing I wanted to return to from yesterday, Ms Elkins, and that is your explanation as to why the issue had arisen at the beginning of 2014, so that Colonial breached section 29WA. And could you just explain to the Commissioner again why it is that Colonial wasn't in a position on 1

January 2014 to pay new contributions for members of FirstChoice Personal Super into a MySuper product?---Again, I think I am remembering – or not remembering some of the detail around this but as I remember it, the issue was that these are people in – the members in FirstChoice Personal who were making contributions
5 were thought by us to be Choice members and, therefore, not identified as needing to be moved to a MySuper product.

I see. Now, do you recall whether it was thought that there were ADAs in the FirstChoice Personal Super product?---I think there were thought to be ADAs but
10 they – they wouldn't have been due to be transitioned – or it was before July 2017 that they – so the – the breach occurred because of the contributions.

Yes. If we just – perhaps if we put this in some sort of timeframe. Can we bring up CBA.0001.0499.0934. Can we bring up a different document. Can we bring up
15 CBA.0001.0499.0931. Ms Elkins, while we see if that document is able to be brought up, in your review of documents during the course of – there we go. So this is a chain of internal emails. I don't suggest that you are copied to these emails, but have you reviewed them in the course of preparing to give evidence?---I'm not sure I do recall this document. It – I may have. I've reviewed a lot of documents.

20 All right. If we go to page .0933. So, again, so that we can understand the timeline of what happens, this is an internal email within Colonial – I'm sorry, within CBA, and you can - - -?---Yes.

25 - - - see in the fourth paragraph it's dealing with FirstChoice Personal Super?---Yes.

And there's an explanation that an issue has been lodged in RiskInSite – RiskInSite is the - - -?---Yes.

30 - - - internal risk database that CBA uses?---Yes, that's right.

Is that right? And the RiskInSite issue is in relation to ADA calculation for FirstChoice Personal Super?---Yes.

35 And that it appears that there has been some delay in calculating and providing the information by 31 December?---Yes, that's what it says.

And, Commissioner, can I just indicate, I will tender now but we won't be able to bring up the entry from the RiskInSite database which is CBA.0001.0499.0934.

40 THE COMMISSIONER: CBA.0001.0499.0934, RiskInSite entry concerning ADA calculation - - -

MR HODGE: Yes, Commissioner.

45 THE COMMISSIONER: - - - exhibit 5.216.

**EXHIBIT #5.216 RISKINSITE ENTRY CONCERNING ADA
CALCULATION (CBA.0001.0499.0934)**

5 MR HODGE: And then you see it's also said in the email:

I believe there will be a project for the transitioning of clients by 2017.

?---Yes.

10

And is that consistent with your recollection, that at the end of 2017 – I'm sorry, at the end of 2013 the intention of Colonial was to move any ADAs within FirstChoice Personal Super over to the – to a MySuper product in 2017?---That – that would – well, they would just be part of the overall project for our ADAs.

15

But there is no more detail than that to assess - - -?---Not that – I can't – not that I know of.

20

All right. And then if we go to page .0932. You see in the middle of the page an email to Peter Chun?---Yes.

And I think he's giving evidence later today?---Yes.

25

And he reports to you?---Yes.

Is he responsible for product development?---He was at that time.

Okay. And it's explained to him that:

30

...risk has raised an issue in RiskInSite as we had not identified ADAs on statements for FirstChoice Personal Super.

?---Yes, that's what it says.

35

Do you recall whether there was an issue which was that Colonial had not, in fact, put in place adequate systems to be able to identify the ADAs within FirstChoice Personal Super?---I do recall there were issues around identifying ADA members, yes.

40

And if we go to page .0931, we see at the bottom of the page an email on 5 December 2013. And do you see the last two sentences:

We are working on identifying ADAs in FirstChoice Personal and this will probably be completed during first half 2014. We will then need to include the ADA in the June 2014 statements.

45

?---Yes.

Now, I tender that document, Commissioner.

THE COMMISSIONER: Emails of November and December 2013 concerning ADA, CBA.0001.0499.0931, exhibit 5.217.

5

**EXHIBIT #5.217 EMAILS OF NOVEMBER AND DECEMBER 2013
CONCERNING ADA (CBA.0001.0499.0931)**

10

MR HODGE: Can I suggest to you that if you hadn't identified the ADAs within FirstChoice Personal Super by 1 January 2014, there was no prospect that you would be able to comply with section 29WA for new contributions?---I think that follows.

15 And if we just step out why it follows: the assets allocated to a member are ADAs if there is there is no investment direction on file?---If – if they derived from a default scenario, yes.

20 Well, there's two ways that an investment can be an ADA; either they've – they're just part of the default contribution - - -?---Yes.

- - - but also if there is no investment direction?---Direction, yes.

25 And if there was no investment direction, then it would also follow that any new contributions would need to be paid into MySuper?---Yes.

30 And so if you haven't actually identified whether there are ADAs, you don't know whether or not there is an investment direction?---That – that's right, but I'm – I'm just worrying about remembering the right order in which things happen then in my evidence.

35 And the problem, can I suggest, then is that CBA or Colonial simply hadn't put in place adequate systems by 1 January 2014 to be able to comply with the law?---Well, yes.

40 And at least in the first half of 2014, or for most of the first half of 2014, the intention that Colonial and CBA had was that it would eventually move the ADAs towards the end of the transition period up to July 2017?---We hadn't had a – there wasn't a date. Our intention was to go sooner than the end date.

45 Sooner than 30 June 2017?---Well, we didn't have an intention to leave it to the last minute, no.

If we bring up the Colonial First State MySuper Transition Plan which is CBA.1004.0079.0014. And that is the transition plan dated 1 July 2014?---Yes.

So by this date, the issues in relation to the ongoing offences under section 29WA have been identified?---Yes.

5 And a decision has been made that where an offence occurs and Colonial has not been able to obtain an investment direction, that it will then need to move those members over to a MySuper product?---Yes.

10 But otherwise, it's not going to accelerate transitioning members over to MySuper?---You mean the bulk of the rest of the ADA?

Yes?---Well, yes, that's – yes.

15 And if we go to page .0024, we see the – what's described as the high level project timeline?---Yes.

And you can see that save for the 29WA affected members, the rest of the transfer strategy for other members is to begin transferring them in tranches from July 2016 through to June 2017?---Yes.

20 Now, in settling on this timeline, was some consideration given to whether it was in the members' best interests to be in the MySuper product rather than in the product they were already in?---I would say in – for this timeline, this is early in the – in the transitioning process. So I would say we were thinking about the – the systems build and how we would prioritise each tranche.

25 We understand that for ADAs in the FirstChoice Employer Super - - -?---Yes.

- - - the analysis of Colonial is that only nine per cent of those members would be worse off on moving over to MySuper?---Yes.

30 So the other 91 per cent would be either the same or better off moving over to MySuper?---The same, better off, or just different.

35 Or just different. Well, they must be either the same or better off if it's not worse?---When it comes to the investment selection it can be a matter of it's not better or worse off but it is different.

It's different?---Yes.

40 And I'm just trying to understand then, when you, as a trustee, are making a decision to approve the transitioning of members, as required under legislation, how do you set in place a timeline back in 2014 without first analysing will our members be better off the sooner they are moved over into MySuper?---Because we had to analyse a range of factors, including the system's capability, and the operational risk,
45 and what else we needed to do including getting a MySuper licence and building MySuper product and so on, so it was the holistic approach.

Well, you already would have a MySuper licence by 1 July - - -?---By then we did, yes.

- - - 2014?---Yes, that's right.

5

You had to have it in 2013?---Sorry, I meant all of the factors over time that we were looking at.

10 I see. So, again, I just want to make sure, in fairness to you, I've understood the points you're making. You had to obtain a MySuper licence first?---Yes.

But that had already been done?---Yes.

15

And then you had to do what?---Build the MySuper products.

But, again, that had already been done?---Yes.

20

And then you had to do what?---Prioritise through both the member analysis and the system's capability.

I'm not sure what that means, "prioritise through member analysis and system's capability"?---That we had to sequence, because of the systems and operational issues, that support the transfer.

25 I see. And so it was just going to take two and a half years to go through and do this sequencing analysis?---Yes.

Except in the case where you were committing offences and then you could get it done very quickly?---We, of course, were focused on resolving the breach.

30

I tender that transition plan, Commissioner.

THE COMMISSIONER: CPSL MySuper transition plan 1 July '14, CBA.0004.0079.0014, exhibit 5.218.

35

EXHIBIT #5.218 CPSL MYSUPER TRANSITION PLAN DATED 01/07/2014 (CBA.0004.0079.0014)

40

MR HODGE: And then you recall we were also looking yesterday at an email – now, this was an email in July of 2014 to APRA – saying that the board had made a decision not to agree to APRAs request to accelerate the transition of ADAs over to MySuper for FirstChoice Personal Super members?---Yes.

45

And I think you and I were both trying to find where it was that the board had made that decision, and we were looking at those minutes from April of 2014?---Yes.

It seems like maybe those weren't the right minutes. Can we bring up CBA.1004.0020.1272.

THE COMMISSIONER: What are your first four digits, Mr Hodge, 0014?

5

MR HODGE: I'm sorry, 1004.0020.1272. That might be my - - -

THE COMMISSIONER: 1004.

10 MR HODGE: Thank you, Commissioner. .0020.1272.

These are the minutes of a board meeting that occurred on 3 June 2014?---Yes.

And you can see you were present, Ms Elkins?---Yes.

15

And if we go over to page .1276. You see an entry which is 29W – sorry, 29WA Compensation Update?---Yes.

20 And you can see there's a paper that has been presented by Mr Wall and Ms McLeod to the board?---Yes.

And then if we go over the page to page .1278 – I'm sorry, .1277, you see these are the continuation of the entries of what the board has done or is minuted as having done. So the first thing is:

25

It is noted that it may not be in the best interest of members with ADAs to transfer them to Commonwealth Essential Superannuation now.

?---Yes.

30

And then the next point is:

Noted that robust processes are in place for the 60,000 members with ADAs.

35 ?---Yes.

And then the third point is:

Noted the principles and process in relation to the remediation of affected members.

40

?---Yes.

And then the fourth point is:

45

Subject to the incorporation of the requested changes, approve the changes to the trustee's MySuper transition plan giving effect to the proposed rectification process.

5 ?---Yes.

And it would seem then the limits of what happened in June of 2014 were this, that management came to the board and said, APRA has requested that you accelerate the transition for 60,000 members. Management didn't – I'm sorry, you agree that that's
10 what – that first thing happened?---Yes, that would - - -

You were aware – the trustee was aware that APRA had requested - - -?---Yes.

- - - the acceleration? And, in fact, to help you with that, go back to page 1276. You
15 see the second bullet point under the item:

Mr Wall and Ms McLeod addressed the board on the paper highlighting the proposed transition plan for accrued default amounts for affected members including the recent suggestion by APRA that the board consider bringing forward the transition for 60,000 members.
20

?---Yes.

Continuing :
25

This suggestion has significant business implications as the original transition date is 2016.

?---Yes.
30

So what has happened is management has come and said, first, APRA has requested that you bring forward the transition?---Yes.

Second, bringing forward the transition has significant business implications?---Yes.
35

Do you know what those business implications were?---Again, my recollection is that related to the operational risk issues, and the – the issues around the insurance – what the differences for some cohorts were.

That is, the differences hadn't been identified. Is that the problem at that stage?---I can't – the sequence of - - -
40

You're not sure?---Yes.

Third, management didn't present a proposed transition plan amended in the way suggested by APRA?---I don't – I'm not sure. I don't think so.
45

Fourth, the board then noted that it may be that it wasn't in members' – in some members' interests to transfer over to MySuper?---At that time. Not to bring it forward.

5 And fifth, therefore, said we will stick with management's plan?---Well, I think we would have – the board would have realised that this would be subject to ongoing consideration, not just, "We will stick to the plan".

10 And why would it not be in members' best interests to transfer them in 2014 but it would be in their best interests to transfer them in 2016?---I believe that referred to if there were operational risks and something went wrong, if there were problems with the transfer, or for those cohorts that had been identified that we wanted to contact to make sure they understood the insurance arrangements.

15 Was one of the issues of which you were aware that immediately moving these ADAs over to MySuper would affect the relationship between Colonial and its advisers?---I don't recall the board ever discussing that.

20 You don't recall the board ever discussing that?---No.

But was one of the issues of which you were aware, because you were an executive - - -?---Yes.

25 - - - that if there was an immediate movement or an immediate transfer from ADAs over to MySuper, that it would affect the relationship between Colonial and its advisers?---Yes.

30 That was something that you were aware of?---Well, I was aware that advisers were impacted by this, yes.

And that was a matter of concern to management?---It was – we were aware of it. I don't know that it follows it would affect our relationship with the advisers but we were aware that advisers were – were concerned, yes.

35 And that was why you were taking active steps for the benefit of advisers to obtain investment directions from members?---We were taking active steps to ensure the members had information to – to assist them with the choices they had.

40 All right. What I want to put to you is we've seen many communications now that the active steps that were being taken by Colonial were to obtain investment directions from the members?---Yes.

45 And the purpose of obtaining those investment directions, or a purpose, I'm sorry, for obtaining those investment directions was to benefit advisers?---That wasn't the purpose.

That was a purpose?---It's – it – well, yes.

Commissioner, I think I may have already tendered that document.

THE COMMISSIONER: The minutes of 3 June '14?

5 MR HODGE: Yes.

THE COMMISSIONER: I'm not conscious of it.

10 MR HODGE: I tender that document then, Commissioner.

THE COMMISSIONER: CBA.1004.0020.1272, minutes CFS Investments Limited
3 June '14, exhibit 5.219.

15 **EXHIBIT #5.219 MINUTES CFS INVESTMENTS LIMITED DATED
03/06/2014 (CBA.1004.0020.1272)**

20 MR HODGE: Ms Elkins, I want to move to another topic, which is cash returns.
You're aware that earlier in the year there were some newspaper articles – or at least
a newspaper article published in The Australian concerning cash returns?---Yes.

25 And that raised questions as to why the returns of certain bank-linked retail funds
were so low?---Yes.

And that prompted a fair bit of internal communication within Colonial and
CBA?---Yes.

30 And is it fair to say Colonial and CBA were unhappy with the article?---Yes.

And can we bring up CBA.0001.0421.2819. One of the points made in the article in
The Australian about CBA Super's cash returns was the difference in 12 month
return between various cash options?---Yes.

35 And as we understand it, the internal analysis of CBA is that the entire explanation
for the difference between the different Colonial products is fees?---Yes.

40 And so in the case of the Colonial First State cash option which forms part of the
FirstChoice pension, the 12 month return is only 1.19 per cent?---Yes.

And then for the Colonial First State wholesale cash option within the FirstChoice
Wholesale Pension, the 12 month return is 1.9 per cent?---Yes.

45 And for Group Super, the 12 month return is 2.01 per cent?---Yes.

And we can see there's a table here where there's a column in the middle which is
percentage-based fee?---Yes.

And this is setting out what the percentage-based fee is for each of those cash products?---Yes.

5 And the 1.14 per cent fee which is being charged on the cash option in FirstChoice Pension, that includes a trailing commission?---Yes.

And the trailing commission is 60 basis points?---Yes.

10 And is that, from the perspective of Colonial, the significant – well, the only explanation for the lower performance of Colonial First State cash within FirstChoice Pension that there’s a trailing commission?---Yes, I believe so.

15 And once this was identified, prompted by the newspaper article, did that then lead to the next obvious question, which is why are we paying a trailing commission on cash?---That – you know, as I said yesterday, all of our arrangements are under review.

I tender that document, Commissioner.

20 THE COMMISSIONER: Summary of page 1 article, The Australian, 11 June ’18 CBA.0001.0421.2819, exhibit 5.220.

25 **EXHIBIT #5.220 SUMMARY OF PAGE 1 ARTICLE, THE AUSTRALIAN DATED 11/06/2018 (CBA.0001.0421.2819)**

30 MR HODGE: And then I want to move to another topic – sorry, actually before we do that, when you said the question is under consideration, is it under consideration by Colonial First State as trustee, or is it under consideration by some other part of the bank?---In our corporate capacity it’s under consideration.

I see. And there’s something called the product governance forum?---Yes.

35 Are you on the product governance forum or part of the product governance forum?---I – it – I don’t think I am on the – on the forum. I think it reports to me.

It reports to you, did you say?---Yes, that would - - -

40 Is it – is it Mr Chun who runs the product governance forum?---No, not – not any – he would have in his previous role.

45 I see. I will just bring up for you a document which is CBA.0001.0450.0161. So this is the minutes of a meeting of the Colonial First State Product Governance Forum. The meeting is meeting number 1 on 21 June 2018?---Yes.

So the forum has just been established?---There was a previous forum. This – this has been re-engineered, if you like, or – yes.

5 Who is Kelly Power?---She is the head of product.

Does she report to you?---She does.

10 All right. So do all of these people listed here report either directly to you or indirectly to you?---No. They don't – so do you want me to go through it?

15 Yes, please?---Brendan French is the CBA customer advocate. Linda Fox is the CFO for Colonial. She does not report directly to me. Franca DiBlasio is the line 2 risk person responsible for Colonial and does not report to me. Todd Stephenson reports to me. He is in a customer and marketing role. Peter Chun is now in a – in a distribution role and reports to me. Kylie Turner reports to Kelly Power, is a product specialist. The same for Dave Yates. Geoff Ferris is in our customer operations team.

20 That's customer operations within Colonial First State?---Yes.

So - - -?---Reports to somebody who reports to me.

Sue Wallace is in the wrap business in Melbourne as a product specialist.

25 Again, within the business - - -?---Yes.

30 - - - that reports to you?---Same for Deb Taylor. Peter Labrie a product specialist. Lisa Rava legal and does not report to me. Dale Hawkins is in a Wealth management – I am not actually sure what the title is but does not report to me. And Marisa Wallace – I'm not sure.

And then there are some apologies, one of whom is you?---Is me, yes.

35 And then Scott Henricks?---Operations.

And Bronwyn Edel or Edel?---I think Bronwyn might be in risk. I'm not sure. Nick Clemence is risk.

40 In any event, this is a forum comprised of - - -?---People who do and people who don't.

- - - a number of people who report either directly or indirectly to you?---Yes. Correct.

45 And also some people from customers relations?---Yes, customer advocate.

I'm sorry?---From the customer advocate.

From the customer advocate. And also some people from risk?---Yes.

Which is?---And legal, yes.

5 And legal. And that's separate - - -?---Yes.

- - - and outside of what reports to you?---Yes.

10 And you see recommendation number 3 is in relation to contribution fees?---Yes.

And the decision sought seemingly from the forum is:

Endorse removing contribution fees for all members in a phased approach.

15 ?---Yes.

Can you just explain to the Commissioner what a contribution fee is for Colonial products?---There are some legacy products that used to have – that have a fee that is deducted when contributions come in.

20

So, for example, every new contribution, four or five per cent of it might be deducted?---Yes.

And paid to the adviser?---Yes, commission.

25

Paid as commission - - -?---Yes.

- - - to the adviser. And when it gets – I'm sorry, and it's deducted whether or not there's a linked adviser?---I don't know the answer to that. I think – I think only when – I'm not sure. I'm not sure, I'm sorry.

30

When the fee is ultimately paid over to an adviser - - -?---Yes.

- - - even if that adviser is external to the CBA Group is there still some part of the fee that flows to CBA or Colonial?---I – I'm sorry, I don't know the answer to that.

35

Okay. And so the Product Governance Forum is endorsing the recommendation to remove contribution fees?---Yes.

40 Has the board of Colonial First State in its capacity as trustee ever considered removing contribution fees?---I – I don't think a – that recommendation – the board is aware of these reviews that are going on. I don't – I'm not sure process-wise whether this has – I don't think so, because off the back of this recommendation we are investigating moving forward with this, and we are currently seeking legal
45 advice.

As to whether you can remove contribution fee?---Yes.

And then you see recommendation number 4, Management Fees. And the decision sought is:

Endorse reducing the management fees in NEF.

5

What is NEF?---Nil entry fee.

Continuing:

10

To entry fee.

?---That's right, yes.

Continuing:

15

And further reducing entry fee options to FirstChoice Personal.

?---Yes.

20

So could you just explain to the Commissioner what is the decision that's being considered here?---To look at reducing our fees.

To reduce the management fees for nil entry fee products. Is that right? To the – is it - - -?---That or both.

25

Is it perhaps this: that you have lower management fees for entry fee products than you do for nil entry fee products and you're considering reducing the management fees for nil entry fee products to the level of entry fee products?---And further reducing the entry fee. So I think we're looking at fee reductions, as I said yesterday, across the board.

30

I see. Then you see the third bullet point under that is:

Noted by Ms Power that CBAs strategic position in relation to trail commission will need to be determined including an understanding of the impact to aligned dealer groups.

35

?---Yes.

40

Now, you weren't there at that meeting, but do you know what that means?---I take that to mean what I've already been talking about, that it – it – this is part of the broader consideration of commissions that is underway.

45

It would seem to suggest that the decision as to whether or not to remove trail commissions depends upon a decision by CBA as to the strategic position it wants to take with respect to trail commissions?---I don't think it means it depends on it. I think it means all of these things are currently under consideration.

Is there any sensible possibility that Colonial First State, as trustee, would decide to remove trail commissions without its owner, CBA, having made a strategic decision to give up trail commissions?---I don't think I can answer that. I don't - - -

5 Well, you sit on the board of the trustee and you have sat on it for a number of years?---Yes.

You've given evidence in your statement as to consideration in relation to trail commission. So it seems as if you must be able to express a view, at least from your perspective – I appreciate one of the difficulties you perhaps face in answering this question is that you're wearing many hats, as we've already talked about?---Yes.

From your perspective - - -?---Yes.

15 - - - is there any sensible possibility that you, as a director of Colonial First State, in its capacity as trustee, would move in favour of removing trail commissions if that was not the agreed position of CBA?---That could definitely happen.

And is it something that has come up before now?---No.

20

Okay. But you think it's possible that maybe the trustee might do it?---Possible.

And this reference to CBAs strategic position in relation to trail commission will need to be determined. Is that your view, that CBAs strategic position in relation to trail commission will need to be determined?---I think my view is that CBA is considering that position.

25

Yes. You see, what this is stating, at least in the literal words on the page, is that CBAs strategic position in relation to trail commission will need to be determined, suggesting that what is going to happen with the products will depend upon what strategic position CBA wants to take?---I can see that that's what that says.

30

And is that your understanding of the reality of the situation?---I'm not sure. That's going to come out as we go through the work. I can't answer definitively one way or the other. No, I don't think – I don't think it is.

35

Colonial First State is, effectively, the product manufacturer?---Yes.

CBA has the related dealer groups?---Yes.

40

Is Colonial First State presently waiting to hear from CBA as to what CBAs position is as to trail commission?---No. We're aware that those – that they are considering that.

45 I see. You're aware – the product manufacturer is aware that that is being considered by CBA?---Yes.

And you're expecting at some stage that CBA will tell you what its position is?---I would expect they would, yes.

5 And then Colonial First State will do whatever follows from that position?---Well, I think there's things happening in parallel, a number of things happening in parallel.

What is happening in parallel within Colonial First State?---We're looking at these product reviews, we're seeking legal advice. There's broader work going on.

10 You're determining whether it's possible for you to simply terminate trail commission?---Yes.

All right. I tender that document, Commissioner.

15 THE COMMISSIONER: Minutes of CFS product governance forum 21 June '18, CBA.0001.0450.0161 exhibit 5.221.

20 **EXHIBIT #5.221 MINUTES OF CFS PRODUCT GOVERNANCE FORUM
DATED 21/06/2018 (CBA.0001.0450.0161)**

25 THE COMMISSIONER: Can I ask whether the date of that forum – how does that relate to CBAs announcement of intention to spin out certain parts of its business?---I don't think there's any relationship, Commissioner.

I'm just asking the date, the temporal relationship?---Sorry, the date - - -

30 I'm not asking other connections?---Yes, sorry. The date - - -

Yes?--- - - - I think CBA had made the – I couldn't be sure. The announcement is in my witness statements. I'm not sure whether it was before – 21 June.

35 MR HODGE: Commissioner, I'm helpfully told by our friends that it's about a month afterwards, that is, the product forum is occurring about a month after the announcement.

40 THE COMMISSIONER: A month after the announcement of the spinout. Yes. Thank you.

MR HODGE: Now, they're being told that's wrong so in a moment I will be told that's wrong.

45 THE COMMISSIONER: It will be a matter of public record and we can track it through ASX announcements. I just thought somebody might know. I should know and I don't.

MR HODGE: It's – in fact the forum occurs on 21 June and the public announcement is on 25 June 2018.

THE COMMISSIONER: Thank you.

5

MR HODGE: Ms Elkins, I want to move now to a topic concerning dealings with related parties?---Yes.

10 And we might start with investment management fees. I can show you a document if this will help to orient you. What we would like to understand is the process by which CBA goes about determining or negotiating its investment management fees with its related party?---Yes.

15 Can I bring up CBA.1004.0027.6811. So this is a minute of the meeting of the board of directors of Colonial First State on 24 February 2017?---Yes. I believe I was not on the board at that time. I see I am an attendee but I suspect I was not.

20 I see. You may not have attended for the entirety of the meeting?---I'm not sure. And I wasn't a board member.

Okay. Was the situation that you had been a board member, then - - -?---Before.

- - - you stepped off the board?---And came back on.

25 And then you became a director again?---Yes.

Are you able to help the Commission understand why it was that you stepped off and then stepped back on?---I was on secondment - - -

30 I see?--- - - - elsewhere in CBA.

If we go to page .6182. You will see there's an item at the top of the page which is about the operating model or fee review with Colonial First State Asset Management (Australia) Limited?---Yes.

35

And I think you may have given some evidence in your statement about the process of who manages what assets?---Yes, I think so.

40 And is the situation that Colonial First State, as trustee, has invested the money into a managed investment scheme of which Colonial First State is the responsible entity – that's the first step?---Yes.

45 And then those assets are then managed or invested by – I think there might be two companies, but one of them is Colonial First State Asset Management (Australia) Limited?---Yes.

And does it manage the assets by itself operating further managed investment schemes?---It can do.

Okay?---It depends.

5 And Colonial First State Asset Management (Australia) Limited, is that a wholly owned subsidiary of Colonial First State?---No, of the Commonwealth Bank.

Of the what, sorry?---Of Commonwealth Bank.

10 Okay. Does it have a separate management team?---Yes.

And so when a negotiation has to happen over the fees that will be paid by Colonial First State Investments Limited to Colonial First State Asset Management

15 - - -?---Yes.

- - - that occurs between whom?---The two business teams.

So they - - -?---So they would have their team, we would have our team.

20 And then you would negotiate over how much is going to be paid. Is that right?---Yes.

And it seems that there was some change so that distribution and marketing was being moved - - -?---Yes.

25 - - - over?---That's right.

Can you just explain what that change was?---I'm going to have to remember. It's - I think it's that simple, that distribution and marketing for the investment options used to reside in Colonial First State, and that was moved from Colonial First State across to - to GAM, across to that - their business, yes.

30

Can we put that document on one side of the screen and on the other side of the screen bring up CBA.1004.0027.6292. Thank you. So this is the - no, that is not the correct document. We will try a different doc ID. Can we try CBA.1004.0027.6292_E. Or CBA.1004.0027.6304_E. Thank you. So you see this is the paper to the board reporting on the investment management fee negotiations?---Yes.

35

40 Now, do I understand you to be saying at this time you would have been on secondment away from Colonial First State?---During this time I - I was. I had forgotten the start date of that but it was - yes, sorry, I have forgotten. I can look it up if you like.

45 That's all right?---But, yes, during this time, for most of this time, I was on secondment.

Okay. But you continued in some respect in your role as executive general manager?---Not at all.

You were out?---I was out.

5

Okay. But some people within the team that you had been responsible for and are now again responsible for - - -?---Yes.

- - - were negotiating with Colonial First State Asset Management - - -?---Yes.

10

- - - about the investment management fees that would be payable?---Yes.

And it would seem that the board doesn't need to sign off on an agreement. It's just – this is just reporting to the board for the board to note?---Right.

15

Is that your understanding?---Yes.

And you see there's a reference in 3.2.1 to engaging a third party consultant, Chant West, to provide an investment fee benchmarking report?---Yes.

20

And then if we go to page .6307. We see this is setting out what the proposed investment management and distribution fees are to be?---Yes.

What we're just trying to understand is if you look at those various CFSGAM funds, you see there's a column which is Current Investment Management Fee?---Yes.

25

Which is for investment only?---Yes.

And then Proposed Investment Management Fee which is to include distribution and marketing?---Yes.

30

And then there's a Chant West Benchmarking Range. Can you see that over on the right-hand side of the page?---Sorry, yes.

35

And it looks to us like, for every product except CFS Future Leaders and CFS Dev Co that at least what had been the investment management fee was outside of the benchmarking range?---Yes.

And depending what value you ascribe to the marketing and distribution, it might now be moving within the benchmark range although it might still be outside the benchmarking range?---Yes.

40

And what we're trying to understand is does this suggest anything about the adequacy of – I'm sorry, and just so that you are – to be fair to you, can I just also point out on the next page, which is .6308, you will see there's the double asterisk:

45

Includes embedded cost of distribution and marketing estimated to be approximately .1 per cent to .15 per cent.

?---Yes.

5

So what we're just trying to understand is if the investment management fees before this change to include distribution and marketing were all outside of the benchmark range, does that suggest anything to you about the adequacy of supposedly arm's length negotiations between two teams within CBA?---Well, I think it suggests that the -- this negotiation needed to happen to -- I mean, this negotiation is in -- relating to incumbent positions. These are not new positions, these were the need to revise the incumbent places that they had. So, yes, it shows that it was necessary to do the negotiation, yes.

15 I see. I tender that document, Commissioner.

THE COMMISSIONER: And the - - -

MR HODGE: Sorry, and the minutes.

20

THE COMMISSIONER: The minutes of the board CFS investments, 24 February '17, CBA.1004.0027.6811, exhibit 5.222.

25 **EXHIBIT #5.222 MINUTES OF THE BOARD CFS INVESTMENTS, 24 FEBRUARY '17 (CBA.1004.0027.6811)**

THE COMMISSIONER: The board paper, 24 February '17, concerning investment management fee negotiations, CBA.1004.0027.6304_E exhibit 5.223.

30

35 **EXHIBIT #5.223 BOARD PAPER, 24 FEBRUARY '17, CONCERNING INVESTMENT MANAGEMENT FEE NEGOTIATIONS (CBA.1004.0027.6304_E)**

MR HODGE: Now, then, the other related party dealing I wanted to ask you about was insurance?---Yes.

40

The Colonial First State funds use CommInsure as the provider of group insurance?---Yes.

45 And can we bring up CBA.0001.0430.0831. This is an insurance benchmarking review conducted by Rice Warner for Colonial First State?---Yes.

Is there a negotiation that occurs between some team within Colonial First State and a team within CommInsure over the insurance premiums?---So in line with our investment insurance governance framework there's an annual review of the insurer.

5 And how does the annual review work? How does it affect the premiums?---So – well, there's two ways premiums may get negotiated. It could be part of the annual review but it's also an expectation of the relevant product manager in terms of maintaining the insurance product. So it doesn't have to be at this annual review.

10 The annual review, does that involve CommInsure saying what premiums it proposes to charge?---The annual review is the holistic review of the insurer. So there will be a date by which in our agreements that premiums are due to be negotiated. This review is part of, you know, our prudential standards to review our insurer annually. And this – this benchmarking will serve two purposes. One is as part of the annual
15 review, the other is it arms the product managers with information for their ongoing relationship with the insurer.

Now, in terms of the breakdown of members of the CES product, which is what this benchmarking review concerns, is – that is Commonwealth Essential Super – are
20 most members blue collar workers or white collar workers?---I would have to – I don't know off the top of my head.

Okay. If we go to page .0836 of the review. See there's a section which is Pricing?---Yes.

25 And there's a heading for Death Only?---Yes.

And it says:

30 *CES –*

So that's Commonwealth Essential Super:

35 *...is competitive against the peer group for blue collar occupations and smokers for some ages.*

And then there's in brackets:

40 *Given CES premium rates don't use occupation type and smoker status as rating factors.*

?---Yes.

45 So does that mean that CommInsure, unlike other insurers, isn't charging a differentiated premium depending upon the – whether or not the worker is blue collar or white collar, and isn't charging a differentiated premium depending upon whether

the worker is a smoker or not?---I think that's right. Actually, that – I would – yes. I think that's right, yes.

And then you will see the next point is:

5

CES premium rates are uncompetitive for white collar workers compared to the median price of the peer group, especially for females aged between 30 and 50 next birthday.

10 ?---Yes.

And then you see that's just for death only. But then there's also some commentary in relation to death and TPD cover?---Yes.

15 And there's one respect, it would seem, in which CES is cheaper than the median price, which is blue collar workers aged under 35?---Yes.

And it said:

20 *Rates for white collar workers are generally uncompetitive.*

?---Yes.

Continuing:

25

But especially for ages over 35.

?---Yes.

30 Continuing:

And white collar occupations and smokers are disadvantaged by CES having no smoker or occupation rating factors applied.

35 ?---Yes.

The conclusion, though, perhaps of comfort to the board, is our key – you can see this at the bottom of the page:

40 *Our key conclusions - - -*

THE COMMISSIONER: Take the pop-up down, please, and just have the page.

MR HODGE: Continuing:

45

Our key conclusions from this analysis is that CES has a package of death, TPD and income protection features that is competitive with the peer group of products.

5 ?---Yes.

That seems to be saying it's competitive in terms of features. It doesn't suggest it's competitive in terms of pricing?---I don't know if that's what that means.

10 And this is a report that gets taken to the board?---Yes, I believe this did go to the board, yes.

And the board gets one of these every year. Is that right?---I don't know if they do the benchmarking every year. Yes, I'm not sure how often they do the
15 benchmarking.

If there is a benchmarking, then it goes to the board?---It would, yes.

And each year the board has continued with CommInsure?---Yes.
20

And if we go to page .0841. So this is a table setting out the competitiveness of CES for death only cover?---Yes.

And it's compared to a peer group of eight products?---Yes.
25

So the worse ranking that you can get is nine?---Yes.

And you see, if you look at that table, that there is really – there are only a few occasions in respect of which CommInsure does better than five?---Yes.
30

And only one occasion in respect of which it's the least expensive premium, which is a female smoker, blue collar, aged 20 to 25?---Yes.

But you see, perhaps of more significance, that there's an analysis of the results which shows that CESs non-smoker rates are on average 34 per cent more expensive than the median of the peer group?---Yes.
35

White collar non-smoker rates are 61 per cent more expensive than the median of the peer group?---Yes.
40

Blue collar non-smoker rates are 19 per cent more expensive than the median?---Yes.

And for blue collar workers, CES is ranked cheaper compared to the peer group for some ages. You see that in the fourth bullet point?---Yes.
45

But across gender, smoker status and age, blue collar CES pricing is, on average, 11 per cent more expensive than the median price?---Yes.

And then if we go over the page to .0842, now we see the same type of table but this time for death and TPD cover?---Yes.

5 Again, though, for a \$250,000 sum insured?---Yes.

And we can see that the performance of CES is still very poor for white collar workers. Do you agree? It's very poor for white collar workers?---Yes.

10 And then it does – it's either in the middle or up to three or four and on a couple of occasion – on a handful of occasions, two for blue collar workers?---Yes.

15 But if we then go to page .0860, this is a table that shows a different type of breakdown. This time not based on the ranking amongst the eight competitors, but how the premiums compare percentage-wise to the median?---Yes.

And so that you can see that, to take the most extreme example, for a female non-smoker white collar worker aged 41 to 45, the premium is 132 per cent higher than the median?---Yes.

20 And can I – and I should note the best – the best comparison to the median is for a female blue collar smoker aged 20 to 25 when the premium will be 29 per cent under the median?---Yes.

25 And what I want to suggest to you is looked at on the whole, when CommInsure does worse than the median, it does much worse than the median?---Yes.

And when CommInsure does better than the median, it does only a little bit better than the median?---Yes.

30 And we see the same type of pattern play out, if we go to page .0861. And we can see again it does in certain respects, and in one respect particularly, for a female blue collar smoker aged 20 to 25, do better than the median?---Yes.

35 But certainly for white collar workers, it does much worse than the median?---Yes.

And I tender that document, Commissioner.

40 THE COMMISSIONER: Rice Warner insurance benchmarking review, 11 April '17, CBA.0001.0430.0831, exhibit 5.224.

**EXHIBIT #5.224 RICE WARNER INSURANCE BENCHMARKING
REVIEW DATED 11/04/2017 (CBA.0001.0430.0831)**

45 MR HODGE: Do you think there are any conclusions that the Commission can draw, based on that report, as to the adequacy of the supposedly arm's length

- negotiations between Colonial First State and CommInsure?---Not necessarily. I think the – the role of the product manager is to do the benchmarking, do the annual reviews. That’s overseen by the office of the trustee as well. Then to come to a conclusion as to whether we’re better off – again, this is a position of incumbency.
- 5 The question becomes are we better off to negotiate with the incumbent insurer where we see these weaknesses or are we better off to change insurer. And on balance the decision that has been made is to negotiate with the incumbent insurer but this benchmarking would inform that negotiation.
- 10 Can you ever recall any serious discussion at board level about the possibility that Colonial would cease to use CommInsure as its insurer?---Yes. That has been discussed.
- And when has it been discussed?---On and off on different occasions it has been
- 15 discussed.
- Recently?---I think it was discussed – again, it was a discussion. I know it’s not minuted – in relation to, as I said – because this was a decision are we continuing with the incumbent, what’s the alternatives, and, of course, the sale to AIL had also
- 20 occurred and that was also informing our view to continue.
- We can take that down. We’re going to move to another document, Commissioner. . Now, Ms Elkins, I think you told us this yesterday but AIL are you also a director of that company?---Yes.
- 25 And AIL has, in the last couple of months, given a notification of breach to ASIC?---Yes.
- And that notification of breach concerns AIL continuing to charge adviser service
- 30 fees to members who had died?---Yes.
- And I’m just trying to find the breach. I think, actually, to be fair to you, you – AIL gave a notification to both ASIC and to APRA?---Yes.
- 35 And you’ve exhibited those notifications to your statement?---Yes.
- And was the way in which the – I withdraw that. I will put it a different way. As you know there was an issue that arose during round 2 of the Royal Commission which was – or the second round of hearings of the Royal Commission concerning
- 40 fees being adviser service fees being charged to people who had passed away?---Yes.
- And as a result of that, did CBA and Colonial put in place a program of work to check whether that was happening in other areas?---To check whether it was happening at all, yes.
- 45

The issue that had been identified in round 2 was in relation to certain individual advisers charging fees to dead members – I’m sorry, dead clients?---The – yes, it was adviser service fees that were identified in round 2, yes.

5 The issue that was identified or has since been identified by AIL is that where it had been notified that a member had died, it had continued to charge adviser service fees?---That’s right.

And the fact that it was doing so had first been discovered back in 2015?---Yes.

10

And identified as a – an issue that required an update to the product disclosure in 2015?---Yes.

15 That is, what AIL thought that it should do is, in the product disclosure statement, say, “We will continue to charge adviser service fees after the member has died.”?---Yes.

But it hadn’t done so?---Correct.

20 And so it formed the view when it has reviewed the issue this year – and, in fact, it had formed the view, I think to be fair, back in 2015 - - -?---Yes.

25 - - - 2016, that if it wasn’t telling members that when they died it was going to continue to charge them adviser service fees, that it shouldn’t have been doing so?---In – that was in 2015. On this review, the conclusion we made was that the practice should cease and should never have occurred.

30 I see. I understand. You’re saying in 2015 and 2016 the view wasn’t that it shouldn’t be done, the view was that it needed to be notified to the members. But in 2018 the view is it shouldn’t be done?---That’s – that’s right.

And - - -?---And our view is that in 2015, the view should have been that it shouldn’t be done.

35 It should have been realised in 2015?---That’s right, yes.

And do you know why it wasn’t realised in 2015?---No. And we do have – we have asked Deloitte to assist us to investigate that so we can understand it.

40 Was it only AIL that has this problem?---Yes.

45 So it has been looked at within Colonial and the problem hasn’t been identified in Colonial?---That – that’s right. There’s ongoing work going. We’re reviewing all of our processes in relation to deceased estates to see if there are any other issues at all, but certainly this issue we cease the fees upon notification of death in – in CFSIL.

I want to show you a document you may or may not have seen before. Can we bring up CBA.0001.0435.1742. This is an internal presentation from Colonial First State on adviser service fees and payments?---Yes.

5 You see it's dated 2 November 2016?---Yes.

Is this a presentation you had seen before?---No.

Before preparing to give evidence?---No.

10

Did you review it in the course of preparing to give evidence?---I think I did.

Okay. Are you able to help us as to who the presentation would have been directed to?---No.

15

Can we go to page .1743. So this is explaining – seemingly explaining the then approach of Colonial First State to adviser service fees. Could I just ask you, do you see the reference to LSF, what does LSF stand for?---Licensee service fee. It's a form of – of ASF.

20

Okay. So:

All entities regard adviser service fees and licensee service fees as an expense requested by the member, not a fee for the purposes of our services or obligations.

25

Do you see that first point?---I see that. I'm not sure I know what that means.

And the last point is:

30

We do not require (or intend to require) licensees to provide positive confirmation of ongoing services.

?---Well, that's just incorrect.

35

Is that a position that has changed?---There was always the advisers who work with us, sign up to our dealer terms of trade and are required to notify us of any failure to provide ongoing service.

40

They have to notify you if they fail to provide service?---They have to notify us if they fail to provide, and since then we are in the process of implementing further testing that we do as well, yes.

45 And, again, you said this statement is just wrong. This seems to be saying you don't require licensees to provide positive - - -?---I guess you're right. It says positive, yes.

So that is correct?---That's correct, although not necessarily because any case where we investigate we would require them to provide that positive attestation.

5 And then if we go to page .1744. So this is outlining the different obligations of the entities, and we can see the RSE is Colonial First State Investments Limited and AIL?---Yes.

And it's explained at the bottom:

10 *The request for these entities to support these fee arrangements are considered an expense of each respective entity.*

?---Yes.

15 So as we understand it, the approach of Colonial First State is that the adviser service fee is an expense incurred by Colonial First State as trustee and, therefore, something that it can deduct from the member's account, or you're not sure?---Yes, I'm not sure technically of what the word "expense" means there. The fees are agreed between the adviser and the member, and then the member authorises us to deduct the fee.

20

And then if we go to page .1747. This is explaining what the existing fees and caps are. Can you see that there's – the first item which is:

Initial advice fee – up to 4.1 per cent.

25

?---Yes.

That is different, as we understand it, from a contribution fee?---Yes.

30 Okay. The contribution fee is a commission - - -?---Yes.

- - - that would keep being paid for every contribution?---Yes.

And then if we go to page .1748?---By the way, there's - - -

35

Sorry?---No, it doesn't matter. There's inaccuracies in that table but it doesn't matter.

40 No, let's go back to 1747. What were the inaccuracies?---The ACF and LSFs – no limits. There are limits.

There's a two per cent limit now; is that right?---Yes.

45 Would there have been a two per cent limit as at November 2016?---I guess probably not because they did this presentation.

If we go to page .1748. We see this is a list of what the existing controls are?---Yes.

And there's a reference here to monthly adviser fee monitoring?---Yes.

Are you able to explain to the Commissioner what that is?---So that is – and see the next one, the Spotfire monitoring, that is first of all that we run a test for the cap that we just talked about, the two per cent cap, so looking for any fees that are over that, which triggers an investigation. And then the Spotfire monitoring, as I understand it – and it is something that we're – is under review and being enhanced – is where we're looking for certain triggers that would cause us to investigate – to seek the positive attestation about the fee.

All right. And then if we go over the page to .1749. This is identifying known gaps?---Yes.

And the first one is fees are not removed retrospectively if the member complains?---Yes, I believe that has been rectified.

So now if a member complains about their adviser service fees, they will be refunded back the adviser service fees?---I think that's right. Sorry, I – I probably should – I'm not certain, but I think so, yes.

And then you see:

Current practice – but a consideration given the recent ASIC report.

And the first item is:

No positive confirmation of continued services.

?---Yes, so this is talking about – again, we have that program of work underway, to look at, given the ASIC fee for no service report, what more we should be doing to seek assurance that the services are being provided.

And this would be, for example, requiring the adviser to provide an attestation that they provided services?---That's what we're working through, is what form that's going to take. Yes, it could be changing from the reporting to attestation. It could – that's right. We haven't landed – we're seeking improvements where we can make them, like enhancing the Spotfire early warning and some other measures, and looking at what overall can we do.

Presumably it will affect your relationship with your advisers if you start requiring them to provide attestations?---So be it. Yes, it will. To be honest, the advisers – we've had advisers who have been very helpful. They obviously also are aware of the ASIC report and advisers are working with us to look at how that can be provided.

And you see then the next point is:

Adviser service fees post death of the member. We currently continue to pay, but are looking to put controls in place after, say, three months.

- 5 ?---That is in – in reference to AIL. That was not occurring in CFSIL.
It was only occurring in AIL?---Yes.
- And was a control ever put in place for the fees to stop after three months?---No.
There – there are – there was a – we can see that there was – that this was – you
10 know there was an attempt, if you like, on some business rules around this but I don't believe they were effective.
- I tender that document, Commissioner.
- 15 THE COMMISSIONER: CFS adviser service fees and payments presentation, 2 November '16, CBA.0001.0435.1742, exhibit 5.225.

20 **EXHIBIT #5.225 CFS ADVISER SERVICE FEES AND PAYMENTS
PRESENTATION DATED 02/11/2016 (CBA.0001.0435.1742)**

- MR HODGE: Now, then, if a member dies, they may have trailing commission being paid in respect of their investments to an adviser?---Yes.
25 And - - -?---Sorry, I had to just think that through. Yes.
- That's all right. And as we understand it, because of FOFA, if the – if there's no reversionary beneficiary, then the grandfathered commission will have to
30 cease?---Yes.
- But if the member has named a reversionary beneficiary, then - - -?---Prior to July '13.
- 35 I'm sorry, prior to July 2013?---If the reversionary beneficiary was nominated prior - - -
To July 2013 or 2014, it would be?---I am not sure.
- 40 You're not sure?---Yes. One or the other.
- Prior to some day?---Yes.
- 45 Then the grandfathered commission can and does continue. Is that right?---Yes.

And, again, has Colonial First State given any consideration to specifically stopping commission being paid out of the assets of a deceased member?---It – it would be in the overall review that I’ve already spoken to you about.

5 Now, I want to move to one last topic, which is the enforceable undertaking that was given recently to ASIC in relation to the selling of CES in the branches?---Yes.

Now, Mr Chun, who’s the next witness, is going to give evidence, as we understand it, in relation to the selling of CES in the branches?---Yes.

10

But you were copied on a number of emails - - -?---Yes, I was.

- - - as the enforceable undertaking was negotiated?---Yes, I was.

15 And I just want to ask you - - -?---Yes.

- - - about some of those documents?---Yes.

20 So as we understand it – and I will just outline this very briefly to make sure we agree about this in summary. In about 2012, Colonial First State and CBA started developing a program whereby Colonial First State would establish a super fund and CBA would sell that super fund in its branches?---Yes.

25 And that super fund was CES?---Yes.

And then by the end of 2014, it had become apparent – or at least become apparent to ASIC but probably also to CBA and Colonial – that there were issues about the way in which that was being sold in branches?---Yes.

30 And in particular, the linking of a financial health check to the sale of the super product?---In 2014 I don’t think we knew that that was the issue.

I see. Just that there were - - -?---I’m not even sure the financial health check was in the branch at that time.

35

I see. At in any event, at some point it became apparent - - -?---But ASIC were investigating, yes.

40 - - - that there was an issue which was that this looked a lot like personal financial advice?---That was the issue that emerged, yes.

And towards the end of 2016 or early 2017, ASIC had suggested to Colonial First State and to CBA that it was going to commence a proceeding in a court?---Yes.

45 And Colonial First State and CBAs position was that rather than commencing a proceeding in a court, ASIC should – I don’t think I’m being unfair in saying this – put out a media release?---Yes.

And ultimately, you met somewhere in the middle. ASIC no doubt put out a media release but also you entered into an enforceable undertaking?---Yes. Well, CBA did, so I do want to be careful not to represent CBAs view rather than my own view of what happened.

5

And I just want to pick up the process or some aspects of the process by which the enforceable undertaking came about. So can we bring up CBA.0001.0478.0058. So this is an internal email within CBA sent by Larissa Shafir to a number of people including Mr Comyn, Ms Spring, Mr Cohen, you, Ms Larnach. Do you see that?---Yes, I actually can't read that very well.

10

Well, if we look at the attachment to it and we go to page .0064?---I can't – if it matters, I can't read - - -

15 That's okay. I think we can take the - - -?---Okay.

We will be able to look at the document afterwards. Apparently that's in a different document. It's CBA.0001.0478.0064. So this is the letter from ASIC to Ms Shafir. And it's – if we go to page .0065. We see this is ASIC making a proposal, which is for the matter to be resolved on the basis of an enforceable undertaking?---Yes.

20

And you will see in the preceding paragraph it says:

25 *ASIC remains open to resolving the matter outside of court.*

?---Yes.

And, again, just so we can make sure that we've understood the context of this, ASIC has previously said it wants to or it's going to commence a court proceeding?---I'm not sure about that, sorry, Mr Hodge.

30

It at least raised the possibility of a court proceeding?---Yes. Yes.

35 Okay. And now it said it's prepared to resolve the matter on the basis of an enforceable undertaking?---Yes.

Okay. I tender the email together with its attachment, Commissioner.

40 THE COMMISSIONER: Emails concerning ASIC letter about Essential Super, Shafir, Comyn and others, together with attached letter, ASIC to Shafir, CBA 27 July '17, CBA.0001.0478.0064 is the attachment, the email is CBA.0001.0478.0058 together will be exhibit 5.226.

45

EXHIBIT #5.226 EMAILS CONCERNING ASIC LETTER ABOUT ESSENTIAL SUPER, SHAFIR, COMYN AND OTHERS, TOGETHER WITH

**ATTACHED LETTER, ASIC TO SHAFIR, CBA DATED 27/07/2017
(CBA.0001.0478.0058 & CBA.0001.0478.0064)**

5 MR HODGE: Then if we bring up CBA.0001.0479.1381. Maybe if we blow up the top so that we can - - -?---Yes.

- - - see first who the email is to. You see this is an email from Ms Shafir to a number of people including Mr Comyn, Ms Spring, you, Mr Sullivan, Mr Cohen, Ms
10 Larnach?---Yes.

If we take that down, and then blow up – there’s a section about a quarter of the way down the page which begins:

15 *I understand that the preferred approach is –*

So if we just look at that paragraph plus the next paragraph. So what is explained is that the preferred approach - - -?---Yes.

20 - - - of CBA is to:

Resolve the matter without an EU if possible.

?---Yes.
25

And:

Subject to a media release.

30 ?---Yes.

And:

35 *Irrespective of whether the resolution is by way of EU or media release only, negotiate the terms of the undertaking so that it permits RBS/Wealth Management to move forward with Project Everest?---Yes*

40 Are you able to explain to the Commissioner what Project Everest is?---So Project Everest, amongst other things but the bit that was relevant to Essential Super was to look at how we could respond to the concerns that ASIC had raised and ensure that we were, if we put Essential Super back into the branches, that it was under a general advice model without the risk of straying into the personal advice territory. So it was how do we do this in line with what ASIC requires.

45 And then if we blow up the next paragraph. We see the steps that are proposed are that:

Matt Comyn will call Peter Kell in the next few days to confirm willingness to engage on a "no EU" basis.

5 ?---Yes, and could I just remind you that Matt would have been in his role as group executive of retail bank at that time, not the CEO.

Yes, he wasn't the CEO at that stage?---No, he wasn't.

10 This wasn't happening at CEO level?---That's correct.

It was happening below the CEO level?---Yes.

And:

15 *If Peter Kell indicates willingness to entertain the no EU approach then ring Tim Mullaly later this week to request a meeting to agree on way forward.*

?---Yes.

20 Continuing:

If not, write to ASIC on 18 August accepting the EU in principle but seeking to discuss specific terms of the undertaking.

25 ?---Yes.

And then:

In either case, to seek clarification.

30

?---Yes.

If we take that down and then blow up, there is a heading which is No EU Position. I just want to blow up the sentence under that. This is the view of Ms Shafir:

35

On balance it is unlikely that ASIC will want to resolve this matter other than by way of an EU.

?---Yes.

40

And just so we can understand how a bank like CBA goes about dealing or negotiating with ASIC, this email suggests, first, that CBA knows by this stage that ASIC is unlikely to be willing to resolve it other than on the basis of an EU?---Yes.

45 Second, ASIC has already sent a letter with respect to which this email is dealing, proposing an EU?---Yes.

Third, CBA is, in fact, willing to resolve this by entering into an EU?---Yes.

5 But fourth, rather than moving forward with that, what's being suggested is Mr Comyn will call up Mr Kell and see whether maybe you can still get a deal done on the basis of a media release rather than an EU?---I don't think that does categorise what was happening. We were doing both in parallel. And, again, I can't represent what the CBA representatives were thinking. From my perspective, the reason for that was that this issue of understanding the definition of general advice versus personal advice is an extremely difficult industry-wide issue. And, you know, we felt that we had acted as best we could to get it right, although accepting that we hadn't got it right, and that getting proper resolution of these definitions for the industry was important, including the fact that BT had gone to court on the same matter.

15 The letter that had been sent suggesting the EU had been signed by Mr Mullaly?---Sorry, I don't know. Yes.

I will – let's go back to that. That's CBA.0001.0478.0064. I'm sorry, Commissioner, I tender that email.

20 THE COMMISSIONER: Email Shafir to Comyn and others, 8 August 17 CBA.0001.0479.1381 is exhibit 5.227.

25 **EXHIBIT #5.227 EMAIL SHAFIR TO COMYN AND OTHERS DATED 08/08/2017 (CBA.0001.0479.1381)**

THE COMMISSIONER: You're now going to CBA.0001.0478.0064.

30 MR HODGE: Thank you, Commissioner. And if we go to page 3 of that document. So Mr Mullaly, who's the senior executive leader for financial services enforcement has sent this letter offering the EU. Are you able to – you may not be able to explain it but able to, as best you can, explain the strategy of trying to call the Deputy Chair about this issue to see whether he will override what Mr Mullaly has done?---I don't think it was – well, again, for me, that wasn't how that was characterised. The discussions that I was involved with about – around why it was important to meet with Peter Kell was to raise with him our concerns that the industry would still have no clarity on what the definitions of general advice versus personal advice were, and that's what we were advocating for, for more guidance or more help or more assistance or to start the, you know, advocacy kind of approach to the industry needing to understand these definitions.

45 THE COMMISSIONER: Well, the premise for that is, is it, that a product like Essential Super could be sold by customer relations staff in the branch. Is that right?---Yes.

And could be sold without those members of staff giving any personal advice to the customer?---That's what would be required, yes.

5 It just is far from apparent to me how that could possibly occur?---Yes, that – that's the issue, Commissioner.

MR HODGE: Now, Mr Comyn did speak to Mr Kell or you're not sure?---I think so. I'm not sure but I think so.

10 If we bring up CBA.0002.1610.0161. Can we try CBA.0002.1610.0161. This is the response, you will see, from Mr Comyn on 10 August saying:

I've left a voicemail for Peter Kell. Will revert with response.

15 ?---Yes.

And we know, in fact, that the process ended up with an enforceable undertaking?---Yes.

20 So we can assume Mr Kell didn't go down the – go with the idea of a media release?---I'm not even sure if that was what Matt discussed with him.

All right. I tender that document, Commissioner.

25 THE COMMISSIONER: Emails of 8 and 10 August '17 concerning ASIC re Essential Super, CBA.0002.1610.0161, exhibit 5.228.

30 **EXHIBIT #5.228 EMAILS OF 8 AND 10 AUGUST '17 CONCERNING ASIC RE ESSENTIAL SUPER (CBA.0002.1610.0161)**

MR HODGE: And then one of the ongoing matters of discussion was what was going on with ANZ?---I don't think that was discussed very often. It – we were aware that ANZ were – ANZ had similarly withdrawn its similar product from – from market. So we were aware of that.

35 Are you – you may or may not be aware of this. Can we bring up CBA.0002.2533.3421. This is a continuing on of the chain of emails but it doesn't seem to be one that you're copied into?---Yes, no, I am on this.

Sorry, yes, you are on the top one?---Yes.

45 So you see - - -?---But not on the other one, no.

Yes. So there's an email – an internal email which says:

5 *Do we have an update on ANZs current position? You may recall they were willing to accept the EU but only on the basis that they would not admit that personal advice had been provided as they were concerned that this admission would expose them to ongoing liability. It would be useful to know whether they are still holding to this position.*

Do you see that in the middle of the page?---I see that.

10 And then there's then an email from Ms Shafir to you and to two others saying:

Do you have any further intel on ANZ?

?---Yes.

15 Do you know why Ms Shafir would think you had intel on ANZ?---Because I obviously am the superannuation leader in CBA. So if ANZ had made announcements or were – had withdrawn the product, whatever was happening with ANZ, I was the one likely to know.

20 If they had made an announcement?---Plus through industry – yes, or through industry associations. Obviously I am likely to know people at ANZ, yes.

25 Was there some communication happening between ANZ and CBA as to what positions they were each respectively taking with ASIC?---There was certainly a lot of discussion around the issues I was talking about before, around general advice and what the problem was, and we were both aware that we were – we were negotiating enforceable undertakings.

30 Discussions between ANZ and CBA?---Not that I'm aware of, in – I mean, there was discussions – for example, at the FSC might be a place where everyone was talking about the problem to do with general advice and personal advice, and BT going to court and, you know, I was looking at enforceable undertakings, we were withdrawing the product from market and so on.

35 The FSC is the Financial Services Council?---Yes. I mean, that's just an example, obviously, in contact with each other in the industry.

40 Do you know - - -?---I was never aware of a formal discussion between ANZ and CBA. Not to my knowledge.

Do you know how it was that Ms Rava knew that ANZ were willing to accept the enforceable undertaking but only on a particular basis?---No.

45 Okay. Presumably that information can only have come from ANZ?---I don't know. Presumably, yes.

I tender that email, Commissioner.

THE COMMISSIONER: Emails of October '17 between Shafir and others draft EU received from ASIC, CBA.0002.2533.3421, exhibit 5.229.

5 **EXHIBIT #5.229 EMAILS OF OCTOBER '17 BETWEEN SHAFIR AND OTHERS DRAFT EU RECEIVED FROM ASIC (CBA.0002.2533.3421)**

10 MR HODGE: And then can we bring up CBA.0001.0478.0555. So this is another chain of internal emails from the end of October 2017. And you see at the bottom of the page Ms Shafir is emailing Mr Comyn and Mr Sullivan explaining that:

15 *... a view has been put to Mr Mullaly of ASIC that ASIC should wait until the Westpac proceedings are determined before taking CBAs matter any further.*

?---Yes, that's an example of the sort of discussion that was going on, you know, as I was saying, between industry players as well. We were trying to understand to what extent the BT court case would inform the – these areas which were very grey.

20 And the suggestion from Ms Shafir, this seems to be to Mr Comyn is:

In that context, I don't think there is –

25 Sorry, I should go back a step. You will see that Ms Shafir is communicating that the position from Mr Mullaly is that it was clear that this was not going to be acceptable?---Sorry?

Do you see - - -?---Start again.

30 The second paragraph of the email at the bottom of the page:

Angus and I raised with Tim Mullaly the view that ASIC should wait until the Westpac proceedings are determined before taking our matter further.

35 ?---Yes.

Continuing:

40 *It was clear that this was not going to be acceptable.*

?---Yes.

And then:

45 *In that context, I don't think there is any great need for you to meet with Kell this Friday unless you would like to have a further go at pursuing this.*

?---Yes.

And then Mr Comyn's response is:

5 *Thanks, Larissa. I think we should keep trying. I don't think it will achieve much but don't think I've got much to lose either.*

?---Yes.

10 The responsive suggestion is:

True, perhaps a conversation with the new commissioner who may have a different perspective.

15 ?---Yes.

Now, you're not on this chain of emails?---I am not.

20 Were you aware there were efforts being made by CBA to try to defer the enforceable undertaking until after the proceeding had been dealt with against Westpac?---I am aware of us talking about that and as I said to you, again, that would be an example of where the industry would be talking to each other saying the – the outcome of the BT court case could, depending which way it went, help resolve the broader issues for everyone, and so we were considering whether it – in our view, if
25 we had that outcome from the court case, we would have a better view of understanding of what had really gone right and wrong because we – there was still a lot of confusion about that.

30 Now, that was October of 2017. The enforceable undertakings from CBA and ANZ were ultimately given in July – at the end of July 2018?---Yes.

A couple of weeks ago?---Yes.

35 Do you know what happened in the intervening eight or nine months?---I think it's the – it's just the normal course of negotiating the EUs. I'm not sure of the timeline here, what this date is versus when ASIC first – yes, I mean, you would need to line those timelines up.

40 I tender that email, Commissioner.

40 THE COMMISSIONER: Emails between Shafir, Comyn and others, 30 and 31 October '17 concerning a call from Peter Kell's office, CBA.0001.0478.0555, exhibit 5.230.

45

**EXHIBIT #5.230 EMAILS BETWEEN SHAFIR, COMYN AND OTHERS, 30
AND 31 OCTOBER '17 CONCERNING A CALL FROM PETER KELL'S
OFFICE (CBA.0001.0478.0555)**

5

MR HODGE: I don't have any further questions for Ms Elkins, Commissioner.

THE COMMISSIONER: Thank you, Mr Hodge. Yes, Mr Finch.

10

MR FINCH: Thank you, Commissioner. There's no re-examination.

THE COMMISSIONER: Yes. Thank you. Ms Elkins, thank you very much. You may step down.

15

<THE WITNESS WITHDREW **[11.36 am]**

20 MR HODGE: Commissioner, would it be convenient to take a 10 minute break now and then we will start with Mr Chun.

THE COMMISSIONER: How are we travelling for time, Mr Hodge? Not well, I think.

25

MR HODGE: I think I'm more optimistic than you are, Commissioner.

THE COMMISSIONER: Exactly so, Mr Hodge. Exactly so.

MR HODGE: As is always the case.

30

THE COMMISSIONER: If I come back at – when, 10 to midday?

MR HODGE: Yes, or – yes, Commissioner.

35

THE COMMISSIONER: Or quarter to midday was what you were about to say. Quarter to midday it is.

MR HODGE: Thank you, Commissioner.

40

ADJOURNED **[11.36 am]**

45

RESUMED **[11.45 am]**

MR HODGE: Commissioner, the next witness is Mr Chun.

<PETER CHUN, AFFIRMED

[11.45 am]

<EXAMINATION-IN-CHIEF BY MR SCERRI

5

THE COMMISSIONER: Thank you very much, Mr Chun. Do sit down. Mr Scerri. Yes.

10 MR SCERRI: Thank you, Commissioner. Mr Chun is your full name Peter Chun?---Yes.

And is your business address 1 Harbour Street, Commonwealth Bank Place in Sydney?---Yes.

15

Have you received a summons to attend at the Commission?---Yes, I have.

Do you have a copy of that with you?---Yes.

20 We tender the summons, Commissioner.

THE COMMISSIONER: Exhibit 5.231, the summons to Mr Chun.

25 **EXHIBIT #5.231 SUMMONS TO MR CHUN**

MR SCERRI: Mr Chun, have you made a statement dated 31 July 2018 in relation to Rubric 5-37 in relation to question 30 and section (l) for Leo in that Rubric?---Yes.

30

Does that have the document ID number CBA.9000.0108.0001?---Yes.

Are the contents of that statement true and correct, sir?---Yes.

35

We tender that statement, Commissioner.

THE COMMISSIONER: Exhibit 5.232, the statement of Mr Chun dated 31 July '18 concerning Rubric 5-37 and its annexures.

40

EXHIBIT #5.232 STATEMENT OF MR CHUN CONCERNING RUBRIC 5-37 AND ITS ANNEXURES DATED 31/07/2018 (CBA.9000.0108.0001)

45

MR SCERRI: Thank you, Commissioner. Mr Chun, have you also made another statement dated 7 August 2018 in relation to sections (a) to (h) of Rubric 5-37 with a document ID CBA.9000.0106.1000?---Yes.

5 Are the contents of that statement true and correct, sir?---Yes.

Commissioner, we tender that statement.

10 THE COMMISSIONER: Statement of Mr Chun of 7 August '18 concerning Rubric 5-37, exhibit 5.233.

**EXHIBIT #5.233 STATEMENT OF MR CHUN CONCERNING RUBRIC 5-37
DATED 07/08/2018 (CBA.9000.0106.1000)**

15

MR SCERRI: And finally, Mr Chun, have you made a statement dated 12 August 2018 in relation to Rubric 5-68 with a document ID CBA.9000.0090.3000?---Yes.

20 And are the contents of that statement true and correct?---Yes.

We tender that statement, Commissioner.

25 THE COMMISSIONER: Statement of Mr Chun of 12 August '18 concerning Rubric 5-68, 5.234.

**EXHIBIT #5.234 STATEMENT OF MR CHUN CONCERNING RUBRIC 5-68
DATED 12/08/2018 (CBA.9000.0090.3000)**

30

MR SCERRI: Mr Chun, Mr Hodge will ask you some questions now.

35 THE COMMISSIONER: Yes. Yes, Mr Hodge.

<CROSS-EXAMINATION BY MR HODGE

[11.48 am]

40 MR HODGE: Thank you, Commissioner.

Mr Chun, I want to deal first with the issue in relation to intra-fund advice, and the adviser that you've recently, I think, suspended. Is that correct?---Yes.

45 Now, there's an agreement, as we understand it, between Colonial First State Investments Limited and Financial Wisdom for the provision of intra-fund advice?---Yes.

Colonial First State is the trustee of the superannuation trust?---Yes.

Financial Wisdom is an advice licensee owned, I think, by CBA?---Yes.

5 And under the agreement, Financial Wisdom is to provide the intra-fund advice to members of the fund?---Yes.

Intra-fund advice is not personal financial advice?---Not the way that CFSIL has implemented intra-fund advice, no.

10

I'm sorry, not the way that Colonial has implemented it?---Colonial, correct.

In theory, it goes a bit beyond what might be termed – or could go a bit beyond what is called general advice?---That's correct.

15

But you've made the decision that it not go beyond general advice?---Yes, we've limited it to factual information and general advice.

20 So could you explain to the Commissioner when a member seeks intra-fund advice, what does that mean? What are they doing?---They are generally looking for some help around understanding the benefits in their superannuation fund, whether it's to do with insurance, investment options, or making additional contributions, and that could take the form of both factual information or general advice.

25 And would they typically, that is the member, typically contact the fund and then be passed on to the adviser?---No. In some cases, yes, but some – in some cases Colonial First State has a contact centre that actually also gives intra-fund advice. So not in all cases would it be referred to a financial planner.

30 And the particular adviser that we are speaking about, or that your statement deals with, he and his corporate authorised representative, they were – he was an AR of Financial Wisdom?---Yes.

And he owned a company that was a CAR of Financial Wisdom?---Yes.

35

And Financial Wisdom subcontracted to him or retained him to provide intra-fund advice in what way?---Per the contract that CFSIL had with Financial Wisdom, that particular adviser was an authorised rep to actually provide intra-fund advice to the members of our super fund.

40

And does that mean that when the members called up, they would be directed through, in some cases, to his office?---Only he would be providing intra-fund advice only to the members that are assigned to the employer plans, which has been authorised by Financial Wisdom.

45

Okay. So, again, just so we can step it through to understand what has happened, FirstChoice Employer Super is a product within the First State Investment Super Fund?---The FirstChoice Superannuation Trust, yes.

5 FirstChoice Employer Super is a product within the fund?---Yes, correct.

There are members who are within that product?---Yes.

10 Only members within that product would have been assigned over to this adviser?---Yes, a subset of the members, yes.

15 How is the subset identified?---They are employer plans that the financial planner was servicing, but importantly, has to be authorised by the licensee. So Financial Wisdom had to assign those employer plans to the authorised rep, and then CFSIL is made aware of that.

20 I see. And, again, we're just trying to tease this out, but what we know and you know is that this financial adviser was receiving trailing commission in respect of some of the members that – to whom he was providing intra-fund advice?---Yes, there was pre-existing trail commission.

And was the trail commission something that arose from the employer plan?---Yes.

25 Okay. So – and you tell me if I'm not explaining this accurately – there was an employer plan in place with Financial Wisdom in respect to certain employees of some employer?---There were many employer plans. So we have approximately 6000 employer plans in FirstChoice Employer and Financial Wisdom and – and their authorised reps had some of those employer plans, that's correct.

30 Financial Wisdom had entered into an agreement with the employer that would allow Financial Wisdom to receive a trailing commission in respect to employees who went into the Colonial FirstChoice Superannuation Trust?---So I understand the question correctly, the trail commission is only in respect of pre-existing arrangements, which have been grandfathered. So no new – no new members
35 actually have trail commission.

I understand?---Yes.

40 There was an arrangement that had been entered into before 1 July 2014 between Financial Wisdom and the employer in respect of which if a member went into the First State Employer Super product, again before 1 July 2014, there would be trailing commission in respect of that member?---Yes.

45 And Financial Wisdom had sold or assigned the trailing commission rights in respect of some of the employer plans it had to the relevant adviser?---I wouldn't necessarily outline it in exactly those words, but the – the financial planner was authorised under

Financial Wisdom and the financial planner was – was servicing that plan, and the trail commission is in relation to the pre-existing arrangement in – in the super fund.

And so the trail commission is, in any event, one arrangement?---Yes.

5

And the intra-fund advice is a separate arrangement?---Yes.

10 But was – was it the case that the only members in respect of whom this adviser was providing intra-fund advice were those same group of members for whom he owned the trailing commission rights?---It's not – there's no direct relationship in that way. There would be members that are part of employer plans that this financial planner was servicing, but equally, there were other plans that this financial planner was servicing in respect of the intra-fund advice.

15 I see. He would have been providing intra-fund advice to both members of the employer plans from whom he was receiving trailing commission and also for members of other employer plans from whom he wasn't receiving trailing commission?---Yes.

20 And he made positive contact with members in respect of whom he was receiving trailing commission, that is, he sent a letter to them?---In respect of the ADA transfer?

Yes?---Yes.

25

And when he did that – and maybe if we bring up an example of that. Can we bring up ASIC.0037.0001.0614. Thank you. So there's a redacted bar at the top of the page. That bar – I'm sure you've seen this document before?---Yes, I have.

30 And that bar is redacting the name of the financial planning business?---Yes.

So this seems to have been some sort of email that was sent out by the financial planner to members?---Yes.

35 And is this being sent as intra-fund advice or is this being sent by the financial planner as part of servicing the employer plan?---This could have been under intra-fund advice, yes.

40 Was there some provision of information by the fund over to the intra-fund advisers of contact details for relevant members?---We did, in relation to the ADA migration, provided advisers with a CFSIL template to also communicate to our end members, and that was in addition to our own ADA communications that have been sent to members.

45 I see. And this – does it follow the template that was provided?---No, it does not.

And the issue, it would seem, is that if you look about – in the second paragraph it says:

5 *Around three years ago the government changed super legislation and it's coming into effect now. As a result, if you don't actively make an investment choice in your super account you are deemed to be disengaged and the government will make an investment choice for you.*

10 And then in the next paragraph:

Your investment will be moved to a government-selected investment called MySuper. It is different and may not be best for you.

15 ?---Yes.

 And as we understand it, Colonial regards those statements as potentially misleading?---Yes.

20 And Colonial is also concerned that some of these statements – there's some other documents which I'm not sure we need to go to – but Colonial was also concerned that these statements may trespass across being general advice into being personal advice?---Not specifically that, but more - - -

25 I see?--- - - - in terms of they could be seen as – as influencing the member to take a particular outcome or take a particular action.

 And the outcome that they might influence the member to take is to provide an investment direction?---Yes.

30 And thereby not transfer over to MySuper?---Yes.

 Because these communications are crafted in a way that might make a member think that it would be bad for them to transfer to MySuper?---Yes.

35 And in the case of this adviser, in the period from – I think it's 1 July 2013 to 30 June 2017, about 1380 of his clients elected to remain or gave an investment direction rather than being transferred to MySuper?--- Yes.

40 And that was about 25 per cent of his clients, or you're not sure?---Not totally sure, no.

45 All right. And the concern then, as I understand what you're saying, is, first, the communication is not balanced, it doesn't accurately reflect the situation?---That's correct.

 And second, it doesn't disclose the potential conflict of interest on his part in relation to the receipt of trail commissions?---That's correct.

And third, it's drafted in this way to make the member fearful and influence them to make an election?---To influence them to make an election, yes.

5 And you've made – sorry, I withdraw that. The pattern – or the history of what has occurred in relation to this specific adviser is that he was initially identified by ASIC, I think, last year. Is that right?---Yes.

10 And he – you received – or there were some notices sent to either CBA or Colonial in respect of this adviser?---In February this year, yes.

And you may or may not know where things have got to with ASIC?---I'm not aware of where it has got to with ASIC, no.

15 And then in July of this year, the Commission issued a Rubric, or several Rubrics to Colonial First State and Financial Wisdom in relation to this adviser?---Yes.

20 And then after that, I think on 26 July 2018, Colonial then took some steps to seek information from Financial Wisdom in relation to that member – I mean that adviser?---Yes.

And then on 10 August, Financial Wisdom provided some information?---Yes.

And then I think very recently you've decided to suspend that member - - -

25 THE COMMISSIONER: Adviser.

MR HODGE: I'm sorry, that adviser?---Yes in respect to intra-fund advice.

30 And what is the connection to intra-fund advice if you don't think this contravenes the prohibition on general advice – I'm sorry, the prohibition on personal advice?---Because in – in the contract, there's a – there's a need to actually ensure that this type of general advice is actually balanced, and – and is not misleading. So we are concerned, in respect of the set of communications and we decided to take action to suspend him going forward servicing our members.

35 And I think from the most recent version of your statement, or the finalised version of your statement, you've expressed the position of Colonial First State to be that it considers that the conduct of the adviser and the corporate authorised representative may be misconduct or conduct falling below community standards and expectations?---Yes.

40 And also that the conduct of Financial Wisdom, if it's established that it involves a contravention of any financial services law, then it would amount to misconduct?---Yes.

45 And that Colonial First State considers that its own conduct in relation to communications with ADA members, but I think just in respect of this adviser, may

have fallen below community standards and expectations?---Yes. It's in relation to all our communications with the ADA.

5 I see?---We felt now, having reflected on this, that it would have been a good thing to call out this conflict of trail commission.

10 I understand. The particular matter of concern and where Colonial considers it may have fallen below community standards and expectations is that it didn't say to advisers that you ought to disclose your conflict of interest to members?---That was one aspect that I believe we should have, as I called out in my statement, and then the other aspect in my statement is also our own ADA communications to members. It would have been good to make that conflict known to our members.

15 And then Colonial also considers that its delay in investigating the matters in relation to the adviser fell below community standards and expectations?---Yes.

20 And finally, as we understand it, Colonial is going to require Financial Wisdom to refund the fees for intra-fund advice. Is that right?---In my statement, it's in relation to a specific issue we identified, and upon when I reviewed the actual fee payment we – it became clear to us that when advisers were not providing the service, our systems did not actually refund that fee or apply a – an adjustment, and so in respect of the last four years of Financial Wisdom advisers, that has amounted to \$48,000, and we're taking steps now to investigate other groups that may have a similar issue. So we've identified that as a – as a process failure, and we're taking steps to actually address that. But it's a – a adjustment from the licensee that we're looking to clawback this payment.

Yes. This is what I wanted to understand?---Yes.

30 It's an adjustment as between Colonial and the licensee?---Correct.

The member doesn't pay separately for intra-fund advice?---No.

35 You're not proposing to give money back to the member?---No.

40 And so the conduct that may have fallen below community standards and expectations of Colonial in respect of this failure to provide services by Financial Wisdom, what is – I don't understand, what is the conduct that you - - -?---The specific conduct we were looking to draw out here was that there wasn't a service being provided and we had paid fees to Financial Wisdom which we've now subsequently identified. And so in that respect, the community would not expect us to be paying fees and, hence, in preparing my statement I felt it was appropriate to call out this process breakdown in the way we were making this adjustments.

45 Do you think the community would expect that if you have charged to members an administration fee, that includes the provision of intra-fund advice, and no intra-fund advice has been provided, that you would make some refund to the members?---No, I

don't. It's – it's a complex matter. I'm happy to explain how – how we've thought about it. So the whole premise of intra-fund advice was to make advice available to all members. And when this concept was introduced in 2013, we followed the ASIC guidance around a collective charging model to actually spread those costs across all members to make the service available, and – and more cost effective. And so that was how we looked to have the service being part of our administration fee rather than being borne by the member on a user – on a user pays basis. We felt a collective charging method versus a user pays method was the most effective way to actually make this advice available to all our members. And hence, your actual question about if there was a – an amount that wasn't being paid by Colonial should members have actually received a – a refund, in the – in the scale of what we were paying, this is actually less than one per cent of the total fees to Financial Wisdom. And in terms of we always look at fee reductions to our members in line with overall cost reductions, but this is one of many different types of services that the trustee provides to our members, and there's no explicit reduction in fee in proportion to this payment reducing or this cost not being borne by the trustee.

Has the adviser complained about being suspended?---I'm not aware of it. This was communicated to Financial Wisdom just recently. So I'm not aware of any – any feedback to – to this point.

By "recently", was it this week?---Yes. Last week.

Last week?---Last week. And then in terms of our decision in CFSIL was last week.

Yes?---And then we communicated to Financial Wisdom on the weekend, I believe.

And do you know is there any contemplation within Colonial of there being consequences for management of Colonial of having, over the course of at least a year and probably longer, misled members in exactly the same way to cause them to think that they ought to make an investment decision rather than going into MySuper?---Can you please just rephrase that, the question?

Do you agree with me that Colonial itself, in communicating with members, made representations to them that were misleading in an almost identical way to this communication from the adviser because they would have caused members to think that they ought to or needed to make an investment decision?---No, I don't accept that.

Okay. I tender that document, Commissioner.

THE COMMISSIONER: Template financial planner email concerning important superannuation changes, ASIC.0037.0001.0614, exhibit 5.235.

45

**EXHIBIT #5.235 TEMPLATE FINANCIAL PLANNER EMAIL
CONCERNING IMPORTANT SUPERANNUATION CHANGES
(ASIC.0037.0001.0614)**

5

MR HODGE: And there has been no internal review within Colonial of the manner in which it communicated to members about the ADA transition to MySuper?---We've reviewed the communications and on reflection, this element of the trail commission conflict we felt we should have included.

10

Have you, more generally, reviewed the communications made by Colonial to members who had ADAs about whether they should or should not make an investment decision?---In the course of preparing my statement I have reviewed those communications, yes.

15

And you don't hold any concerns about those communications, save insofar as they fail to disclose the conflict?---No, I don't. I believe they were fair and balanced and described the difference between the MySuper product and the Choice product.

20

Have you discussed that view with Ms Elkins?---No, I have not.

She hasn't expressed a different view to you?---This is the view that in preparing my own witness statement, that I believe is correct.

25

Okay. I want to then move to a different topic, which is the selling of Commonwealth Essential Super which is something you've also given a statement about?---Yes.

30

Were you involved in the development of that product?---Yes, I was.

Okay. Now, the development – I'm sorry, the selling of it occurs pursuant to an agreement which we might bring up, CBA.0001.0398.3229. That is exhibit PC-1 to Mr Chun's statement in response to Rubric 5-37.

35

THE COMMISSIONER: Which date statement, sorry?

MR HODGE: It's the statement dated 26 July 2018. So this is the Distribution and Administration Services Agreement?---Yes.

40

And it's an agreement between the bank and Colonial First State?---Yes.

And the effect of the agreement seems to be that CBA will provide certain services to the trustee, which is Colonial?---Yes.

45

And Colonial is going to establish this – or has established this particular superannuation fund which will include the CES product?---Yes.

And if we go to page 30 of the document which is .3258. We see a description of what the services are and what the fee is. So the – the effect of the services is that this Essential Super product will be sold by the bank through its branches?---Yes.

5 Was it envisaged when it was first established that the only members of the product would be members who came through the branches or through CBAs distribution network?---That was the original target market and at the same time it was coinciding with the introduction of MySuper. So it was a low cost, simple, superannuation product for CBA customers. Yes.

10 And the fee is that the bank will be paid 30 per cent of the total net revenue earned by the trustee in relation to the fund?---Yes.

15 Is 30 per cent of the total net revenue a high fee for distribution services?---I can't comment on high. I can give you the – the reason we agreed with the bank the 30 per cent. It was based on the costs that the bank incurred and – versus the costs that CFSIL incurred. So we had an assumption on the costs of the trustee and the costs of the distribution, and it was broadly 30 per cent/70 per cent. So 30 per cent being CBA and 70 per cent being CFSIL. It was an – it was an assumed cost allocation.

20 And presumably, that would include a profit margin for both?---It would. It would – what – the concept is we collected the total fee for members and that fee was split 30/70, based on the costs incurred in the respective part of either the bank or – or in CFSIL. So, yes, if you're implying that then in turn there would be a profit within both the bank and in CFSIL.

25 And the – the net revenue, that's actually the gross revenue?---This is some internal terminology but it's based on net of any external investment management fees that we might pay away. So it was based on – on that as a concept.

30 So this was a product set up on the basis that it would be a new product and 30 per cent of the fees would go to the bank for selling the product?---Yes.

35 And was there any suggestion that there was internal analysis to show that this product would perform better or be lower cost for members compared to other available products on the market?---Yes. As I've said in my witness statement, the pricing strategy of this fund was always intended to be in the top quartile. So we took the MySuper universe and in relation to Chant West, we used the Chant West research at different account balances. We wanted to ensure it was priced very competitively. And so it was top quartile, meaning the – the most competitive fees in the top 25 per cent of all MySuper funds.

45 And what about performance. Was there any performance ambition for it?---The performance of – and, again, this was the MySuper product, where we launched a life cycle strategy which varies based on – or the asset allocation of the fund would alter during the life of the member. So we had a – an investment objective that we set for

a brand new fund. And since launch, it has actually exceeded its target investment objective.

5 Every MySuper fund has managed to exceed its investment objective over the last four years, hasn't it?---I can't comment exactly, but – but in – but in our case we look at how has it been performing against what we had indicated to our members, and we certainly are satisfied that it's performing in line with the objective and exceeding the objective.

10 Sorry, I said "every". I withdraw that. Do you know what – how in general MySuper funds have performed over the last few years against their investment objectives?---In general, I believe they would have performed in line with – with their objective. Our strategy was quite different because we did life cycle, and – and we couldn't – you cannot necessarily compare to some other MySuper funds that just
15 has a single default investment strategy. For us, we were very focused on making sure ours was appropriate for our members.

And then if we just understand the process of developing it, can we bring up
20 CBA.0517.0176.2000. So this is an exhibit to your statement. This is a presentation that you gave to ASIC?---Yes. Can you just refer me to my exhibit, just so I can see the whole - - -

Yes, it's PC-2, Mr Chun?---Yes. Thank you.

25 You, in creating this product, went and told ASIC about what you were doing?---Yes, we did.

Can you explain to the Commissioner why you told ASIC about it?---We recognised
30 at the outset that there were potential risks around the general advice distribution model of – of potentially blurring into personal, as well as this was a major undertaking of CBA around a new superannuation product, a new distribution model. So we felt, as a trustee, it would be prudent to consult the regulator, get clarity on the – using general advice as the right distribution model. And, again, the other
35 important element here was this was also the time of FOFA, where FOFA – one important aspect was – of FOFA was the government's intention to make advice accessible and affordable, and they were advocating general advice as a way to help meet the needs of more customers or more – more Australians, and with those two initiatives, the introduction of MySuper being a low-cost, simple, superannuation
40 product, as well as the FOFA regime of advocating for a general advice model, those two initiatives we embarked upon designing a new fund and – and a distribution model. And in 2012 we engaged the regulator to actually make sure that they were comfortable with the way we embarked upon a – a general advice distribution model.

45 I'm told that your statement may have different exhibit numbers from my version?---I found it.

You found the right one?---Yes.

Good?---I was just wanting to make sure I had the whole deck.

5 If we go to page .2011. So this is – again, this is all part of what you’re explaining to ASIC, that a customer is going to come into a branch, the person – the customer is going to say, for example, “I’m starting a new job.” Then the person in the branch will say:

Congratulations on your new job.

10 And then start trying to create an interest for the member in taking up a CES product. Is that right?---Yes.

15 And that’s for an individual. And then if we go over the page to .2012, this is the same type of process but it’s being described now for dealing with an employer customer rather than an individual customer?---Yes.

20 And then you went back and spoke to ASIC again in February of 2013, and that’s CBA.0517.0176.2019, which is in my version exhibit PC-3. So you went back, gave them another presentation about what you were doing?---Yes.

20 And then on page 2023, you explain, for example, how you are going to uncover customers – the customer need for Essential Super?---Yes.

25 And one of the things you identified for ASIC was as part of the customer interaction that might be either a customer transaction or the financial health check or customer request or referral?---Yes.

30 And then I take it at the time ASIC didn’t object to you going ahead with the product?---No. We walked them through all the screens, all the scripting. So these meetings were to ensure we had the appropriate guidance from ASIC, because we – we felt that this was a – in the general advice space was an important area of the legislation that we wanted clarity.

35 That is, you wanted to know that they weren’t going to suggest that you were breaching the prohibition on providing personal advice by what you were doing?---No. So specifically, we wanted to design a model that was based on general advice, and that was important when the government advocated a simple superannuation regime of MySuper. So we felt that there was a safe place to use general advice. And it was on that basis we specifically designed the process with a
40 general advice distribution in mind and were seeking ASICs input along the way. As you can see in these multiple sessions that we had with ASIC.

And you brought the product into effect in, what, about July of 2013?---Yes.

45 And then about 12 weeks later you had KPMG do a mystery shopper project in relation to the product?---Yes. And that was actually one of the elements that when we went to ASIC we had already indicated to them that we would be doing a series

of mystery shopping to help make sure we were addressing those general advice risks where appropriate.

5 If we bring up CBA.0001.0463.6783. This is the report from KPMG after that initial mystery shop?---Yes.

And if we go to page .6785. This is the executive summary of that first shop?---Yes.

10 And the first shop identified that there are a high volume of compliance exceptions?---Yes.

85 per cent of shoppers were not provided with a financial services guide?---Yes.

15 40 per cent of shoppers were not provided with a PDS?---Yes.

95 per cent of customer service reps did not follow the application process in detail?---Yes.

20 85 per cent of shoppers were not provided with a general advice warning as part of the inquiry/sale?---Yes.

And were the results of this provided in 2013 to ASIC?---No, not in 2013, no.

25 Not until 2014?---Yes.

And then you continued to do mystery shopping. I think you've referred to it in your statement. You did one at the beginning – the end of 2013 into 2014?---The second mystery shop was conducted in December 2013.

30 Yes?---Yes.

And then reported on in 28 February 2014?---Yes, that's correct.

35 And the third mystery shop was conducted in September 2014, and reported on 3 December 2014?---Yes, that's correct.

40 And I'm not sure – did you say there was some but not a lot of improvement in terms of compliance?---If I go back to what's on the screen, the first mystery shop, they were 20 branches, and it was not a random sample. So those were 20 branches which had late sales training. So we were – we had specifically identified a subset of branches, and we're talking about 1000 branches of CBA. So 20 of them we chose. And these results were concerning. We immediately took steps to send out communications and – and videos to all branches and all staff to specifically focus on following the sales approach. And then in the next – the second round of mystery shop we did see an improvement. By then it had expanded to 45 branches. And, again, there were areas where there was general advice warnings weren't given, or no financial services guide given. However, when we analysed the 45 sales, because

they – there were only 45, we were satisfied that they were not areas that we had concerns with, and our – one example being FSG, not giving an FSG. Many of these customers were CBA customers. So there's actually an exemption because it was the bank's FSG or CBAs FSG. So even though the outcome was high in terms of not actually meeting that, when we analysed the specifics, it actually was not an important element of that – that particular sale. But notwithstanding that, off the back of the first two mystery shop, we did further changes to the sales approach. And particularly around the need to have a general advice warning, which, as I said at the beginning, was an important element of the control. And so not only were we relying on the verbal warning, but also we included a written warning. So we took a number of steps to make sure that improvements were made.

Are you finished?---Yes.

15 The concern that ASIC had, in particular, was about the use of the financial health check along with recommending Essential Super?---That was in a later period when we became aware that ASIC was looking at the financial health check, but that was not back in 2014.

20 Okay, initially?---I think it was around 2015 onwards.

Initially when they were interested in it in 2014 they were just concerned generally about the model, were they?---They were not concerned – we went to them to lay out exactly our approach. And then off the back of that, we indicated we would be doing a program of mystery shopping to help us tighten these controls, which we subsequently sent a good governance letter to ASIC in December 2014.

ASIC issued you with a notice on 28 August 2014?---Yes.

30 And that was the first of a series of notices?---Yes, it was.

And presumably in that notice, they identified some matter of concern that might constitute a contravention?---Not specifically at that time. My recollection was that at that time they were seeking information on branch staff sales member accounts. There was no specific area that we could see. We were responding to their request for information. My recollection is the financial health check that they started investigating that was 2015/2016. I'm not aware back in 2014 they – that was an area that they had requested of CFSIL. It was information – it was asking information to be provided.

40 And then by either the end of 2016 or the beginning of 2017, they were suggesting they would commence a proceeding, or you're - - -?---Yes.

- - - not involved in that?---We were aware that they had concerns, and I recall during that period every time they had indicated there was an area of concern, we took steps to make a change. And one specific change that we did in the model was remove the ability to consolidate superannuation funds in the branch, and have it as

part of once a member is part of the fund, it would be something that they turn their mind to, or they contacted our contact centre to better understand how to consolidate. And so in – I recall in January 2017 we took the action to remove consolidation from branch.

5

Perhaps if we just cut to the end. Do you know what happened between October 2017 and July 2018 in relation to the negotiation of an enforceable undertaking?---Yes, I was aware the bank was in dialogue with ASIC in relation to an enforceable undertaking, yes.

10

You weren't directly involved in those negotiations?---No, I was not.

Okay. Does it seem strange to you that it would be impossible under FOFA for a superannuation fund to enter into an agreement with a financial adviser where they will agree to pay 30 per cent of their revenue to the financial adviser if the financial adviser provides personal financial advice to a member of the public and that leads to the member of the public going into the fund, but it's apparently fine for a fund to pay 30 per cent of its net revenue to a bank to recommend to a member of the public or attempt to suggest to a member of the public that they should join the fund?---As I outlined before, this was a new product, a new distribution model. The trustee felt that the fairest way to determine a fee to pay the bank was on the basis of costs incurred. That was the approach we and CFSIL took.

But it's not on the basis of costs incurred. It's a revenue-sharing arrangement?---It's a revenue sharing in terms of the basis of the payment is expressed as a percentage of revenue.

Yes?---However, the way that was determined was on a - - -

An approximation of costs?--- - - - fair costs model, because it was a new – offering a new distribution model. The trustee felt this was the fairest and most equitable way to strike a – a fee arrangement with the bank.

Somebody working in the bank isn't under a best interests duty in relation to the member – I'm sorry, in relation to the customer?---Not in terms of general advice. I'm not aware that that's the provisions of best interests applies in a general advice model but I could be wrong.

And when this person in the bank is offering general advice, it's envisaged that the effect of that advice will be that the customer should join CES?---If it's appropriate for the customer. I mean, it's – it's factual information or general advice, but we – we felt that for the branch staff they often would need to respond to benefits of consolidation, benefits of additional contribution.

But only because they've raised superannuation in the first place?---That's correct, yes.

And what's envisaged by this model is that inevitably whatever is said in the branch is going to lead to a member joining the superannuation fund?---If it's appropriate for the member, yes.

5 But the person in the branch isn't attempting to make any assessment of whether it's appropriate for the member?---That's exactly the – the general advice regime. We were not recommending other products to the customer. We were making them aware of this particular superannuation offering.

10 I don't have any further questions for this witness, Commissioner.

THE COMMISSIONER: Yes, thank you. Mr Scerri.

MR SCERRI: No re-examination, Commissioner.

15

THE COMMISSIONER: Yes, thank you very much, Mr Chun. You may step down. You're excused.

20 **<THE WITNESS WITHDREW** **[12.44 pm]**

MR HODGE: Commissioner, Mr Dinelli is taking the next witness.

25 THE COMMISSIONER: We have a changing of the guard, do we, Mr Dinelli? If I come back at 10 to 1.

MR HODGE: Thank you.

30

ADJOURNED **[12.45 pm]**

RESUMED **[12.50 pm]**

35

THE COMMISSIONER: Mr Dinelli.

40 MR DINELLI: Thank you, Commissioner. The next case study concerns CSF. And my learned friend will call the witness, Mr Peter Haysey.

MR J. BRERETON: If I announce my appearance. My name is Brereton and I appear for CSF.

45 THE COMMISSIONER: Yes. Thank you, Mr Brereton. Is the witness in the room?

MR BRERETON: He is. I call Mr Peter Haysey.

<PETER JAMES HAYSEY, SWORN

[12.50 pm]

5

<EXAMINATION-IN-CHIEF BY MR BRERETON

10 THE COMMISSIONER: Do sit down, Mr Brereton – Mr – I will work out which of you is which, won't I, presently.

MR BRERETON: Thank you, Commissioner.

15 THE COMMISSIONER: Do sit down. Yes, Mr Brereton.

MR BRERETON: Is your full name Peter James Haysey?---Yes.

20 And is your business address level 1, 535 Bourke Street, Melbourne?---That's correct.

And are you a director, deputy chair and member representative on the board of CSF Proprietary Limited?---That's correct.

25 Mr Haysey have you attended the Commission today in answer to a summons dated 31 July 2018?---I have.

Do you have the original of that summons with you today?---I do.

30 I tender that summons, Commissioner.

THE COMMISSIONER: Exhibit 5.236, the summons to Mr Haysey.

35 **EXHIBIT #5.236 SUMMONS TO MR HAYSEY DATED 31/07/2018**

MR BRERETON: And have you made two statements in response to Rubrics given to you by the Commission, Mr Haysey?---I have.

40

And is the first of those statements dated 24 July 2018?---Yes.

You have the final signed version of that statement with you today?---I do.

45 I tender that statement and the annexures to it, Commissioner.

THE COMMISSIONER: And I take it the content of the statement is true, is it, Mr
- - -?---It is, Commissioner.

5

Yes, thank you. Statement of Mr Haysey of 24 July '18, exhibit 5.237.

EXHIBIT #5.237 STATEMENT OF MR HAYSEY DATED 24/07/2018

10 THE COMMISSIONER: Yes.

MR BRERETON: And the second of your statements, Mr Haysey, is that dated 3
August 2018?---That's correct.

15 And is the content of that statement true and correct?---Yes, it is.

Do you have the final version of that statement with you today?---I do.

20 I tender that second statement, Commissioner.

THE COMMISSIONER: Thank you.

MR BRERETON: And the annexures to it.

25 THE COMMISSIONER: The second statement of Mr Haysey and its annexures is
exhibit 5.238.

30 **EXHIBIT #5.238 SECOND STATEMENT OF MR HAYSEY AND ITS
ANNEXURES DATED 03/08/2018**

MR BRERETON: My friend, Mr Dinelli, will ask you some questions now, Mr
Haysey.

35

THE COMMISSIONER: Yes. Thank you, Mr Brereton. Yes, Mr Dinelli.

40 **<CROSS-EXAMINATION BY MR DINELLI**

[12.53 pm]

MR DINELLI: Thank you. Good afternoon, Mr Haysey, my name is Albert Dinelli
and I am one of the Counsel Assisting the Royal Commission. Mr Haysey, you've
been a director, as I understand it, of CSF for – or since 2010. Is that
45 correct?---That's correct.

And you're presently the deputy chair?---Yes.

And, of course, you're well aware of a trustee's obligations in that capacity?---Yes, I am.

5 And aware of the trustee's obligations to act in the best interests of members?---Yes.

And to give priority to the duties to and the interests of members where there is a conflict?---Yes.

10 And, of course, to comply with what's known as the sole purpose test?---Yes.

In the SIS Act. In preparing your statement, are there any issues that you – have given you cause for concern in relation to those duties?---In preparing my statement?

15 Yes?---I – I have been made aware of some potential conflicts of interest.

And what are they?---So there – they're with respect to a particular arrangement with a particular service provider and an employee.

20 Is that a reference to Australian Family?---It is.

Okay. We will come to that. Were there any other issues that concerned you in the preparation of your statement?---No.

25 Can I ask you about – some questions about the fund itself before we come to Australian Family and some other issues. The first is in your first statement you set out some attributes of the fund. And am I right to say that the – as at 30 June 2017 the funds under management were approximately \$8.7 billion?---That's correct.

30 And now, or at least at the time of preparing your statement, it's over \$9.3 billion?---At the time, yes.

35 And over the last five years in your statement you – you've – in the form of a table – given evidence to the fact that the number of members has increased from approximately 69,000 to approximately 75,000?---That's correct.

And over that time, the average balances of the members of the fund have also increased considerably?---That's my recollection, yes.

40 Yes. So in financial year 2013, approximately 76,000 and now the average balance is approximately 115,000?---That's correct.

45 And whilst the fund has increased in size, one of the things that you have given – when I say “you”, I mean the trustee has given active consideration to over the last few years is to the question of whether or not to merge?---That's correct.

And why has that been something to which the trustee has turned its mind?---So the – the benefits of a merger to members are clearly the benefits of the scale that those mergers would – would result in.

5 And can you explain to the Commissioner how you understand that to apply to CSF?---So in terms of the funds under management or the numbers of members that are in the fund, any merger which would result in an increase in the number of members and the number of funds under management would, by definition, decrease the costs per member. And so in that sense, the benefit of the scale would – would
10 result.

And am I right that there has been negotiations between Catholic Super and the Australian Catholic Superannuation Retirement Fund?---That's correct.

15 And scale was very much one of the issues that was identified in the past in relation to your negotiations with the Australian Catholic Superannuation Retirement Fund?---And still relevant.

In fact – or at least in October 2016 your CEO, Mr Pegan, presented a paper to the
20 board in which he set out – set out his views as to some of the benefits of a merger. Do you recall the discussion at that time or general discussions?---General discussion, yes.

25 And as a board, you obtained some advice and assistance from Rice Warner?---That's correct.

Who is Rice Warner?---So they're a consulting firm providing actuarial analysis and other services.

30 And if I can take you briefly to CSF.0001.0003.0322. CSF.0001.0003.0322. As the document is called up, they – do you recall – you've indicated that you recall Rice Warner giving some advice to the board. That was in relation to a merger assessment between CSF and what's called in the documents ACSRF?---I do. Is this the letter or the presentation you're referring to.

35 The presentation?---I do recall a letter.

And there was a later letter?---Yes, yes.

40 Some time during the process of the negotiation of the merger?---I know the document so you would like - - -

45 Perhaps if I can ask you if you recall that it's – that one of the issues that was identified by Rice Warner was that the superannuation industry was undergoing many changes over the next few years, and expected there to be a smaller number of larger funds?---Yes, I do recall that.

And that was because of increased competition and – between funds downward pressure on fees, etcetera?---Yes.

And at 0324 – I think consistent with your evidence so far this afternoon:

5

...funds which want to provide a wide range of services at a competitive price will need scale.

?---Yes.

10

And Rice Warner's view was that:

CSF and ACSRF both face individual challenges as to how to grow from their current positions and there are considerable strategic advantages to both in considering a merger.

15

?---Yes.

And that was the view of the board at that time as well. I am just conscious of the time. Is that a convenient time, Commissioner.

20

THE COMMISSIONER: Yes. I'm sorry, Mr Haysey, we will have to get you back here in time to begin again at 2 pm. Adjourn to 2 o'clock.

25

ADJOURNED

[1.01 pm]

RESUMED

[2.00 pm]

30

THE COMMISSIONER: Do come back into the witness box. Sit down, please. Yes, Mr Dinelli.

35

MR DINELLI: Thank you, Commissioner.

Before lunch, Mr Haysey, I was taking you to the first stages of discussion about a merger?---Yes.

40

If I could take you to CSF.0001.0003.0218. I am about to take you to a note prepared for an extraordinary board meeting on 17 March 2017. If I could just have blown up the first two paragraphs. It is – sorry under Why Merge:

It is now more difficult to rapidly gain economies of scale, sustain lower fees, broaden their services and communicate compelling benefits to members.

45

Do you see that?---Yes.

And then there's reference to the:

Challenges and pressures facing both –

5 Your fund and the Catholic Superannuation Retirement Fund. And then:

10 *Despite this highly competitive and threatening environment, ACSRF and CSF have two major competitive advantages over most other funds: their membership loyalty and a thorough understanding of the Catholic market, its communities and how they operate.*

And then this goes on to set out then in the paragraph below a number of synergies that would occur if the funds were to merge. And at that time, these were views which were encouraging of the board, that is your board, to merge?---Yes.

15

And there were subsequently merger negotiations, weren't there?---Yes.

If I could take you to CSF – perhaps if I could tender that document, I'm sorry.

20 THE COMMISSIONER: Extraordinary board meeting 17 March '17, CSF.0001.0003.0218, exhibit 5.239.

25 **EXHIBIT #5.239 EXTRAORDINARY BOARD MEETING 17 MARCH '17 (CSF.0001.0003.0218)**

30 MR DINELLI: And, Commissioner, just before lunch I didn't ask to tender the Rice Warner presentation, and perhaps I can regularise that by seeking to tender that document dated December 2016, merger assessment prepared by Rice Warner.

THE COMMISSIONER: Document of that description, CSF.0001.0003.0322, exhibit 5.240.

35

EXHIBIT #5.240 MERGER ASSESSMENT PREPARED BY RICE WARNER, DECEMBER 2016 (CSF.0001.0003.0322)

40 MR DINELLI: Thank you, Commissioner. And now if I can go to SCS.0012.0013.0219. Are you aware that two statements have been prepared by representatives of SCS being the trustee of the Catholic Superannuation Retirement Fund?---I wasn't aware of two. I knew there was a statement at least.

45 Yes, one of Mr Hartley and one of Mr Cantor. I am going to take you to some documents now which you may not have seen before which set out various stages of the negotiations between yourself and the Sydney fund, if I can call it that. And the

first is SCS.0012.0013.0219. Who was the chair of CSF in March 2017?---Peter Bugden.

He has been replaced now by Mr Casey. Is that right?---That's correct.

5

And at the time the chair of the Sydney fund, which for convenience if I can call it that, was a Mr Haddock. Is that right?---That's correct.

Richard Haddock. Bear with us for a moment.

10

THE COMMISSIONER: I'm confused if no one else is. What's the doc ID? What's the - - -

MR DINELLI: SCS.

15

THE COMMISSIONER: SCS?

MR DINELLI: Yes.

20

THE COMMISSIONER: Yes. SCS.

MR DINELLI: .0012.0013.0219.

THE COMMISSIONER: Thank you.

25

MR DINELLI: Thank you. Now, this is an email from Mr Haddock who you have said was the chair of SCS at that time?---Yes.

To members of his board and other executives SCS?---I haven't seen this document before.

30

No. He says there that – I mean in the second paragraph that there was some initial – he refers to a meeting between Mr Cantor being the CEO of SCS and Mr Bugden the chair of CSF and Mr Pegan, the CEO of CSF and he says:

35

Initial discussions centered on how we all thought as did our respective boards that a merger of the two funds made sense and would not only benefit our present members but would place us in a stronger position to seek members in Catholic organisations outside education.

40

Was that a view shared also by CSF?---Well, certainly, our view was that it was in the best interests of members of both funds and we have many members of course outside education sectors.

45

And he sets out at about point 6 of the page:

We impressed upon them that this has to be seen as a merger of equals and we explained what we meant by that and the importance of it for our members and employers. Frank –

5 That's a reference to Mr Pegan:

...then told us that their board accepts this but on the basis that they have their CEO as the ongoing one and that the chair comes from their board.

10 Was that the position of CSF, that it wanted in any merger both the CEO and the chair?---That's certainly not the case, no.

And Mr Haddock went on to say:

15 *We informed them this was not acceptable to our board.*

Is it your evidence that it wasn't the position of CSF that it wanted both the CEO and the chairman at that time – sorry the chair to be from CSF?---That's certainly my understanding. There were various iterations of this agreement or negotiation.

20

At this time, being in March 2017, were you aware what the position was?---So my recollection is at this time there were discussions about one of those two positions resting with one fund and the other position resting with the other fund.

25 And in fairness to you I will take you to some of those things in a moment. And then the position did change then during the course of March or the position from CSF if I take you to CSF.0001.0003.0361. Now, this is a letter dated 27 March. I'm not taking you, of course, Mr Haysey, to each and every document but this is a document that as I understand it was approved by the board. Do you recall seeing a version of
30 this document?---I do.

And there, in the second last paragraph it says:

35 *CSF board remains unanimous notwithstanding that the detailed due diligence and thorough benefit analysis is incomplete that a merger of our respective funds is likely to be in the best interests of our members.*

Do you see that?---That's certainly the case.

40 And then:

The board of CSF provided its consent to the following arrangements –

down the bottom of the page, and it's here that it said that:

45

ACSRF chair would be invited to chair the board of the merged entity.

Is that your recollection of what the position was?---At that time that was the position.

Yes. And CSF chair would be invited to be the deputy chair?---Yes.

5

And the CEO and CIO of the merged entities would be from CSF?---Yes.

And 4, over the page:

10 *The merged entity would be brought about by CSF being the successor fund.*

?---Yes.

And 5:

15

The existing fund operations would be harmonised over a transition period of no more than two years.

?---Yes, I recall all those.

20

Could I tender that document, please, Commissioner.

THE COMMISSIONER: Letter CSF to the chair of SCS dated – sorry, what date?

25 MR DINELLI: Dated 27 March 2017.

THE COMMISSIONER: 27 March '17, CSF.0001.0003.0361, exhibit 5.241.

30 **EXHIBIT #5.241 LETTER CSF TO THE CHAIR OF SCS DATED 27/03/2017 (CSF.0001.0003.0361)**

MR DINELLI: Thank you, Commissioner.

35

Now, the response to that letter appears to be CSF.0001.0003.0314. And this is a letter from Mr Haddock to Mr Bugden. So that is the chair of the Sydney fund. If I could take you to the bottom of that page. The board notes –

40 That is the Sydney fund's board:

... notes your earlier request that the CEO of the combined fund come from CSF and your more recent request that the CIO and deputy chair come from CSF.

45

Do you see that?---Yes.

And the Sydney fund put its position as:

5 *The ACSRf board considers that these arrangements at management and board level should be determined by a process that identifies the best candidates for the required roles. The ACSRf board believes that the identification of those roles and candidates to fill them should be based on merit and should be undertaken as part of a process for the assessment of the needs of the combined fund.*

10 ?---Yes.

That seems like a reasonable position, Mr Haysey, that was being put?---Our view – our view here was that the nature of our fund and the relative performance of our fund was – was such that the CEO of the fund that would have been the continuing fund should have come from CSF.

And in fact, if you go over the page, the board acknowledges that at the top – it says:

20 *However, the ACSRf board also understands that as part of any merger, key leadership roles need to be put in place until those roles are determined by the new board.*

?---Yes.

25 Continuing:

Accordingly, the board accepts your proposed key leadership roles for the chair being from its fund and the CEO being from CSF.

30 ?---Yes

And then:

35 *The board proposes that these roles will continue during the first two years of the combined fund. By the end of that two year period the ACSRf board expects that the chair and deputy chair and the CEO will be determined by the new board which would have been in existence for two years and had the opportunity to judge performance of the parties in these roles.*

40 ?---I understand the position, yes.

Commissioner, if I could tender that letter dated - - -

45 THE COMMISSIONER: 6 April '17 letter ACSRf to CSF, CSF.0001.0003.0314, exhibit 5.242.

**EXHIBIT #5.242 LETTER ACSRF TO CSF DATED 06/04/2017
(CSF.0001.0003.0314)**

5 MR DINELLI: And then on 9 May – so some time later a further letter was sent by
CSF to the Sydney fund. If I can go to CSF.0001.0003.0349. And Mr Bugden on
behalf of your board says in this letter that:

10 *Despite our discussions and the various pieces of correspondence it seems we
have reached an impasse. You have consistently stated that ACSRF accepts
CSFs CEO and CIO. ACSRF should therefore provide the chair and the
merged board composition must be equal from each fund.*

15 And then the position on the third page, 0351, CSF then says – and I want to
understand I think it seems there's a change of its position here. It says:

Unfortunately the concerns are of such magnitude –

20 That is in relation to this issue of governance that it says:

*The CSF board has concluded new leadership is required to take the merged
entity forward.*

25 Do you see that?---Yes.

Continuing:

We believe a new independent chair is essential.

30 ?---Yes.

And:

35 *The chair should be someone who is not currently on the board of either fund
who has a commitment to ensuring the long-term success of this substantial
Catholic enterprise and who has the support of the Archbishops of Sydney,
Melbourne and Brisbane.*

40 ?---Yes.

That was a change in CSFs position at that time?---So if I can just – yes, a change,
yes.

45 It wanted there to be an independent chair rather than the chair coming from the
Sydney fund?---Yes.

And this – the proposal then is that both the chair – both the chairs at that stage – I’m sorry, I withdraw that. Then in the paragraph commencing:

For the sake of such an important venture –

5

Mr Bugden says:

... he is indeed proposing we both stand aside immediately after the signing of a memorandum of understanding and entrust the merger to new leadership.

10

Do you see that?---Yes.

How was it intended that the board of CSF would be – would be operating once there was a memorandum of understanding signed?---Can you repeat that question, please, Mr Dinelli.

15

How was it intended that the board of CSF would be chaired after the signing of the memorandum of understanding?---So the – the board chair – the position of our board chair – CSFs board chair would stay in place until such time as that agreement was reached. Now, part of that agreement would have been for a new chair to succeed our chair. Can I just add some context here, if I may?

20

You may?---The – the arrangements at this point hadn’t got to the stage of the heads of agreement. We hadn’t had a chance to discuss the – the proposition that a merger of equals would mean six plus six without any discussion of who might be the successor fund, and so all of these iterations of – of numbers was still negotiating around who might be a successor fund.

25

THE COMMISSIONER: What did it matter who would be the successor fund and who would be the merging fund?---So from our point of view the paramount consideration was the best interests of our members. And we’re talking about a fund with exceptional performance over a long period of time, and those financial best interests of members was our paramount concern.

30

Well, understanding that, why does it matter which fund merges into which?---We took the view, very strongly, that there would be no circumstances where the retirement savings of our members could be put at risk by not having the successful strategies that had been in place for a long period of time continuing. There were also some structural differences that were critical here, if I could add some of those.

35

Yes?---So CSF, the trustee company, of course, at this point, is a master trust. And Catholic Super is a division of that master trust. And in addition to Catholic Super we have another division, MyLife MySuper. And in addition to those divisions, we also have a banking licence. We also have a financial planning service. And so when we’re talking about how future arrangements might be struck, we’re not talking about just the CEO of one of the best and most successful super funds in the country,

40

45

we're talking about the CEO of the organisation as a whole. And – and all of that is necessary background to the discussions.

5 But does it follow from the considerations you have mentioned that the only way of achieving scale would be by takeover as distinct from merger?---Not the - - -

10 Your entity remained, if you like – this is inaccurate, but if you like, the dominant element in the combination?---So clearly, that would be a case-by-case consideration. In this particular case, there was no doubt in our mind that the financial best interests of our members would not be served if the – if the arrangements had have been different to the ones I described.

Yes.

15 MR DINELLI: Did the Sydney fund agree to the appointment of Mr Pegan as the CEO?---Yes. As you see, eventually, it was accepted as our position.

Sorry - - ?---So it was accepted.

20 It was accepted by the Sydney fund?---Sydney fund, yes.

As I call it. In fact from very early on that was their position, though, wasn't it?---It was – it was conceded that that was to be the case, yes.

25 And then – and I might have to tender that document, if I may, before I go to the next.

THE COMMISSIONER: Letter CSF to ACSRF, 9 May '17, CSF.0001.0003.0349, exhibit 5.243.

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**EXHIBIT #5.243 LETTER CSF TO ACSRF DATED 09/05/2017
(CSF.0001.0003.0349)**

35

MR DINELLI: Thank you, Commissioner.

40 If I can go to CSF.0009.0001.0370. This is an email that Mr Bugden sent to – or addressed to Richard, which is a reference to Mr Haddock. This is a few months down the track and there has been some further negotiations. And as I understand it, Mr Bugden there says:

45 *Further, both ACS and CSF have agreed to all but one point to reach final agreement. I feel, following our telephone conversation this afternoon, the ACS board should understand directly from me why the CSF board has come to the decision that it must appoint the chair for the new board and why Danny Casey should be the appointee.*

Do you see that?---Yes.

5 So had the position of CSF by this point changed to the actual appointment of a particular person?---At this point, yes, we had – we had – September 27 – at this point we had taken the view that the chair should be someone other than the existing two chairs.

That was a view that was being expressed by CSF, wasn't it?---That's right.

10 And that was different to the view that it had expressed earlier on in the negotiation?---So early on in the negotiations, as you've described them, there were – there was an acceptance that the chair could come from ACSRF.

That's right?---Dependent on a number of other factors.

15 And the Sydney fund had agreed to the other issues, which were between the parties, and this remaining issue was the appointment of the chair and it was CSFs position that that person must be Mr Casey?---So in that particular instance, the – the agreement was that we had got to the point where we needed an independent chair or
20 someone other than the two chairs. I will just reiterate, if I could, that there had been no heads of agreement signed, there had been no agreement with respect to successor fund transfer and that we were still at the point of trying to, to the very best of our ability and the interests of our members, get to an agreement which would satisfy what you described initially as a merger of equals.

25 Well, that's not my language. I think that was the language of the Sydney fund?---Correct.

30 And – but the position that CSF was putting was that there must be a particular person who should be the independent chair?---No. So what I'm – what I'm suggesting is that if we were going to extend the negotiations, and if that was predicated on a six by six arrangement, then an independent person, in addition to the six plus six, would need to be found, and our preference, at that point in time, was Danny Casey.

35 Can you explain what involvement Mr Casey had had in the negotiations during this time?---So Mr Casey had, during this year, 2017, been employed by CSF as a consultant given his background in the Sydney market, in the Sydney community, which we were, obviously, trying to enter into an arrangement with, and become the
40 successor fund for, and it was felt that he was perfectly placed to be the best person to suit and satisfy the interests of the members of both funds.

45 Was it known to the Sydney fund that Mr Casey had been assisting CSF?---I don't know. Sorry, I should add, it became known to me. I'm not sure at what point. Fairly late in the process that that was known to Sydney. Whether at that point I'm not certain.

Thank you. Commissioner, can I tender that document – that email, please.

THE COMMISSIONER: Email Bugden to Haddock, 27 September '17
CSF.0009.0001.0370, exhibit 5.244.

5

**EXHIBIT #5.244 EMAIL BUGDEN TO HADDOCK DATED 27/09/2017
(CSF.0009.0001.0370)**

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MR DINELLI: If I may I will take you to the two further documents – two final documents in relation to the negotiations. By October 2017, a response was put by the Sydney fund which is at CSF.0001.0003.0161. Again, this is from Mr Haddock to Mr Bugden. And he says – or he wishes to express his – what he describes as:

15

...unwavering commitment of our board to serving the best interests of our members and engaging with your board and management team in a manner that is open, transparent and in the utmost good faith.

20 ?---Yes.

And at paragraph 3 he says that:

25

There remain a number of elements to the proposed merger that require further discussion. These include the selection of the CEO and the chair of the merged fund and agreed understanding of what is involved in combining our two Catholic funds in a merger of equals.

30

?---Yes.

And the proposal that's put under the heading Final Proposal on 0164 is that:

35

*The board is only prepared to implement the merger on the following basis:
(a) six directors are selected from each fund who will comprise the first 12 directors of the new board and the new board will select an independent chair through a market search process.*

Do you see that?---Yes.

40

Continuing:

CSFs CEO to be the ongoing CEO.

45

That's still the position?---Yes.

And third:

A merger of equals that brings together the best elements of each fund in an open, unbiased and impartial way.

?---Yes.

5

If I could tender that document.

THE COMMISSIONER: Letter ACSRF to CSF, 26 October '17,
CSF.0001.0003.0161 exhibit 5.245.

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**EXHIBIT #5.245 LETTER ACSRF TO CSF DATED 26/10/2017
(CSF.0001.0003.0161)**

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MR DINELLI: And I won't take you to it but are you aware that then on receipt of this letter on the same day Mr Bugden sent an email to the chair and the CEO of the Sydney fund, Mr Haddock and Mr Cantor?---I would need to see it.

20

There was an email – and I can't call it up for you, but the email – or the email was in these terms:

Thank you for the response. We are disappointed that you are not able to accept our offer and I wish you well for the future.

25

Are you aware that email was sent?---What was the date of that email?

27 October 2017?---So there was a detailed letter on the same day. I remember that date. I think - - -

30

In any case was the position – in any case was the position that CSF didn't accept – or wasn't able to pursue the merger further at that time?---If I could go back to the document you had before 164 still on the screen.

35

Yes?---So the position here – once again, I reiterate there has been no agreement to successor fund transfer, no heads of agreement had been signed. No due diligence had been done. And we have still got the suggestion that six plus six is okay, without what we considered to be the continuing fund or the superior fund with respect to investment returns and the best interests of our members, potentially having no control over who the chair might be or who the successor fund might be. So our position was quite clear that we could not continue the arrangements without having clarity around those critical issues in the best interests – interests of our members.

40

THE COMMISSIONER: Well, can I ask you this: there was a deal of discussion and negotiation. We've seen that?---Yes.

45

There was no agreement?---We didn't reach the starting point.

Well - - -?---Of the heads of agreement.

5 - - - there was no agreement. If you were asked the question why did this fall over, what's your answer?---My answer is that the best interests of both funds' members would have been served by Catholic Super being the successor fund.

10 So it becomes who is the fund that merges into which, that is, which is the dominant fund. Is that right?---My understanding is that's always the case in successor fund transfer and merger negotiations.

Even though there's a proposal not disputed, I think, by the end, that governance of the fund would be six plus six. Is that right?---An agreement to that fact?

15 There was no dispute. I'm not suggesting that you ever got to a final agreement. I'm just saying that the parties were at a point where each – or there was no dispute that the board would be a six plus six. Is that right?---We accepted six plus six on the grounds that if there wasn't an independent chair that CSF would have the chair. So we sought separate independent legal advice to the – to the view of the importance of the chair in a successor fund arrangement going forward in the best interests of our members to protect their retirement savings, given the superior performance of one fund over a long period of time. We saw no other option.

20 I understand that point. You've made that point. I just want you to pause a moment. What you wanted was a six plus six board, plus an independent chairman. Is that right?---That was our offer.

And the governance of the fund, no matter who merged into who, would rest accordingly with a board of six plus six plus one independent. Is that right?---Yes.

30 What does it matter a hill of beans which fund merges into which?---We felt, to protect our members' interests and given our structural arrangements as I described earlier, that it wouldn't be in our members' best interests for their retirement savings to be put at risk, given that the – the policies and procedures that were in place to achieve those outstanding returns might, in fact, not be able to be guaranteed going forward.

35 Well, those policies and procedures are set by the board, aren't they?---They are.

40 Yes. Do go on, Mr Dinelli.

MR DINELLI: You would agree, wouldn't you, that the choice of a chair or even the CEO, they're all relevant – they might be relevant considerations but the overarching consideration is always the interest of the members?---Absolutely.

45 THE COMMISSIONER: I think the witness may have agreed with that proposition more than once, Mr Dinelli.

MR DINELLI: And that was, however, at that point, the end of the negotiations?---The negotiations haven't ended. So our new chair and the chair of the Sydney fund have recommenced discussions.

5 And I'm not going to take you to those further discussions but there were then some discussions which, as I understand it, are ongoing from earlier this year?---That's correct. And it's still the hope of both funds that that merger will eventually occur, in the interests of members of both funds.

10 THE COMMISSIONER: Yes.

MR DINELLI: Can I take you to another issue, one that you've raised already, and that is a very important aspect of – perhaps before I do that, Commissioner, I will just tender that letter dated 26 October.

15

THE COMMISSIONER: It's in as 5.245. Yes, go on.

MR DINELLI: Thank you. That can be brought down. You would agree that a very important aspect of the role of a trustee is to manage conflicts?---Yes.

20

And you're familiar with the general obligation that I've already – that you've already referred to. You're familiar with those - - -?---Yes.

- - - general obligations. And you're also familiar with the prudential standard SPS 25 521 which deals with conflicts of interest?---Yes.

And in fact, there is a conflict management policy within the organisation. If I can take you to CSF.0006.0001.0035. This is exhibit 37 to your first statement. Are you familiar with this policy - - -?---I am.

30

- - - Mr Haysey. Now, obviously, as a general proposition, all of these policies that are in place are directed to ensuring that CSF complies with its various obligations?---Correct.

35 And you will note that this is – this policy is dated April 2018?---Yes.

But since the first of these policies – and I understand there was one by a different name – but since at least 2012, the – materially, the policy has been in similar terms? Or perhaps I can take you to some provisions and to the extent that you recall - - -?---Thank you.

40

- - - that there's any difference you can indicate that. On _0006, it says:

45 *This conflict management policy documents, the arrangements in place for managing situations giving rise to actual, potential or perceived conflicts of interest and conflicts of duty – together conflicts – for the RSE, responsible persons and employees of the trustee.*

?---Yes.

And:

5 *The interests of the fund's beneficiaries must take precedence over the interests of responsible persons and employees.*

?---Yes.

10 And that's an obligation with which you are well familiar?---Yes.

 And this applies to, obviously, you as a director of the trustee - - -?---Yes.

 - - - and your co-directors, and also applies to senior executives who are responsible
15 persons?---That's correct.

 And also to employees?---Correct.

20 On _0009, at 1.7.1 there's an indication that:

Failure by a responsible person or an employee to disclose a personal conflict is considered a serious disciplinary matter and corrective action will be determined by the board.

25 ?---Yes.

 So ultimately, it's the board that takes responsibility for this policy?---Yes.

30 And at – the policy goes on to define relevant conflicts. Without going to the specific provisions, but, of course, if a – there's a duty owed by the trustee or a responsible person to beneficiaries, a conflict between that and duties owed by the responsible person or employee to other people, that can be a conflict?---Yes.

35 And if I can just take you to – finally to paragraph 7.5.

 THE COMMISSIONER: At page?

 MR DINELLI: On – thank you – _0018. And you're aware that:

40 *Under the policy if a responsible person or an employee believes that another responsible person or employee has or may have a conflict which has not been disclosed, the first responsible person or employee must bring the matter to the attention of the chief risk officer or the risk compliance team as relevant and provide an explanation why he or she holds that belief.*

45

 Do you see that?---7.5?

7.5, yes?---Yes.

5 And I won't take you to the old policy, but the provisions to which I've taken you are in the same terms as they were in 2012?---I – yes, I'm not surprised by that. I would expect that, yes.

10 Now, you raised, at the start, when I asked you about some matters of concern, one particular issue, and that, as I understand it, was a relationship between a senior executive of CSF and Australian Family. Can you explain what Australian Family is?---So Australian Family is a marketing and communications network organisation that publishes some material, and provides support in the early education and care sector. They are also responsible for sponsoring the national awards, the early education and care awards. In addition, they provide general marketing and consulting services.

15 And are you aware that CSF has used their services on a number of occasions, since 2010?---I am aware.

20 And I think we've referred – you referred to the term “network”, the Australian Family network or it's called Australian Family but in your evidence more specifically, you say that it's constituted by Family PACT Services Pty Ltd and Paul Clancy Consulting Pty Ltd which was formerly known as Australian Family Magazine?---Yes, they're all related parties.

25 And you've also indicated in your statement that – and I will have to refer to Mr Paul Clancy and he is the CEO of Australian Family Network – and:

30 *...he has provided services and Australian Family have provided services in relation to the strategy of seeking to grow the number of members of the fund*

?---Yes.

35 And do you yourself have knowledge of why or how it came to be that Australian Family was chosen to provide services to CSF?---I don't know the beginnings of that relationship. You're correct, though, that it has been providing services to the fund since 2010.

40 And those services include, I think you describe them as genuine marketing and other services. Is that right?---So there's a number of different elements to this – this arrangement. So initially, they – the firm was commissioned to enter into research in the child care, if I call it that, at that time, in the child care sector. We had – we had developed a business – strategic business plan at the time that identified that the early education space would be a potential growth area for our fund in order to achieve some of the scale desired, and the CEO commissioned some research that took place, 45 from my understanding, in 2011 and '12 to confirm the prospects of that approach.

And you would accept that the head of institutional relations at CSF, Mr Robert Clancy, ought to have disclosed his relationship with his wife who was a shareholder in Australian Family PACT Services?---I would expect that.

5 And that she was an editor of the magazine?---That was disclosed in 2015.

Yes. And you refer to that in your statement. It was disclosed in 2015. But it wasn't disclosed before then, was it?---No.

10 In fact, I think you might have said 2011. It matters not but since 2010 or 2011 Australian Family have been engaged?---Yes.

And Mr Robert Clancy failed to disclose that potential conflict on the register until May 2015?---So the conflict was disclosed on – in May 2015.

15

Were you aware that extensive amounts of money had been paid to the organisation even before that time?---Yes, they had been contracted to provide services to the fund through that period.

20 Now, I've already referred to Paul Clancy, he is the managing director of the Australian Family Network or the CEO. I can't recall?---It's one or the other. That's my understanding, too. Yes.

25 That's right. And he's also the sole director of the entity known as Paul Clancy Consulting Pty Ltd?---That's my understanding. Yes.

And that has never been disclosed, has it?---On to the register? That was disclosed for the first time on July 18 this year when I insisted it be put on.

30 Before that time, Mr Robert Clancy had not disclosed that conflict to the board or in fact in accordance with the conflict management procedure, had he?---The conflict with his brother?

Yes?---No, he had not.

35

It seems – if I can take you to CSF.0009.0001.3867. You will see this is an email from August 2010. And Paul Clancy writes to his brother, Robert – so Robert is with CSF – in relation to the third paragraph of his email:

40 *I'm suggesting that Catholic Super continue their sponsorship to almost formalise the platinum sponsor status I have provided for the past two years.*

Do you see that?---Yes.

45 And then I think this is a reference to what you may have referred to before as the first dot point:

Undertake a research study to determine other players in the market, how they are perceived and what and how they do to promote themselves in the sector.

Do you see that?---Yes.

5

And that was sent by Paul to his brother. And there's a reference then – or a response from CSF – or from Robert Clancy at CSF:

This all sounds good. Are you suggesting 30 to 40 thousand per year?

10

?---Yes, I can see that.

So that appears to be – or it may not even be the first, but that's certainly a reference to the sort of work that you referred to earlier in your evidence?---So the reference to the “work”, yes.

15

Has Mr Pegan ever raised an issue with the board that Robert Clancy has or may have a conflict which has not been disclosed?---So if I take you to the conflict – the – the matter we were talking about before - - -

20

Yes?--- - - - when the conflict was first registered with the board in 2015 - - -

That's in relation to Mr Robert Clancy's wife?---That's correct. So the control put in place at that time was that only Mr Pegan would have any relationship with Australian Family. And that had been the case since the beginning of the relationship, 2010. So the board, at that point, 2015, were clearly of the – of the view – of the mind – of the understanding that Mr Pegan, the CEO, because of the obvious conflict of interest, had managed the relationship entirely.

25

And based on your preparation for today, are you satisfied that that is the case?---No, I'm not. There are numerous examples of email correspondence between the brothers which are a breach of not only the conflict policy, but the email and internet policy, for example, and – yes.

30

And I won't take you to all of those. But – and I will return in a moment to what Mr Pegan did in May 2015. But you would know – and in your statement you set out the payments that have been made to Australian Family since 1 January 2013?---Yes.

35

And they amount to \$1.5 million?---Yes.

40

And \$500,000 in sponsorship expenses to Australian Family?---So the sponsorships would specifically be for the early education and child care awards which we were a major sponsor of at that time.

So in total, \$2 million has passed from CSF to Australian Family?---Over the period of time that you're talking about, yes. So I – I can add, though, that this has been an evolution in terms of services contracted. So you mentioned the sponsorship and I

45

mentioned the sponsorship of the awards. In addition to that, there has been the research done by Paul Clancy that was commissioned in – in the beginning of the relationship. And you've then got the evolution, as I will describe it, to other work contracted.

5

I understand that?---So, in fact, if – if I go through those numbers, the 2 million you described, about 42 per cent of that 2 million has in fact been in a branding exercise which coincided with the decision, based on the research done by Paul Clancy, to look at a different identity in terms of our master trust. So, in fact, the research indicated quite clearly that Catholic Super was not going to be an identity, to put it that way, which may well have gained traction in this new market that we were seeking as part of our business plan to grow the business in order to achieve the scale we've talked about earlier. And so part of that was you need to come up with a different identity to attract those people who might have issues with the Catholic name as a potential merger partner or as a potential – as a potential, yes, merger partner, I will put it that way. In fact, that initial work led to discussions around a master trust. So that work around the master trust and all the work involved in that took place in that period, 2013/14. And, in fact, the master trust set up Catholic division, MyLife MySuper division into which prospective early education and care workers would be placed. In addition, of course, every other potential merger, like our successful merger with Transport Industry Super in 2016, they've now moved into that MyLife MySuper division. Prospective mergers, even the Sydney fund you've talked about, that would have been an opportunity to form a division under the master trust. So Australian Family, if you're talking about 2 million, and I'm talking about 42 per cent, so you're talking 800,000 of that money was specifically in the branding space.

And are you aware of what other work was done by CSF to ensure that that amount was an appropriate amount to spend on those services?---So that quantum, which, of course, has been calculated in the course of preparation for this hearing, is the subject now of an independent review that has been commissioned to do precisely that. We have now commissioned an independent study to assess the total money spent, the nature of the contracts, the value to members of that money being spent.

If I understand your evidence, it's that Mr Clancy was engaged to do research about ways to expand in a particular segment of the market. Is that right?---Initially, correct.

And, in fact, that period was before 1 January 2013, wasn't it?---Yes.

40

So that wouldn't even be part of the \$2 million, would it?---So going back to 2010, the \$2 million I think – I could be corrected here – my understanding is it goes back to 2011. There could be extra money in 2010 that wasn't sought as part of this information. That will be part of the review, though, I just described. That will go back to - - -

45

How far back do you intend to go in terms of your review?---To the inception of the contract.

5 Now, it's not a criticism because you were asked to provide the figures from 1 January 2013 and you do that in your statement at schedule I20C?---Yes.

10 But that doesn't go back before 1 January 2013. So you accept that there may be even more funds that were paid in that early period for that research?---We certainly know the research was done in 2011/12. So I – I presume, yes.

15 And if I understand it correctly, you relied on his research to then do work in terms of branding in the child care sector. Is that correct?---One of the outcomes of the – of the research was the identity issue that I described.

15 And then Australian Family was paid, on your figures, 42 per cent of the \$2 million for doing that very branding exercise, wasn't it?---Yes.

You say in your evidence that:

20 *Due to the familial relationship between Paul and Robert Clancy and Jennifer Kernahan, Robert Clancy's status as head of institutional relations at CSF, dealings between CSF and the Australian Family entities have been conducted by CSFs CEO Frank Pegan and/or its COO.*

25 Is that correct?---That's correct.

You have referred to this – and you say this at paragraph 114 of your statement that:

30 *Frank Pegan confirmed to the deputy CEO head of compliance and Rob Clancy that the nature of the controls that he had in place with regard to his management of the relationship between CSF and the Australian Family entities were that negotiations with Australian Family entities were to be conducted by Frank Pegan and management of the arrangements with Australian Family entities was to be conducted by Frank Pegan.*

35 ?---That's the assurance I described earlier when the conflict was first registered.

And having prepared your statement - - -?---Yes.

40 - - - and prepared to give evidence today, do you consider that accurately reflects what has actually happened?---Sorry, can you read the statement again?

Yes, I will take you to paragraph 114 - - -?---Yes.

45 - - - of your statement. That's your second statement, I'm sorry, Mr Haysey?---Second statement. Thank you. Yes. So on that date, May 22, 2015 we received an assurance from Mr Pegan that negotiations had been conducted only by

him and that the management of those arrangements was conducted by Frank Pegan. Now, clearly, since that time, as you can see from the emails, that situation has not been – has not been the case. That has not been managed that way.

5 And in fact - - -

THE COMMISSIONER: Well, what follows from that? Perhaps if we can cut to the chase. What's the consequence that then follows? The fund is investigating these matters?---Correct.

10

Has that investigation concluded?---The investigation has not concluded. So Mr Clancy has been placed on leave and there's an investigation into this matter.

15 And has the board formed any view about what it should do in response to the matter yet?---The board has not finalised that view.

All right. Yes.

20 MR DINELLI: That's an opportune time to tender that email, Commissioner, if I may. It's the email - - -

THE COMMISSIONER: Email Clancy to Clancy, 26 August 2010, CSF.0009.0001.3867 becomes exhibits 5.246.

25

EXHIBIT #5.246 EMAIL CLANCY TO CLANCY DATED 26/08/2010 (CSF.0009.0001.3867)

30 MR DINELLI: In fairness to you, you say in your statement that since preparing your first witness statement you've become aware that Mr Clancy appears to have sent emails to Australian Family and purported to approve payments without authority on three occasions - - -

35 THE COMMISSIONER: I think he said that, Mr Dinelli.

MR DINELLI: And are you aware of his involvement in any other payments?---No, I'm not aware of any other payments that he has actually approved.

40 And - - -?---But might I add that's also part of the investigation that we've just commissioned.

45 Thank you. And that – are you aware that Rob Clancy attended meetings with Paul Clancy and other CSF employees including the CEO to discuss the work undertaken by Australian Family?---Once again, that's become very evident with the string of emails that have been presented to me during the course of my preparation.

And, in fact, as recently as – as recently as 29 May this year, Paul and Rob have been engaged in email communications about particular tasks for CSF?---It's fair to say it has been continuous.

5 And you – you're also aware that confidential information has also been disclosed in the course of that period of – or for a period of time by Mr Clancy's confidential information of CSF, Mr Paul Clancy?---I've been made aware of that during this period.

10 Can I come to one final issue in relation – or two final issues in relation to Australian Family. The first is CSF purchased the awards, did it not, from Australian Family in 2017?---That's correct.

15 And if I can take you to CSF.0009.0001.2557. It's an email from Mr Robert Clancy to Mr Paul Clancy. And if I can go to the next page. Have you – it might be a different document with CSF.0009.0001.2558 - - -

20 THE COMMISSIONER: Why are we trying to establish, Mr Dinelli? The witness has said that the award was purchased. He said that there's a continuing investigation. What are we trying to establish?

25 MR DINELLI: I don't think I need to take that matter further. Can I go to the last issue I would like to deal with. In your statement, you also acknowledge that that same employee, there has been 46,000 of expenses which were unauthorised in the period of 2013 to 2016?---That's correct.

And that's, of course, in breach of the corporate card use policy?---Yes.

30 And you're aware this came to a head in early 2016?---It came to a head?

It came to a head when Mr Clancy was given a letter in early 2016. Do you recall giving evidence about that in your second statement?---So the review that established the \$46,000 of unauthorised expenses took place at that time. I just – I can't recall if that's what you're referring to.

35 Yes?---Thank you.

40 In fairness to you, if I take you briefly to PJH-61, CSF.0010.0001.0839. This isn't dated but in your evidence you say that it was in early 2016?---Yes.

And it was written by one of CSFs finance team. Is that right?---That's my understanding. It's not signed but that's my understanding.

45 How did this letter come to your attention?---This letter was found in Mr Clancy's drawer after he was put on leave.

When – when?---A matter of weeks ago.

So this issue wasn't elevated to the board at the time?---No.

And it's your evidence that the money was paid back. Is that right?---The \$46,000 identified has been repaid.

5

And are you satisfied as a board member that the processes – that the personal expenses on that credit card have ceased thereafter?---No.

10 Is that part of the current inquiry?---Absolutely. So the – the review into Mr Clancy's credit card use and his – and the personal use of that card will commence from the first day of his employment to the present day.

15 And in your statement you also identify a longstanding practice which was not documented which allowed senior executive staff to incorporate personal travel and accommodation and other minor expenditure, provided it was reimbursed. Do you recall that?---I do.

20 And that has gone on for 10 years?---It has come to my attention in recent – in preparation.

You accept that's plainly contrary to policy as well?---It is – it is. Might I add that immediately that came to my attention, in the last few weeks, that policy now has been restated and reaffirmed and that longstanding practice has now ceased.

25 And these matters - - -?---Just by way of context, if I could, in my – in my preparation, I note that most of these would be with respect to spouse travel, and that in the – I've been informed that in the booking process, the staff member would make the booking for two, and in all of the cases where I've asked for this to be checked, those private expenses have been repaid immediately. That has been the
30 longstanding practice, in addition to the longstanding practice of allowing it, the repayment has been certainly carried out.

35 But that's ongoing, that inquiry, is it? Is that inquiry ongoing?---So the inquiry into Mr Clancy's personal use, definitely. That's due for completion – I'm thinking – I was going to say 21 August but I will say before the end of this month.

40 Thank you. And, in fact, it was the preparation of that Rubric – of your statement in answer to that Rubric which actually raised some of these matters for your attention and for the attention of the board?---The credit card review took place in '13 to '16. Now, I wasn't aware of that review until preparation for this hearing.

Should the board have been informed of that?---I believe so.

45 And just so I can understand what the inquiry is, will that deal with – will that deal with others who hold credit cards and who might have used this longstanding practice?---So the process for use of credit cards is that there are a number of steps where those credit cards should be signed off, and that should be, of course, by your

manager, and in the case of Mr Clancy and in the case of Mr Pegan, who is also – you’ve asked specifically for his – where they might not have been signed off, the investigation will include both of those credit cards. So the finance team have assured me that there are no other instances.

5

All right. And the final issue in relation to that that I just want to raise is you say in your statement in relation to these credit card expenses, that Mr – that after this came to the executives’ attention in 2016, Mr Clancy’s credit card was signed off by people above him. Is that right?---That’s correct.

10

And have you – have you had reason to look at those approvals from – that were given in respect of his credit card?---Yes.

15

And are you aware that, in fact, he didn’t have his credit card approved by – as required by the chief risk officer for most of 2017?---That’s not my understanding.

If I can take you to this final document. CSF.0015.0001.0022. Did you consider these documents in preparing to give evidence today?---I have seen these.

20

Do you see – perhaps I can take you to the actual documents rather than the summary which has been prepared by someone within your organisation. If I can go to .0023. This is February 2017. If you go to – so they’re the various expenses there. And it’s – in your evidence you say this was signed off by David, which I think is a reference to David O’Sullivan, the chief risk officer?---Yes. So the previous page showed you that there were two months, December, January, which I understand coincided with Mr Clancy’s period of leave, that weren’t signed.

25

Perhaps you want to go to the next page, 0024?---Yes.

30

Now, for those sitting here it may not be of much use because this is redacted. Whose signature appears above the manager’s name and signature?---Mine is redacted too. That appears to be Mr Clancy’s signature.

35

Thank you. No further questions, Commissioner.

THE COMMISSIONER: Are you tendering that last document, Mr Dinelli?

MR DINELLI: Yes.

40

THE COMMISSIONER: Credit card expenditures, Clancy, CSF.0015.0001.0022, exhibit 5.247.

45

**EXHIBIT #5.247 CREDIT CARD EXPENDITURES, CLANCY
(CSF.0015.0001.0022)**

MR DINELLI: Thank you. Thank you, Commissioner.

THE COMMISSIONER: Mr Brereton.

5 MR BRERETON: No re-examination, Commissioner.

THE COMMISSIONER: Yes. Thank you very much, Mr Haysey. Yes.

10 MR R. AUSTIN: May I have leave to appear for SCS Super. Robert Austin.

THE COMMISSIONER: Yes, Mr Austin.

15 MR AUSTIN: I haven't troubled the Commission so far but there is an issue about evidence in relation to CSF and SCS. I think Mr Dinelli has something to tell - - -

15 MR DINELLI: If I can interrupt my learned friend. As you may be aware, Commissioner, in response to two Rubric – SCS has provided a statement of Mr Hartley, and a Mr Cantor. Those statements will be tendered – we had hoped to tender them now, Commissioner, it's just we've got some issues with getting it on to the system but they will be tendered in a bundle before the end of the week.

20 MR AUSTIN: And with exhibits.

25 MR DINELLI: With their exhibits.

THE COMMISSIONER: If that's done, does that solve the difficulties you've - - -

MR AUSTIN: That solves the problem. We need to refer to them in submissions if the Commission is asked to make any findings on the merger.

30 THE COMMISSIONER: Well, exhibit 5.248 will be the statement of Mr Hartley.

35 **EXHIBIT #5.248 STATEMENT OF MR HARTLEY**

THE COMMISSIONER: Exhibit 5.249 will be the statement of Mr Cantor.

40 **EXHIBIT #5.249 STATEMENT OF MR CANTOR**

45 THE COMMISSIONER: The further details of those exhibits will be provided once they make it into the system, but it will keep the exhibit markings reasonably proximate. Yes, thank you, Mr Austin.

MR DINELLI: Thank you, Commissioner. If Mr Haysey can be excused.

THE COMMISSIONER: Yes, Mr Haysey. Thank you very much. You may step down. You're excused.

5 <THE WITNESS WITHDREW [3.11 pm]

THE COMMISSIONER: I take it we have a changing of the guard, do we, Mr Dinelli?

10

MR DINELLI: There is. Mr Hodge will be here in a moment, as well as my learned friend, Dr Collins, for ANZ.

THE COMMISSIONER: Yes. 3.15.

15

MR DINELLI: Thank you, Commissioner.

20 **ADJOURNED** [3.12 pm]

RESUMED [3.16 pm]

25 MR HODGE: Commissioner, the next witness is Ms Weekes from ANZ.

THE COMMISSIONER: Is Ms Weekes in the hearing room?

30 <VICTORIA SOPHIA MARY WEEKES, AFFIRMED [3.16 pm]

<EXAMINATION-IN-CHIEF BY MR PIKE

35

THE COMMISSIONER: Do sit down. Yes.

MR PIKE: May it please, Commissioner.

40 Is your full name Victoria Sophia Mary Weekes?---Yes, it is.

Are you a non-executive director and the chair of OnePath Custodians Pty Limited and Oasis Fund Management Limited?---Yes, I am.

45 Is your business address level 23, 242 Pitt Street Sydney?---Yes, it is.

Have you received a summons to attend to give evidence today?---Yes, I have.

Do you have the original of that summons in front of you?---Yes, I have.

I tender the submission – sorry, tender the summons, Commissioner.

5 THE COMMISSIONER: Exhibit 5.250, the summons to Ms Weekes.

EXHIBIT #5.250 SUMMONS TO MS WEEKES

10

MR PIKE: Ms Weekes, have you made a statement dated 14 August 2018?---Yes, I have.

Do you have the original of that statement in front of you?---Yes, I do.

15

And is the contents of that statement true and correct?---Yes, it is.

I tender the statement, Commissioner, together with exhibits.

20 THE COMMISSIONER: 5.251, the statement of Ms Weekes and its exhibits, the statement being dated 14 August '18.

**EXHIBIT #5.251 STATEMENT OF MS WEEKES AND ITS EXHIBITS
DATED 14/08/2018**

25

MR PIKE: May it please the Commission.

30 THE COMMISSIONER: Yes. Yes, Mr Hodge.

<CROSS-EXAMINATION BY MR HODGE

[3.18 pm]

35

MR HODGE: Thank you, Commissioner.

Ms Weekes, we would just like to explore some aspects of the decision that the trustee will need to make in relation to the recent or recent-ish decision by ANZ to sell its Wealth business to IOOF?---Yes.

40

So just so we can help the Commissioner to put this in context, can we bring up what is exhibit number VW-15 to your statement, and that is ANZ.801.098.2273. This is a briefing paper that has been prepared that explains the successor fund transfer that's proposed. If you go – I'm sorry, I should say it at least contains a diagram that explains some aspects of the successor fund transfer. If we go over to page

45

.2274?---Yes, just so I can confirm I'm looking at the right document, it's the front says Rice Warner briefing paper. Is that correct?

That's correct, yes?---Yes.

5

Now, the present situation, is that accurately described in the first column there, which is:

10 *There is presently a trustee which is OnePath custodians and it is the trustee of two super funds.*

?---Yes, that's correct.

And one of those funds is OnePath Master Fund?---Yes, that's correct.

15

We will come back to that in a moment. And the other is the Retirement Portfolio Service?---That's correct.

20 And is the Retirement Portfolio Service effectively like a superannuation wrap platform?---Yes, similar to that.

25 That is, the products that a member would be invested in if they are invested through the Retirement Portfolio Service is effectively through a platform and then into investments of their choice?---Yes, a smaller number than the typical wrap but yes, that's correct.

And OnePath Master Fund contains a variety of different products?---Yes, that's correct.

30 And it would contain an employer product, the MySuper product?---Yes.

35 And it also contains – is it Smart Saver or Smart Super?---Smart Choice Super which is both – there's a Smart Choice Employer MySuper version – or in fact two – and there's Smart Choice Retail, but that's one of the – that is the core MySuper product is the Smart Choice Employer.

Smart Choice Retail is not a MySuper product?---It's not a MySuper product but it's the same underlying product. It's a life stage fund.

40 And the investments of the OnePath Master Fund are presently made into insurance policies issued by a related party life insurer?---Yes. All of the – if you call them superannuation products, Smart Choice and there are other superannuation products in the master fund, are currently achieved through the trustee acquiring what we call an investment linked insurance policy, which is issued by OnePath Life, and in turn
45 OnePath Life invests in the underlying investments which reflect the product design of the particular product, be it Smart Choice or one of the other products.

And ANZ is also selling the insurance business, which is run by OnePath Life?---That's correct.

But not selling it to IOOF?---That's correct.

5

It's being sold to Zurich?---That's correct.

And the consequence of the sale to Zurich is that the OnePath Master Fund will need to unwind its investments through the life insurance policies?---That's correct. Both the consequence of the sale to IOOF of the superannuation business would also require the – are variously referred to the extraction of the investment component parts and superannuation parts from the life insurance, or separation from the life insurance company, and similarly, the sale of the life insurance company to Zurich required that separation if the businesses are to be separated.

15

And insofar as the separation of the super fund from the life insurance business goes, there might be some element of choice on the part of OnePath Custodians as to exactly what action it takes, but is it the situation that inevitably, either it will choose to redeem its investment in the life – or in the investment linked insurance policies or it will be compelled to do so, or it will simply occur in some way at the hands of OnePath Life?---The current proposal, based on the – as selected by the trustee is the preferred proposal that the redemption of those investment-linked life policies occur by way of successor fund transfer. One of the significant benefits of that is that it has the benefit of legislation which provides relief from treating that separation as a capital gains, or tax event, and if you combine the redemption of those investment linked life policies with a successor fund transfer, then there's no impact on members of the fund. In fact, they're kept whole or kept the same. There's no event which causes a change in their interest, albeit that the nature of the investment will no longer be through an investment linked life policy.

20

I understand. Let me attempt to say it back to you to make sure we're agreeing with each other. The preferred option for the trustee for capital gains tax reasons is that the delinking from the insurance policy investments occur by the means of the successor fund transfer from the OnePath Master Fund into the Retirement Portfolio Service?---Sorry, could you repeat that? Apologies.

25

The preferred method for the trustee of de-linking the OnePath Master Fund from the insurance policy investments is by successor fund transfer of the OnePath Master Fund into the Retirement Portfolio Service?---Yes, that's correct. At this stage, that is the preferred option but we will be going – continue to go through a process to ensure that all components of that actually achieve the best outcome for members. But yes, that's the preferred option.

40

And one of the reasons that that is the preferred option is because there are capital gains tax advantages for the members in doing it in that way?---You may describe them, yes, as capital gains tax advantages or more that they just stay the same. There's no adverse impact out of that, correct.

45

The advantage is they are not disadvantaged?---No disadvantage. Correct.

5 All right. And once that successor fund transfer happens, assuming that it does, there will only be one super fund operated by OnePath Custodians, the Retirement Portfolio Service?---That's correct.

And OnePath Custodians will, as part of the IOOF transaction, be sold to IOOF?---Yes, that's one of the preconditions, yes.

10 And if we go to page .2275. We can see that sketched out here in more detail. You start with two super funds. You then end up with only one super fund, that you start with ANZ OnePath owning OnePath Custodians, that you finish with IOOF owning OnePath Custodians?---Yes.

15 Now, there's two aspects of the decision in relation to the successor fund transfer that we're interested in understanding. One is grandfathered commissions. And you've expressed a view about this in your witness statement?---Yes.

20 So to put this in some very small amount of context can we bring up ANZ.800.697.7699. So these are the – the front it's the management papers – I'm sorry, board meeting papers in relation to a meeting of the board of OnePath Custodians and also Oasis Fund Management on 26 February 2018?---Yes.

25 And if we go through to page .7713.

THE COMMISSIONER: Do you want her to have a hard copy? I think one is about to be provided if you want.

30 MR HODGE: I am content with that, Commissioner.

MR PIKE: I can assist, Commissioner.

THE COMMISSIONER: Yes.

35 THE WITNESS: Thank you.

MR HODGE: So this is a list of the matters arising for the meeting to be held on 26 February 2018 in relation to the transition?---Yes.

40 And if we go to page .7714. We see item number 16, and this reflects, I think, the view you were expressing before, which is for OnePath Custodians to provide approval, and at this stage it's just talking about in-principle approval, it will be conditional upon various matters, including being satisfied that it's in members' best interests for things to proceed?---Yes, I see that.

45 And is it fair to say one of the things that is of importance for you as the independent chair of the trustee is that you're satisfied that the members' best interests will

ultimately be met – it will have to be in some way with the assistance of IOOF once the sale goes through?---That’s correct.

5 And then if we go to page - - -?---Actually, I can just add to that slightly. You used the term with the assistance of IOOF. I would say that it is dependent upon certain factors that we’re satisfied with in relation to IOOF.

10 You have to be satisfied that it is possible to meet the members’ best interests - - -?---Yes, yes.

15 - - - if IOOF is involved in the management of the fund?---We recognise that there are certain matters that in order to satisfy the members’ best interest test and to be satisfied it’s in members’ best interests there are certain matters that, if you like, pertain to IOOF, whether it’s with their assistance but there’s certain aspects that, if you like, it’s not just the technical transaction I would describe; it’s actually the – their view about the – the business and the future, yes.

IOOFs view about the business - - -?---Yes, yes.

20 - - - and the future?---Yes.

And if we go to page .7754?---Sorry.

25 Sorry, 7754. So this is – have you got that up – managed to find that, Ms Weekes?---Yes, I have it here I’m just - - -

This is part of the risk overview in relation to the proposals?---Yes.

30 And risk number 4 is:

Adviser loss of revenue.

?---Yes.

35 And what’s explained is the risk flows if the successor fund transfer disturbs the FOFA grandfathering of commission arrangements?---Yes.

I tender that document, Commissioner.

40 THE COMMISSIONER: Board meeting papers OnePath Custodians, 26 February ’18, ANZ.800.697.7699, exhibit 5.252.

45 **EXHIBIT #5.252 BOARD MEETING PAPERS ONEPATH CUSTODIANS, 26 FEBRUARY ’18 (ANZ.800.697.7699)**

MR HODGE: Then if we go back to exhibit VW-2 of your statement, Ms Weekes?---Yes.

THE COMMISSIONER: Have you got a doc ID?

5

MR HODGE: I'm sorry, Commissioner. It's ANZ.801.046.0001.

THE COMMISSIONER: Thank you.

10 MR HODGE: This is a presentation prepared by certain parts of management in relation to the – what's referred to as Project Edison which we understand refers to this entire transaction?---Yes, that's correct.

And it's for a meeting on 29 March 2018?---That's correct.

15

And then if we go over the page to .0002. This is part of the presentation but you see this is item 6(v):

Future of Financial Advice grandfathering.

20

And what's set out there is an objective to:

Receive legal confirmation that Future of Financial Advice grandfathering relief carries across to the RPS.

25

?---Yes, I acknowledge that.

And there's an explanation that the present status is that OnePath Life pays commissions to advisers?---That's correct.

30

And so that's being paid by the life insurance company?---As the administrator for the custodian.

35 Out of the investments made with it through the life insurance policy – I'm sorry, through the investment linked insurance policies or you're not sure?---My understanding is that the – the – all the fees that customers – members pay for their products, the commissions are paid – any commissions are paid out of the payment by members of their fees for commissionable products, yes.

40 I see. And it's explained that:

The current working assumption is that commissions will continue to be grandfathered.

45 ?---I acknowledge that that is what is noted there. I might provide a little bit of context. These are management papers that – that – that go to the board. The issue of grandfathering, or the impact of the transaction, the SFT and the transaction of

5 grandfathering was identified early in the transaction – early in the board’s
considerations, as far back as the 26 February meeting, and possibly before, and
notwithstanding the fact that some of the management papers, and even the legal
advice – not legal advices, but the – the – I guess assessment of risks referred to the
10 issue of grandfathering as a risk as though if grandfathering weren’t maintained, that
was a problem. On several occasions, including that first assessment, both I and
others on the board queried those – those statements, and said that that wasn’t
necessarily the view of the board, or – or an intention or, frankly, a concern of the
board, and that we are – and we continue to this day to, you know, await the detailed
15 legal advice. I acknowledge that that paper and perhaps some of the earlier papers
might lead you to believe that that was actually a board view and these – these papers
were presented by management and the board are saying on a number of occasions
until the full advices had been received, wanted to, you know, maintain their position
on that matter.

15 I think you’re quite clear in your statement that the view of management is not the
view that you hold about grandfathering of commissions. I should put that a
different way. You’re quite clear in your statement that you don’t accept as a matter
of course that maintaining commissions is necessary or important if the successor
20 fund transfer is going to go through?---That’s correct.

And the point you’re making is when you look at a number of these documents,
management seems to be saying that it is of critical importance that commissions are
grandfathered?---I think as you look at them, that’s a possible interpretation. The
25 focus seemed to be as a recognised component part of working through the
transaction that it was a matter that had to be considered about whether they were
necessarily disturbed. I can’t really give a view about what management did or
didn’t think. I really want to give a view about the board’s approach to the issue.

30 Well, at least in this presentation, we see under the heading Impact of Denial or
Delay:

Support from the adviser network is critical for the IOOF sale.

35 ?---I acknowledge that. That’s what they’ve written.

And you understand the view of management – we can go to some other documents
if it would help, but I think you’re obviously across it – seems to be that if
commissions are not grandfathered, then the adviser network will not support the
40 super fund or the sale?---Based on my participation in the board meeting, it certainly
wasn’t the sense – the strong sense that I got in those terms, no.

I’m sorry, you’re saying when you’re actually in the board meetings, and you look at
these papers and discuss them and push back and challenge management, you didn’t
45 get the sense that they were strongly married to, say, that proposition, which is the
support from the adviser network is critical for the IOOF sale, and without
grandfathered commissions you will lose the support of the adviser

network?---That's correct. And this – on this particular day, and it has probably been in subsequent board meetings, an update on where it's at, we're waiting for legal advice, it's unknown. That's not to say it wasn't considered or the board didn't read the paper but any given meeting it wasn't – there wouldn't have necessarily have
5 been a lengthy discussion about that, but I wouldn't – yes.

In fact, can you see how if via the successor fund transfer you simply cut off all commissions, that might be in the interests of members?---My – it might be, but I think the challenge, as I see it, with some of those issues is the first position the
10 board would take would be to understand the issue, to understand the legal position. So what – what is the actual effect, rather than forming a view about what we would like the effect of transfer to be on grandfathered commissions. Secondly, on the – on the issue of grandfathered commissions generally, I think not just the legal position, but understanding how our obligations as trustee interact in terms of Choice
15 members and members who have chosen a product, versus members of the fund as a whole. So there's a set of lengthy considerations around it and I don't think the trustee has a clear view either on the – yet because we haven't got the legal advice on the effect of the transaction, so the legal effect, and then to the extent there is a discretion or option for the trustee, what – what would drive our determination and
20 the factors that we would consider in determining what is in the best interests of members.

Has the trustee considered previously why it's in the best interests of members to continue paying commissions?---No, not – not in that specific manner, no.
25

And so will part of the consideration that will now have to occur in relation to the successor fund transfer be whether it's actually ever in the interests of members to be paying commissions?---Yes, that's correct. And, in fact, as part of the advice that we will be receiving for the purposes of this matter, the effect of the transaction, we have
30 also requested a deeper consideration, even in the status quo, about the retention or not of grandfathered commissions. Absolutely.

And ultimately, you, as the chair of the trustee, and you and the other members of the board, will make whatever decision you think is in the best interests of members in
35 relation to commissions, regardless of what your parent company, whether it's ANZ or IOOF, wants?---That is absolutely correct.

And can I then show you another document and move to the second point we want to understand in relation to the sale process. Can we bring up ANZ.800.697.8299. So
40 this is – or these are the papers in relation to a meeting that's to occur on 29 March 2018?---Yes.

And if we go through to page .8314, you see this is another later version of that same type of action list of matters arising?---Yes.
45

And item number 7 is Presentation From IOOF:

The board commented that it would be useful to have a presentation to the board from IOOF in relation to IOOF's strategic direction and business plan and operations, services and performance to give comfort to the board that members' best interest obligations will be met going forward.

5

?---Yes.

Has the board yet had a presentation from IOOF?---No, we haven't.

10 And do you know why that is?---Yes. The board has discussed this on a number of occasions, and as we have – and these minutes and actions are from March and before, we had always identified that this would be an important component, whether it was a presentation or, as we discussed before, some input from IOOF. As we have, as a board and from the project team, progressed the planning of the successor
15 fund transfer and all the considerations that go into that, we have decided and we review this on an ongoing basis, that it would be better to seek input, if I could call it that, from IOOF at a later stage in the process. And the intention of that was not to put it off, but recognising that there were a number of aspects of the process where, in fact, the board could and, in fact, has, made a number of decisions in relation to
20 the structure, the future administration arrangements, our expectations of how the business will operate, that we can, in fact, do that, and we can, in fact, secure commitments and arrangements before involving IOOF. And strategically, in fact, it may be more sensible, and in the members' best interests, to address those issues first and be very clear about, when we meet with IOOF, what it is, if we meet or what we want or what we're seeking from IOOF, to be very clear about what that – what that is. And so to do so too early may have the potential to confuse the board's considerations. It is a complex process and – and as chair also I was quite keen not to confuse the very deliberate and careful considerations and the component parts of our decision, with a general engagement with IOOF. So as we progress through the
30 process, I think the board and I both knew we need to be clear about what input we want from IOOF and at what stage. And the other thing that I would add is something – and I can't recall whether it was already at this meeting or afterwards, is that we talk a lot about the operating environment or the target operating model that will exist to support this future – future business. And what that target operating
35 model looks like is partly influenced by team structures, how they relate to investment frameworks, risk frameworks, and governance frameworks, and that is one component we're waiting for. And I expect – would expect that in developing that clarity around the target operating model that we are asking the project team to present to us, they may well engage with IOOF. But, again, at this stage our focus
40 has been let's get that information, make sure we're comfortable with it as a board, and the point at which we feel the need directly as a board to engage with IOOF will be at a later stage. I apologise for the long answer but it is something we've given quite a lot of thought to.

45 So originally the board, in March, thought that it wanted to meet with IOOF?---Yes.

And now it has decided that at least in the immediate future it can put off meeting with IOOF?---Yes, we will meet with them when we think the time is right, and – well, I would use different language. It may be that we may not actually meet with them, that we will engage with them and seek information from them for particular purposes that it won't necessarily be – take that – that form. So, yes, it's – our thinking has matured as the transaction has progressed, and, yes, almost at every board meeting we have this conversation about what is the right time, what are we seeking from them, how does what they do fit into the assurances and certainties that we need to obtain to satisfy ourselves as part of a broader package that the – both the SFT and the transaction will be in members' best interests.

So it might be that it's possible for the board to resolve to approve the successor fund transfer without having met with IOOF?---It is possible, yes.

Would it be possible for the board to approve the successor fund transfer without being satisfied that upon the subsequent sale of OnePath Custodians to IOOF the members' best interests would be served by remaining within an entity controlled by IOOF?---I think the answer is no. Would you mind repeating the question?

Well, what I'm wondering about is, as you know, the original proposal seemed to be that there would be two successor fund transfers?---Yes.

Now, it is only proposed that there will be one successor fund transfer?---Yes.

The consequence of there only being one successor fund transfer is that OnePath Custodians will just be the trustee of a single superannuation fund into which both the master fund and also the RPS form separate divisions of that fund?---Yes.

OnePath Custodians has no control over whether its parent company sells it to IOOF?---Once all the condition precedents are satisfied and the SFT occurs, yes.

But the SFT is just the SFT of the Master Fund into the RPS?---That's correct.

And what I'm trying to understand is now that there's just one successor fund transfer, and it's just a transfer of the Master Fund over into the RPS, is it necessary for the board to actually take into account at all what's happening with IOOF?---The board's view is yes, it is very much a consideration, absolutely.

And so if the board wasn't satisfied that ultimately being within the IOOF group was in the best interests of members, then the consequence would be it wouldn't approve the successor fund transfer?---That's correct.

And one of the things the board has been doing – well, one of the things the board has done is to monitor and review some media stories about IOOF?---Yes.

And if we bring up ANZ.801.098.2251. I am not sure it matters. There was – what we were going to look at I think are the draft minutes of a meeting that occurred a couple of weeks ago?---Yes.

5 One of the items that the board considered at that meeting were some recent media reports in relation to IOOF?---Yes.

And it also received – I don't – I am obviously not asking you to tell me what this is – but it also received a legal view about that. If we go to page .2257. This is, as I
10 say, the draft minutes, but this is - - -?---Yes, our internal legal advisers prepared a paper identifying some of those issues, yes.

And presumably then, one of the things that the board will have to continue to do is to monitor other information that's available about IOOF?---That's correct.

15 And that would include, for example, the evidence that was given last week by IOOF?---Yes.

And in doing that, is it your view that the trustee, acting in the best interests of the
20 members, must take all of that information into account in forming a view as to whether putting those members within the control of the IOOF Group is in their best interests?---Yes. And the only modification of the “yes” is that we wouldn't merely rely on media reports, or even the testimony. I think in that meeting, the focus was it assisted us in identifying the issues of concern, and I – and the issues that I think that
25 we would consider within the trustee's remit validly of concern and some of the options that we had before us to address those concerns and seek input from IOOF on those issues. So it was assisting us to start to formulate how we would frame the considerations that you have referred to before relating to the relevance of the broader IOOF Group in our deliberations around the successor fund transfer.

30 I tender the draft minutes, Commissioner.

THE COMMISSIONER: Before we deal with that, the board meeting agenda of 29
35 March as well, or is that already in?

MR HODGE: No, I don't believe that is in, Commissioner. I tender that as well.

THE COMMISSIONER: Board meeting agenda OnePath Custodians 29 March '18
40 ANZ.800.697.8299 exhibit 2.253.

EXHIBIT #2.253 BOARD MEETING AGENDA ONEPATH CUSTODIANS 29 MARCH '18 (ANZ.800.697.8299)

45 THE COMMISSIONER: Exhibit 5.254, draft minutes OnePath Custodians meeting – what date July?

MR HODGE: 26 July.

THE COMMISSIONER: 26 July '18, ANZ.801.098.2251 exhibit 5.254.

5

**EXHIBIT #5.254 DRAFT MINUTES ONEPATH CUSTODIANS MEETING,
26 JULY 2018 (ANZ.801.098.2251)**

10 MR HODGE: Commissioner, I don't have any more questions for Ms Weekes.

THE COMMISSIONER: Yes. Is there anything arising?

MR PIKE: No re-examination. Might she be excused, your Honour.

15

THE COMMISSIONER: Yes. Thank you, Ms Weekes. You may step down. You are excused?---Thank you.

20 <THE WITNESS WITHDREW [3.56 pm]

MR HODGE: Commissioner, the next witness is Mr Pankhurst.

25 THE COMMISSIONER: Yes. Is Mr Pankhurst in the hearing room?

MR PIKE: I think he might be outside, Commissioner.

30 THE COMMISSIONER: If we can send for him, please. Just a moment. Just a moment. Would you be good enough, please, not to move around while the oath is being administered. It is, I thought, still regarded as common courtesy to the witness more than anyone. Perhaps you could begin to administer the oath again, please.

35 <MARK JAMES PANKHURST, SWORN [3.57 pm]

<EXAMINATION-IN-CHIEF BY MR PIKE

40

THE COMMISSIONER: Do sit down, Mr Pankhurst. Yes.

MR PIKE: Thank you, Commissioner.

45 Sir, is your full name Mark James Pankhurst?---Yes.

And are you the head of superannuation, pensions and investments for ANZ Wealth?---Yes.

Is your business address 833 Collins Street, Docklands, Victoria?---Yes.

5

Have you received a summons to attend to give evidence to this Commission?---I have.

Do you have the original of that summons in front of you?---I have.

10

I tender the summons, Commissioner.

THE COMMISSIONER: Summons to Mr Pankhurst, exhibit 5.255.

15

EXHIBIT #5.255 SUMMONS TO MR PANKHURST

MR PIKE: Mr Pankhurst, you've made, have you not, two statements in relation to evidence to this Commission?---I have.

20

The first dated 1 August 2018?---That is correct.

And the second dated 14 August 2018?---That is correct.

25

Now, in paragraphs 10 and 11 of your second statement, Mr Pankhurst, you have made, have you not, two changes – or two corrections to your first statement?---That is correct.

Now, with those changes, is your first statement true and correct?---That is correct.

30

I tender that statement and its exhibits.

THE COMMISSIONER: Exhibit 5.256, the statement of 1 August '18 and its exhibits.

35

**EXHIBIT #5.256 STATEMENT AND EXHIBITS OF MR PANKHURST
DATED 01/08/2018**

40

MR PIKE: And in relation to your statement of 14 August 2018, is that true and correct?---That is correct.

I tender that statement, Commissioner.

45

THE COMMISSIONER: Exhibit 5.257, the statement of 14 August.

EXHIBIT #5.257 STATEMENT OF MR PANKHURST DATED 14/08/2018

MR PIKE: May it please the Commission.

5

THE COMMISSIONER: Thank you. Yes, Mr Hodge.

<CROSS-EXAMINATION BY MR HODGE

[3.59 pm]

10

MR HODGE: Thank you, Commissioner.

Mr Pankhurst, I would like to deal with two topics with you. The first is in relation to payments made by responsible entities of managed investment schemes to the ANZ Group. And you've addressed some questions about that in your statement. You might need to speak up?---Certainly.

15

So if we could bring up your statement which is ANZ.999.019.0001, and go to page .0073. Do you see you say in paragraph 157 of your statement that you're informed that:

20

OnePath Custodians and Oasis have not formally considered these types of payments.

25

?---That's correct.

And the types of payments we're talking about are payments made by responsible entities of managed investment schemes to some member of the group where the payment is calculated by reference to investments made out of the super fund?---That's correct.

30

And you say you were informed that:

35

To the extent that OnePath Life or Oasis retain the benefit of such payments, OnePath Custodians and Oasis consider that it is appropriate to do so where this is a major consideration by management in setting the pricing position of fees within products charged to members of the fund.

40

?---That is correct.

And then you say:

Such payments are a major consideration by management in determining the pricing position of fees.

45

?---That's correct.

And you may not be aware of this but has this position very recently changed only in one respect, which is that the board of OnePath Custodians and Oasis has recently turned its mind, since receipt of the Rubric from the Commission, to exactly what is going on in relation to these payments?---Yes. I was made aware this afternoon.

5 I see. And perhaps if we bring back up ANZ.801.098.2251. These are the draft minutes, Commissioner, that were just tendered.

THE COMMISSIONER: Yes.

10 MR HODGE: And if we go to page .2256. You see item 9 which is a consideration of shelf space fees?---I do.

And shelf space fees is another way of referring to the types of payments that I'm referring to?---That is correct.

15 And you see there was a presentation made to the board?---That's correct.

And was the first time you were made aware of this this afternoon. Is that right?---That's correct.

20 Just before you were giving evidence?---That's correct.

Okay. And what was explained there was that management's understanding is that shelf space fees are factored into the calculation of fees by OnePath Life?---I'm sorry, do you mean in that board meeting or - - -

Yes. You're not sure?---I'm not sure, I'm sorry.

30 Okay. Are you aware or have you had the opportunity to make any inquiries about what the outcome was of the board meeting?---No, I haven't, but – but I was shown a diagram.

You were shown a diagram?---I was shown a diagram of a - - -

35 I see?---Of a – a flowchart, if you like, but I don't know what the outcome of the conversation was. It was just that I was shown that.

Okay. Maybe if we can just check if we're referring – or I understand what you're referring to. Can we bring up ANZ.801.039.0039. This is the first page of the document. Then if we go to the second page. Is this the diagram that you are referring to?---That's correct.

40 Okay. Explaining how it is in the case of OnePath that the money flows through from an external MIS?---I think it was attempting to do that but I don't believe that it's correct.

45

You don't think it's accurate?---No, I don't.

5 Could you just explain to the Commissioner, so that when we come to look at this afterwards we know what the problems are, why it is incorrect?---I've only had a very scant look at it, so I – I quickly spoke with the person who informed me in regards to the way that flows work for RPS, and my understanding is that they – the flows that have been diagrammatically drawn there that go from the particular investment investment management there they don't flow through OnePath Funds Management at all. My understanding is there is a different pathway. And so
10 I would probably want to understand a little bit more about the thinking and the context as to why this diagram was proposed because I'm not sure as to that before I comment too much further.

15 I see. You're saying that you're not sure that the money flow is going from the responsible entity of the external managed investment scheme through to OnePath Funds Management?---In – in the RPS situation, I know how the OnePath Master Fund works.

20 Yes?---I'm very clear on those arrangements but I would need to understand the context in which they were talking whether that was a historical arrangement, whether that was a future – I'm not – I'm not clear of that context, unfortunately, so I'm struggling a little bit with trying to understand the way that they've drawn it. Because it just doesn't – it didn't look correct to me. And when I spoke with my peer, he made similar mention that that was the case, and he also hadn't been aware
25 of the document as well.

All right. Do you know whether the board has requested further information to understand exactly what's going on in relation to these payments?---It – it would be based on what you've just explained to me and what I learnt this afternoon, I – that's
30 what I believe to be the case.

All right. I tender the document, Commissioner.

35 THE COMMISSIONER: OnePath shelf space flows, ANZ.801.039.0039, exhibit 5.258.

EXHIBIT #5.258 ONEPATH SHELF SPACE FLOWS (ANZ.801.039.0039)

40 MR HODGE: And then if we go back to Mr Pankhurst's statement, which is ANZ.999.019.0001. And if we go to page .0075?---Should I go to that or - - -

45 It might assist you to have it in hard copy. Yes, it's page 75 of your statement, Mr Pankhurst?---Thank you very much. Thank you.

And this is one of a number of tables that you very helpfully prepared in response to a request from the Commission for a table setting out the total amount of payments made by external responsible entities of managed investment schemes to an entity within the OnePath or ANZ Group where the payment takes into account
5 investments of the assets of the superannuation fund?---Yes, that's one of the considerations, but it takes into consideration other factors as well.

And sorry, when you say that what do you mean by that?---It could take into consideration other consideration – other factors at play. So, for example, when I
10 look at these arrangements, I look at them as ultimately a wholesale pricing arrangement that we've been able to negotiate that may represent a range of factors in the way that we can then consider the cost inputs to our pricing model. And so it's – it's one factor, you're correct, but there are – there are other things at play there.

15 You see the first item there is Schroder Investment Management Australia Limited?---That's correct.

And the total amount paid by that fund manager back to some entity within, perhaps multiple entities within the ANZ Group was \$2.28 million?---That's correct.

20 Sorry, \$2.228 million?---That's correct.

And that was for the year ending 30 September 2017?---I believe – yes, I believe that to be the case.

25 And that's – are we right in understanding – just the amount calculated by reference to investments of the assets of the OnePath Master Fund?---I – I would assume that to be the case but yes, if that's in that table, that – that's correct.

30 And your point is that this is akin to a wholesale pricing arrangement. Is that right?---Yes. So in – in the way that I would approach these – is effectively that when we look to provide an investment option on the platform, we would seek to do that by investing into that fund manager's wholesale or managed investment scheme. We would have gone through a due diligence process which would be quite
35 extensive with a number of managers, etcetera. So we would then invest that money wholly into that – into that MIS on behalf of the members. And what that would mean is that they would be wholly invested at the price, the rack rate if you like or the market price of that fund. We would be then trying to see what we could do at our level to try and understand how we could reduce that price, and that would be to
40 try and reduce the cost inputs, if you like, into the pricing model so we have a range of inputs that go into the pricing model to effectively get to a position where we can then effectively price that product to make it competitive. Then what these flows are, as I understand them and the way that – that we approach them is, effectively, they are a rebate of the discount. If – if we were able to invest at that wholesale MIS
45 rate, which is effectively the discount amount, and we were able to go into a separate MIS, then there would be no payment because you would be fixing that investment at that rate. So all this really does is reflect the negotiated discount, and – and the flows

then it goes back into the entities as we've discussed. So that's – that's effectively what that is.

5 Are you involved in negotiating these arrangements?---Teams of people from my area are – are involved in that specifically.

10 Okay. Can we bring up ANZ.800.467.0007. Whilst that's coming up, how many of these arrangements are only able to continue to operate because they are protected by the grandfathering provisions under the Corporations Act?---So we've spent a lot of time on these from a legal perspective because there are – as you say there are provisions and there are guidance and guidelines in regards to all of that. Our view is that from the extensive legal process that we've gone through, that all the arrangements that we have are in place either fit a test that is pre-FOFA or post-FOFA. So, in effect, there are groupings of those within these arrangements.

15 I will give the doc ID again. It's ANZ.800.467.0007. So this is one of the master distribution agreements that ANZ has?---That's the general cover sheet, yes.

20 And what's blacked out there is which particular investment management entity it is?---Sure.

And if we go over the page to .0008, we see this is an agreement made on 27 January 2011?---That's correct.

25 So it's a pre-FOFA agreement?---That would be – that would be right.

And we can see that the parties to the agreement include OnePath Custodians, the trustee?---That's correct.

30 OnePath Funds Management Limited?---That's correct.

And OnePath Life Limited?---That's correct.

35 I had understood from your statement that the payments don't get made back to OnePath Custodians. Is that right?---In this regard, that's correct.

If we go to page .0009. You see OnePath is defined about two-thirds of the way down the page to mean:

40 *OnePath Custodians and OnePath Funds Management Limited.*

?---That's correct.

45 And then if we go to page .0012. Do you see clause 5, the shelf space fee?---That's correct, yes, I can see that.

And the issuer – that’s the responsible entity for the external managed investment scheme or schemes?---That would be right.

5 And it is agreeing to pay OnePath the shelf space fee in respect of each of the issuer’s schemes that are listed in the schedule to the agreement?---That’s what it appears to be, yes, correct.

10 And if we go to page .0015. We see what the operator’s obligations are. That refers to OnePath which we know is OnePath Custodians or OnePath Funds Management and it needs to comply with the law. But it doesn’t seem to actually need to provide some sort of services to the issuer?---That – that’s what that appears to do, yes.

And then if we go to page .0025?---Sorry, I can’t see that yet. Sorry, thank you.

15 This page here. So, again, the issuer and the particular percentage is redacted, but we can see that what’s identified is a scheme of the issuer which is going to be available through a number of the products issued by OnePath?---That’s – that’s – that’s correct.

20 And then in exchange, it would seem, for being available to be invested in through one of the OnePath products, the issuer pays a percentage per annum of the funds under management to OnePath?---That’s correct.

25 And so to take an example, if an investor has invested through the Retirement Portfolio Service – invested their superannuation through the Retirement Portfolio Service, that acts like a wrap platform, they have a menu of options that they can select?---That’s correct.

30 And they could, for example, select to go into the scheme of whatever – or one of the managed investment schemes of whatever this issuer is?---That’s correct.

35 And whatever managed investment scheme they go into, they pay the rack rate investment fee charged by the external managed investment scheme?---In RPS I think – I think generally yes for the brand new products, absolutely. I think that is true for the – yes, I think that’s true for the – the older products as well.

40 And this rebate, that goes back to OnePath Funds Management or OnePath Custodians or some entity within the ANZ Group?---In – in the Master Fund example, that would go – the payment would be received by a bank account for OnePath Funds Management and that would be – there would then be a journal entry that would take that across to the OnePath Life administrator account, and that’s effectively where the products, fees and charges are – are calculated and set at that level. And that’s where that – that flow goes.

45 But in the retirement service – I’m sorry, in the Retirement Portfolio Service, RPS, the money that’s paid by the external responsible entity for the managed investment scheme, where does it go?---I’m – I’m feeling a bit confused because of that

document that came my way this afternoon. So I do apologise in that regard, because it has sort of thrown me a little bit. But to be honest, on that basis, I – I would have to say that I would – I would need to now understand a little bit more about that, for RPS. Just to be clear, that's not part of my portfolio. So I just need to get a little bit more information now on that.

You're not sure which entity within the ANZ Group receives it?---Well, it certainly doesn't go through the Funds Management entity so I'm assuming at this point there would be a – that payment would go straight through to the OPC entity, if you like, in that regard, but I would need to confirm that. As I say, it's not part of my portfolio.

Is this, do you think, a flaw in the analogy with a negotiating wholesale rate, which is what happens through the Retirement Portfolio Service is that the member pays to the external managed investment scheme the retail rate, and the external managed investment scheme pays back to ANZ but not to the member the difference between the retail rate and the wholesale rate?---No, I don't.

You don't think that's what happens?---No, I – sorry, the premise of your question was – was I think you said was there a flaw.

Yes?---I actually don't think that's a flaw. And if I could give some context. Effectively what we're doing here is we're trying to drive down the inputs, if you like, of the costs in setting a price. And – and I would imagine that within the RPS situation that's exactly the same. So investment management is at least largely another cost input into the – into the model where we're trying to get ourselves above a hurdle rate, which is a sustainable level that we need to meet, and then there are various other inputs, costs that are associated with administration and custody, and whatever else. And so at the product manufacturer level what you're trying to do is reduce down those inputs. And – and it has been done in a way where, effectively, you're having a negotiation, but the negotiation is also with that particular fund manager because you have a range of different things that the organisation brings to that negotiation because it's large. Scale is a big – is a big influence. And so effectively, we do lots of things and we provide and have access to lots of things within the group that allows us to be able to achieve those – those – those economies of scale, if you like. And so what – what we do is we get that input and then that can help reduce what will be the cost ultimately within the model so that the pricing can then be set separately and the aim is to be competitive and to price it competitively. So I don't think the model is flawed. It sounds like a complicated and convoluted model, I appreciate that. In many cases now we set up a mandate arrangement where we simply manage a lot of that in the Master Trust. We simply manage that ourselves and we fix the price and there are no payments. So really this is – is probably an antiquated flow, if you like, of the way that the wholesale pricing negotiation physically pays that discount.

Let's go back, though, to your analogy, which is a retail versus a wholesale price. Do we agree that the member invested through the Retirement Portfolio Service pays

the retail price to the external managed investment scheme for the investment fee charged by that external managed investment scheme?---As I understand it, I believe that they would pay a wholesale arrangement price that we would have negotiated.

5 I'm sorry, you are right to pick up on that, because one of the other difficulties with this is external managed investment schemes will themselves offer a retail fund and a wholesale fund with a retail price and a wholesale price. Is that right?---That's correct.

10 And when you negotiate – or when you put an external managed investment scheme on to one of your platforms, your superannuation platforms, you are putting on the wholesale fund?---That's correct.

And so - - -?---It's a wholesale managed investment scheme.

15 It's – the wholesale managed investment scheme fee will be lower than the retail managed investment scheme fee?---That's – that's generally the case, yes.

20 The – perhaps we will need to use a different way of putting it. The member of the Retirement Portfolio Service who invests into an external managed investment scheme will typically pay the rack rate wholesale managed investment scheme fee?---They will. However, in the new Grow Wrap product which is an RPS product, any negotiated discount would be passed back wholly to the customer.

25 For members who aren't in the new product, they will pay the rack rate wholesale fee?---They would pay a price that would include the wholesale rack rate with any other pricing discount factored into it, done separately, and then that would be whatever the working out that would be passed through. So there would be an element of a discount or it could be that they may, as you say, invest at that rack rate.

30 The issuer, assuming they're covered by one of these distribution agreements with you, will pay to you a rebate for every dollar that is invested with them through your Retirement Portfolio Service?---They will pay the rebate on the negotiated discount on the amount that has been invested with them.

35 Yes. Well, there's – yes, they will pay the rebate to you. Yes?---Yes, it's only – it's only the difference, if you like.

40 You don't pass the rebate on to the member?---In some cases, as I just explained - - -

I'm sorry, in the case of the new Oasis Wrap platform - - -?---That's correct.

- - - you do pass it on?---That's correct.

45 For other members, you don't?---Now, there – in the pre-FOFA sort of arrangements, the – that – that's true.

And do you say that that money that you don't pass on then has some effect on some other pricing decision you make?---It's – it's an input into the pricing model. And so it becomes the cost to deliver the services that we – we go to, and it's – it's one of the variables that we use when we price a product.

5

And by that you mean if we weren't receiving that money, we would still need to receive just – we would ultimately need to somehow raise just as much money in order to be able to hit whatever our profit targets are so then we would have to increase either the members' administration fee or the members' investment management fee?---That's a possible out-working. You need to think of it in those terms but ultimately you're trying to position the fund to be competitive. Because if you don't position the fund to be competitive and have an offering that the market would like, well, then, ultimately no one is going to invest in the fund and you're not going to actually receive any flows into that fund. So there needs to be – there's a multiple range of considerations and that's one of them.

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I tender that agreement, Commissioner.

THE COMMISSIONER: Master distribution agreement of 27 January 2011
ANZ.800.4670.007, exhibit 5.259.

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**EXHIBIT #5.259 MASTER DISTRIBUTION AGREEMENT OF 27 JANUARY
2011 (ANZ.800.4670.007)**

25

MR HODGE: Commissioner, is that a convenient time. I will be half an hour, I think, in the morning.

THE COMMISSIONER: Yes. I we can ask you, Mr Pankhurst, if you wouldn't mind being back here in time to begin again at 9.30 tomorrow morning?---Certainly, Commissioner.

30

35 <THE WITNESS WITHDREW

[4.28 pm]

THE COMMISSIONER: 9.30.

MR HODGE: Thank you, Commissioner.

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MATTER ADJOURNED at 4.28 pm UNTIL THURSDAY, 16 AUGUST 2018

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