

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Statement of Agreed Facts  
File Number: VID183/2020  
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v  
COLONIAL FIRST STATE INVESTMENTS LIMITED  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 2/09/2021 8:51:45 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



No. VID183 of 2020

**Federal Court of Australia  
District Registry: Victoria  
Division: General**

**Australian Securities and Investments Commission**  
Plaintiff

and

**Colonial First State Investments Ltd (ACN 002 348 352) in its own capacity and as trustee for the  
Colonial First State FirstChoice Superannuation Trust**  
Defendant

**STATEMENT OF AGREED FACTS AND ADMISSIONS**

**A. Introduction**

1. This Statement of Agreed Facts and Admissions (**SAFA**) is made for the purposes of s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**) jointly by the plaintiff (the Australian Securities and Investments Commission (**ASIC**)) and the defendant (Colonial First State Investments Ltd (**CFSIL**)). The SAFA relates to proceedings number VID183 of 2020 commenced by ASIC on 17 March 2020 (**Proceedings**). By the Proceedings, ASIC has sought declarations that CFSIL contravened particular provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Corporations Act 2001* (Cth) (**Corporations Act**), and orders that it pay pecuniary penalties to the Commonwealth as well as other ancillary orders.
2. The facts agreed to, and the admissions made, as set out in this document are agreed to and made solely for the purpose of the Proceedings and do not constitute any admission outside of this proceeding.
3. For the purposes of the Proceedings only, CFSIL admits that it contravened:
  - (a) sections 12DA(1), 12DB(1)(h) and 12DB(1)(i) of the ASIC Act; and
  - (b) sections 1041H, 949A, 912A(1)(a) and 912A(1)(c) of the Corporations Act,in particular respects as set out in Section D of this SAFA.
4. Accompanying this SAFA and forming part of it is a USB marked 'SAFA' containing copies of the documents referred to below. A reference to a document by a Ringtail Document identification number in the SAFA is a reference to that document stored on the USB.

**B. The parties**

5. At all material times, ASIC is and was a body corporate:
  - (a) established under section 7 of the ASIC Act;
  - (b) continued by section 261 of the ASIC Act; and
  - (c) able to sue in its corporate name by reason of section 8 of the ASIC Act.
6. At all material times, CFSIL is and was:
  - (a) a corporation duly incorporated under the Corporations Act;
  - (b) liable to be sued in its corporate name;

- (c) the holder of an Australian Financial Services Licence, licence number 232468;
- (d) a registrable superannuation entity (**RSE**) licensee, licence number L0002196, within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**);
- (e) the trustee of the superannuation fund known as Colonial First State FirstChoice Superannuation Trust (**FirstChoice Fund**) registration number R1056150;
- (f) the trustee of the superannuation fund known as Commonwealth Essential Super (**CES Fund**) registration number R1075199; and
- (g) a wholly-owned subsidiary of the Commonwealth Bank of Australia.

## **C. Facts**

### **C.1. Background**

7. Each of the FirstChoice Fund and the CES Fund is and at all material times was:
- (a) a regulated superannuation fund; and
  - (b) a RSE,
- within the meaning of the SIS Act.
8. At all material times:
- (a) there was a product in the FirstChoice Fund called "**FirstChoice Personal Super**";
  - (b) there was product in the FirstChoice Fund called "**FirstChoice Employer Super**";
  - (c) neither FirstChoice Personal Super nor FirstChoice Employer Super was a MySuper product within the meaning of the SIS Act;
  - (d) there was a product in the FirstChoice Fund which was a "MySuper product" within the meaning of the SIS Act, and which CFSIL was authorised to offer as such a product pursuant to section 29T of the SIS Act (**FirstChoice Fund's MySuper Product**). As at April 2014, the design of CFSIL's systems and products meant that it was only able to offer FirstChoice Fund's MySuper Product to members of FirstChoice Employer Super and was not able to offer the product to members of FirstChoice Personal Super; and
  - (e) there was a product in the CES Fund which was a "MySuper product" within the meaning of the SIS Act, and which CFSIL was authorised to offer as such a product pursuant to section 29T of the SIS Act (**CES Fund's MySuper Product**).
9. At or about the time CFSIL applied for authorisation to issue a MySuper product, CFSIL made an election in accordance with sections 387 and 29SAA of the SIS Act in relation to the transfer of accrued default amounts of FirstChoice Fund members.

### **MySuper**

10. In May 2009, the Commonwealth Government commissioned a review of Australia's superannuation system (**Review**).

11. The terms of reference for the Review included that:
- (a) The Review would comprehensively examine and analyse the governance, efficiency, structure and operation of Australia's superannuation system, including addressing the following issues:
    - (i) examining the legal and regulatory framework of the superannuation system, including issues of trustee knowledge, skills and training, and thoroughly assessing the risks involved in the use of debt and leverage and the development of investment options that lead to a weakening of the diversification principle in the superannuation system;
    - (ii) ensuring the most efficient operation of the superannuation system for all members, whether active or passive members and whether making compulsory or voluntary contributions, including removing unnecessary complexities from the system and ensuring, in light of its compulsory nature, that it operates in the most cost effective manner and in the best interests of members;
    - (iii) promoting effective competition in the superannuation system that leads to downward pressure on system costs, examining current add-on features of the superannuation system, examining other structural legacy features of the system; and
    - (iv) maximising returns to members, including through minimising costs, covering both passive defaulting members, who should receive maximum returns and value for money through soundly regulated default products, and active selecting members, who should not be negatively impacted by conflicts of interest that may inhibit advice being in the best interests of members.
  - (b) The Review would be conducted around the concepts of the best interests of the member and the maximising of retirement incomes for Australians.
  - (c) The Review would be led by an expert panel made up of a full-time Chair and five part-time members, supported by a secretariat drawing on the skills of the key policy and regulatory agencies of the Commonwealth, as well as market expertise.
  - (d) The Review would make recommendations to the Commonwealth Government on possible options for reform.
12. On or about 30 June 2010, the expert panel that had been appointed to undertake the Review issued its final report (**Report**) **CFI.0003.0004.0260** and **CFI.0003.0004.0428**.
13. The Report concluded, amongst other things, that:
- (a) the superannuation system needed to be able to cater for the significant proportion of members who were not engaged with their superannuation, or were not in a position to make informed decisions about their superannuation;
  - (b) the existing superannuation system assumed that all members wanted to make choices about their superannuation and were interested in receiving a variety of superannuation-related services;
  - (c) trustees were not always focussed on acting for the benefit of members and maximising members' retirement incomes in an efficient and cost-effective way; and
  - (d) members who were invested in the default investment option of their current fund were not adequately protected in the existing system.

14. One of the reforms recommended by the Report to address the issues identified in paragraph 13 above was the creation of a simple, cost-effective superannuation product intended to better serve the interests of members who were invested in the default investment option of their current fund (including members who had not exercised choice as to the investment option of their superannuation contributions as well as members who had chosen to have their contributions invested in the fund's default investment option), called "MySuper".
15. The Report recommended that legislative changes be made so that:
- (a) only a MySuper product would be eligible to be nominated by an employer as a default fund for compulsory superannuation contributions;
  - (b) MySuper trustees would be subject to additional statutory duties requiring them to:
    - (i) formulate a single, diversified investment strategy at an overall cost aimed at optimising fund members' financial best interests; and
    - (ii) actively examine and conclude whether, on an annual basis, their MySuper product had sufficient scale on its own (with respect to both assets and number of members) to continue providing optimal benefits to members; and
  - (c) trustees of MySuper products were required to satisfy certain objective criteria, including criteria relating to:
    - (i) licensing by Australian Prudential Regulation Authority (**APRA**);
    - (ii) the types of contributions that must be accepted;
    - (iii) the formulation of a single, diversified investment strategy;
    - (iv) restrictions on the types of fees that could be charged to members;
    - (v) requirements for MySuper products to be benchmarked against each other in accordance with a methodology approved by APRA;
    - (vi) requirements to include default levels of death and total permanent disability insurance for members on an opt-out basis; and
    - (vii) prohibitions on the payment of certain types of commissions, including product-based up-front or trailing commissions in respect of superannuation advice or other products or services provided to members.
16. On 16 December 2010, the Commonwealth Government announced that it:
- (a) supported 139 out of the 177 recommendations made in the Report, including each of the recommendations set out in paragraphs 14 to 15 above; and
  - (b) would implement reforms of the superannuation system in response to the Review and Report, including reforms to introduce a mandatory MySuper product (**Stronger Super Reforms**) **CFI.0003.0004.0192**.
17. Between September 2012 and January 2014, legislation came into operation to give effect to the Stronger Super Reforms, including a mandatory MySuper product (**MySuper Legislative Changes**). That legislation included:
- (a) *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth);

- (b) *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012 (Cth);*
  - (c) *Superannuation Legislation Amendment (Further MySuper and Transparency measures) Act 2012 (Cth);*
  - (d) *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Act 2013 (Cth); and*
  - (e) *Superannuation Legislation Amendment (MySuper Measures) Regulation 2013 (Cth).*
18. The matters set out in paragraphs 10 to 17 above are referred to below collectively as the **"MySuper Background Information"**.
19. As a result of the MySuper Legislative Changes, at all material times since 1 January 2014:
- (a) MySuper has been a low cost and simple superannuation product;
  - (b) MySuper has been subject to legislative requirements designed to make it suitable as the default investment option for members who have not chosen a fund or an investment option into which their superannuation contributions are to be invested;
  - (c) subject to the exceptions set out in section 29WA of the SIS Act, superannuation contributions of members who have not chosen a superannuation fund or an investment option into which their contributions are to be invested have been required to be paid into a MySuper product;
  - (d) trustees have been required to obtain authorisation from APRA in order to offer a product as a MySuper product;
  - (e) MySuper products have been required to meet minimum characteristics prescribed by legislation;
  - (f) legislation has restricted the types of fees that can be charged to members in respect of a MySuper product;
  - (g) trustees have in effect been prohibited from charging fees to MySuper members in relation to a MySuper product which relate directly or indirectly to the payment of conflicted remuneration within the meaning of Part 7.7A of the Corporations Act, including product-based up-front or trailing commissions in respect of superannuation advice or other products or services provided to members;
  - (h) subject to the exceptions set out in section 68AA of the SIS Act, life and total permanent disability insurance have been required to be provided to members of MySuper products on an opt-out basis; and
  - (i) trustees have been required to comply with additional statutory obligations (including up until April 2019, those that were contained in section 29VN of the SIS Act) in relation to MySuper products.
20. At all material times since at least January 2014, CFSIL was aware of:
- (a) the matters set out in paragraph 19 above; and
  - (b) the MySuper Background Information.
21. Further, at all material times since at least January 2014, CFSIL was aware that:
- (a) MySuper products were simple, low fee superannuation products that met certain minimum requirements set by the government, including default levels of insurance;

- (b) MySuper products were introduced pursuant to a government initiative to provide low cost and simple superannuation products for employers to choose as the default superannuation fund for their employees and that they had basic features and fee structures; and/or
  - (c) MySuper products had a simple set of product features, irrespective of who provided them, and that this enabled members, employers and market analysts to compare funds more easily based on a few key differences and also ensured members did not pay for any unnecessary features they did not need or use.
22. The matters referred to in paragraphs 19 and 21(a) to (c) are referred to below collectively as the "**MySuper Features**".

***CFSIL's MySuper Obligations***

*CFSIL's Section 29WA Obligation*

23. On and from 1 January 2014, pursuant to section 29WA of the SIS Act, where:
- (a) a contribution was made to a regulated superannuation fund of CFSIL for the benefit of a fund member (other than a "defined benefit member" within the meaning of the SIS Act); and
  - (b) that member had not given CFSIL a direction that the contribution was to be invested under one or more specified investment options (**Investment Direction**),
- CFSIL was obliged to treat the contribution as a contribution to be paid into a MySuper product of the fund, unless one of the exceptions in section 29WA applied (**Section 29WA Obligation**).
24. Pursuant to section 29WA(4) of the SIS Act, any Investment Direction given to CFSIL after 31 March 2013 was taken not to have been given if:
- (a) the direction was not given in writing; or
  - (b) a copy of the direction was not held by or on behalf of CFSIL.
25. Pursuant to section 29WA(3) of the SIS Act, a contravention by CFSIL of its Section 29WA Obligation was a strict liability offence.
26. The matters set out in paragraphs 23 to 25 above are hereafter collectively referred to as the "**29WA Obligation Information**".

*CFSIL's ADA Transfer Obligations*

27. At all material times, pursuant to section 20B of the SIS Act (and subject to the exclusions in subsection 20B(3)), the total amount attributed by CFSIL to a member of the FirstChoice Fund was an Accrued Default Amount (**ADA**) for the member if:
- (a) the member had given CFSIL no direction on the investment option under which the asset (or assets) of the fund attributed to the member in relation to the amount was to be invested; or
  - (b) the investment option under which the asset (or assets) of the fund attributed to the member in relation to the amount was invested was one which, under the current governing rules of the fund, would be the investment option for a new member if no direction were given.

28. At all material times prior to 1 July 2017, CFSIL was subject to the following obligations (**ADA Transfer Obligations**):
- (a) pursuant to paragraph 6 of *Superannuation Prudential Standard 410 — MySuper Transition (SPS 410)*, by no later than 30 September 2013 and quarterly thereafter, to identify:
    - (i) all members of the FirstChoice Fund in respect of whom CFSIL held an ADA; and
    - (ii) the amount of each ADA;
  - (b) pursuant to paragraphs 10 to 12 of SPS 410, to identify one or more suitable MySuper products to which the ADAs would be attributed or transferred;
  - (c) pursuant to paragraph 11 of SPS 410, CFSIL could only identify a product as being a suitable MySuper product for the transfer of a member's ADA if CFSIL had formed the view that the attribution of the member's ADAs to that MySuper product promoted the financial interests of the member or class of members;
  - (d) pursuant to paragraph 7 of SPS 410, by no later than 1 July 2013, to prepare and thereafter regularly review and give effect to, a transition plan (**MySuper Transition Plan**), approved by the CFSIL Board, in respect of the FirstChoice Fund that articulated the process and expected time frames for:
    - (i) identifying one or more suitable MySuper products to which ADAs were to be attributed;
    - (ii) identifying any impediment to attributing a member's ADA to a suitable MySuper product, and, if any such impediment existed, how the impediment was to be resolved;
    - (iii) communicating with members about the placement of their default contributions (being any contribution, transfer or rollover paid into an RSE in respect of a member for which the member had not provided written instruction as to its investment in an investment option other than the default investment option available to the member) into a MySuper product, and the movement of their ADAs to the MySuper product; and
    - (iv) attributing all identified ADAs to the identified suitable MySuper product(s), by no later than 1 July 2017;
  - (e) pursuant to section 29SAA(3) of the SIS Act and regulation 9.46 of the *Superannuation Industry (Supervision) Regulations 1994 (Cth) (SIS Regulations)*, where the attribution of an affected member's ADA to a MySuper product, or the transfer of the affected member's ADA to another fund, would result in any of the following:
    - (i) an increase in a fee or charge that applied to the ADA;
    - (ii) a reduction in an insured benefit that was attributable to the member;
    - (iii) an increase in an insurance premium that is attributable to the member; or
    - (iv) a change in the investment strategy that relates to the ADA,

to give the member, at least 90 days before the attribution or transfer of the ADA, a notice in writing which was required to mention the following:

- (v) the amount that was attributable to the member at the time the notice was sent;
- (vi) the name of the MySuper product to which the amount would be attributed or transferred;
- (vii) how the member could elect, in writing, to opt out of the attribution or transfer;
- (viii) how the member could obtain a product disclosure statement for the MySuper product;
- (ix) any change to a fee or charge that applied to the amount;
- (x) any change to the member's insured benefits as a result of the attribution or transfer;
- (xi) any change to the investment strategy applicable to the amount as a result of the attribution or transfer; and
- (xii) any other information that the member needed to understand the attribution or transfer;

(f) pursuant to section 29SAA(3) of the SIS Act and regulation 9.46A of the SIS Regulations, to give to FirstChoice Fund members for whom there was an ADA, with the first periodic statement sent to the member after CFSIL had identified the ADA and with each subsequent periodic statement sent to the member until the ADA was moved to a MySuper product, a notice in writing which was required to mention the following:

- (i) CFSIL's obligation to:
  - (A) move the ADA by 30 June 2017; and
  - (B) promote the financial interests of the member in relation to a MySuper product held by the member;
- (ii) the ADA; and
- (iii) either:
  - (A) if CFSIL had identified a MySuper product, either within the fund or in another regulated superannuation fund, to which CFSIL proposed to move the ADA, the name of the MySuper product, and when the proposed move would occur; or
  - (B) if CFSIL had not identified such a MySuper product, why CFSIL had not done so, and what CFSIL had done, and would do, to do so;

(g) pursuant to sections 29E(6B) and 387(1)(a) of the SIS Act, to attribute to the FirstChoice Fund's MySuper Product each ADA for a member who was eligible to hold that MySuper product, unless the member directed CFSIL in writing to attribute the ADA to another MySuper product or an investment option within a choice product in the FirstChoice Fund;

- (h) pursuant to sections 29E(6B) and 387(1)(a) of the SIS Act and paragraph 14 of SPS 410, to transfer to an identified suitable MySuper product each ADA for a member who was not eligible to hold the FirstChoice Fund's MySuper Product, unless the member directed CFSIL in writing to attribute the ADA to another MySuper product or an investment option within a choice product in the FirstChoice Fund; and
  - (i) pursuant to section 387 of the SIS Act and paragraph 14 of SPS 410, to attribute/transfer members' ADAs in accordance with subparagraphs (g) and (h) above;
  - (ii) by no later than 120 days from the date of provision of the notification to the member in accordance with regulation 9.46 of the SIS Regulations (as referred to in subparagraph (e) above); and
  - (iii) by no later than 1 July 2017.

Approval of a MySuper Transition Plan

- 29. On or about 14 June 2013, the CFSIL Board approved CFSIL's MySuper Transition Plan. *CFSIL MySuper Transition Plan dated 1 July 2013, CBA.1004.0079.0001.*
- 30. CFSIL's MySuper Transition Plan, which CFSIL was obliged to give effect to pursuant to SPS 410, provided that:
  - (a) CFSIL would correctly identify ADAs in the FirstChoice Fund and which may arise between the date of initial determination of the ADA and 1 July 2017 (section 5.1);
  - (b) in order to identify a MySuper product to which an affected member's ADA within the FirstChoice Fund could be attributed, CFSIL would give consideration to the benefits and features of MySuper products available (section 5.3);
  - (c) CFSIL would identify a MySuper product as being suitable only if, inter alia, CFSIL had formed the view that the attribution of the member's ADA to that MySuper product promoted the financial interests of the member or class of members (section 5.3);
  - (d) the criteria CFSIL would adopt for determining the suitability of a MySuper product would have regard to, amongst other things, the overall MySuper offering, including investment strategy, fees, insurance cover and the range of services provided to ensure a suitable fit, and the potential transfer processes and costs to be borne by members in moving to a MySuper product (section 5.3);
  - (e) any decisions made in respect of the selection of one or more suitable MySuper products would be approved by the CFSIL Board (section 5.3);
  - (f) CFSIL would develop a clear and comprehensive communication strategy to explain what an ADA was and what was involved in the MySuper transition process to members and the timeline in which it was to take place (section 5.4);
  - (g) each affected member would be provided with at least 90 days' notice prior to their ADA being attributed to the selected MySuper product (section 5.5); and
  - (h) the communication regarding the transition would (section 5.5):
    - (i) contain information that should reasonably enable a member to understand the nature of the changes resulting from the transfer, including each of the matters referred to in paragraphs 28(e)(v) to 28(e)(xi) above; and

- (ii) include a detailed timetable, the costs (if any) that would need to be borne by the member and identify whom (within CFSIL) to contact if the member had any questions.

## C.2. Events relating to CFSIL's section 29WA breach

### CFSIL's identification of section 29WA breach

31. In or about early 2014, CFSIL determined that:

- (a) there was a cohort of members of the FirstChoice Personal Super product within the FirstChoice Fund in respect of whom CFSIL did not hold an Investment Direction which satisfied the requirements of section 29WA;
- (b) CFSIL had not put in place, and did not have, the system capability to stop contributions of those members being paid into the FirstChoice Personal Super product and to direct those contributions into a MySuper Product of the FirstChoice Fund in accordance with its Section 29WA Obligation; and
- (c) by reason of the matters referred to in subparagraph (a) and (b) above, CFSIL would commit an offence under section 29WA of the SIS Act each time a contribution was made to the FirstChoice Fund for the benefit of one of those members after 1 January 2014 (**Undirected Contributions**) because CFSIL was unable to comply with its Section 29WA Obligation in respect of those contributions,

(the matters referred to in subparagraph (a) to (c) are referred to below collectively as the "**Section 29WA Issues**").

32. In early 2014, CFSIL consulted with APRA in relation to the Section 29WA Issues (as referred to further below).

### CFSIL's initial remediation proposal

33. On 21 February 2014, a meeting was held between representatives of CFSIL and APRA at which the Section 29WA Issues were discussed. CFSIL prepared a note containing a record of the discussions that took place at the meeting: *Document entitled 'Regulatory Reform and General Matters'*, **CBA.5800.0001.2600**. In relation to the Section 29WA Issues, the note states:

- SW advised that CFS instigated a process to ensure written investment option level direction was ascertained for new members from 31 March 2013. CFS has around 13 000 pre 31 March 2013 members that have been SFT or flipped from FCES to FCPS that may have a s29WA issue.
- The problem is not growing and is confined to these members, who are all members in personal superannuation products making choice contributions. The members have exercised choice of fund but potentially not investment direction.
- Of the 13 000 members all but 50 have ADA balances that will transition to MySuper however we continue to receive their contributions.
- For approximately 70% of these members contributions are received electronically. We do not have the functionality to reject them as they are received real time into the superannuation fund's accounts.
- Writing to these members to confirm direction is not considered the best course of action due to the cost, time and likely low response rate based on similar previous correspondences.
- The issue has seemingly stemmed from our interpretation of the legislation that was only finalised mid-way through 2013, in particular its application to members who are not in standard employer sponsored arrangements.

KE advised that APRA are not seeking to mould the s29WA definition. It is clear that these provisions relate to default contributions as opposed to ADA balances and APRA believes it was anticipated that there may be consequential impacts such as duplicate member accounts.

Perhaps for this group of members it may not be in their best interests to do the ADA transition in 2017 in order to be compliant with 29WA, if CFS cannot ascertain direction. CFS should consider changing their ADA transition plan for these members.

JC advised that in all circumstances of standard employer-sponsored arrangements CFS are compliant with 29WA as FCES contains a MySuper option where default contributions are being paid to. These are the circumstances referred to in APRA's 15 November 2013 letter to trustees.

The members that are the subject of this issue have in most circumstances directed CFS not to pay contributions to their new employers default superannuation arrangement and instead directed them to pay to FCPS.

KE requested CFS send APRA a brief e-mail describing the problem, as APRA will need to consult internally before providing any firm views.

A210214.02 - Provide APRA with a written description of CFS's direction of contributions S29WA issue.

34. On 6 March 2014, CFSIL sent a letter to APRA in relation to the Section 29WA Issues: *Letter from Peter Sutherland, General Manager Wealth Risk Management CFS & WRM Advice, to Katrina Ellis, Senior Manager, Diversified Institutions Division, APRA, dated 6 March 2014, CBA.5700.0001.0358*. In its letter, CFSIL requested that APRA agree to a proposal (**6 March Proposal**) whereby:
- (a) CFSIL would continue to accept Undirected Contributions into FirstChoice Personal Super in breach of its Section 29WA Obligation;
  - (b) CFSIL would transfer all Undirected Contributions to a MySuper product by 1 July 2017 in accordance with its ADA Transfer Obligations; and
  - (c) CFSIL would contact by telephone those members who did not have an ADA balance (representing about 50 of the approximately 13,000 members in respect of whom an Undirected Direction had been accepted by CFSIL at that stage), in order to obtain an Investment Direction.
35. CFSIL also informed APRA in its 6 March 2014 letter that it had considered several other remediation options, including:
- (a) contacting all affected members by telephone and/or mail to advise them of the impact of section 29WA (and the ADA transition requirements) and encourage them to provide an Investment Direction;
  - (b) implementing a system build which will allow CFSIL to reject Undirected Contributions; and
  - (c) setting up a second account for members in the MySuper product of the FirstChoice Fund,
- and that it had formed the view that none of these options were feasible and would, among other things, impose an unreasonable cost and administrative burden on the Fund.
36. On 14 March 2014, APRA sent a letter to CFSIL in which it, amongst other things, stated that it did not consider the 6 March Proposal was acceptable and that it expected CFSIL to determine a course of action so that it ceases to be in breach of section 29WA as soon as possible, which can be achieved via contributions received after 1 January 2014 without an Investment Direction being allocated into a MySuper product or CFSIL receiving a valid

contribution Investment Direction from an affected member: *Letter from Robyn McMahon to Linda Elkins dated 14 March 2014*, **CBA.5800.0006.1360**.

37. On 18 March 2014, representatives of CFSIL met with representatives of APRA to discuss the Section 29WA Issues. Following the meeting, Peter Sutherland (General Manager Colonial First State & WM Advice) sent an email to Peter Taylor (Executive Director and Chief Risk Officer, Wealth Management), Linda Elkins (Executive General Manager CFSIL), Alison McLeod (Head of CFS Legal) and Peter Chun (General Manager Product & Investment) which contained his notes of the meeting: **CBA.0002.2428.3429**.
38. On 19 March 2014, CFSIL sent a letter to APRA in which it set out a revised plan to address the Section 29WA Issues: *Letter from Linda Elkins to Robyn McMahon dated 19 March 2014*, **CBA.0001.0451.0200**. The letter stated that CFSIL has considered a number of options to remedy the Section 29WA Issues and set out details of the plan, including that CFSIL had commenced pro-active out-bound calls via the call centre to contact affected members to obtain and record a valid Investment Direction.
39. By no later than 19 March 2014:
- (a) CFSIL had determined that it had already committed offences against section 29WA in relation to approximately 13,000 members in respect of whom CFSIL had received Undirected Contributions which it had failed to treat in accordance with its Section 29WA Obligation;
  - (b) CFSIL had determined that as a result of the Section 29WA Issues:
    - (i) CFSIL had breached and would likely commit further breaches of a condition of its RSE license;
    - (ii) the breaches were and would be significant; and
    - (iii) CFSIL was obliged to provide a written report about the breaches to APRA pursuant to section 29JA of the SIS Act; and
  - (c) CFSIL had determined that it was possible for CFSIL to introduce a contribution block by the end of April 2014 so as to prevent contributions from being applied to an affected member's account in breach of CFSIL's Section 29WA Obligations; and
  - (d) CFSIL considered that introducing a contribution block was its least preferred option because it considered that it was highly likely to cause "Superannuation Guarantee compliance issues for contributing employers, as well as out of market issues for Affected Members"
40. On or about 19 March 2014, CFSIL provided APRA with a breach report under section 29JA of the SIS Act in respect of the Section 29WA Issues: *Notification of breach by RSE licensee under section 29JA Superannuation Industry (Supervision) Act 1993*, **CBA.0002.1134.3095**.

#### CFSIL's Trustee Compensation Policies

41. During the period between 1 January 2014 and 30 December 2016, CFSIL had in place the following policies in relation to the payment of compensation to superannuation members:
- (a) CFSIL Compensation Policy dated 26 August 2011, which applied from August 2011 to at least 10 March 2015: **KWM.003.001.0117**;
  - (b) CFSIL Customer Remediation Framework Version 1, which applied from 10 March 2015 to 27 October 2015: **KWM.003.001.0042**;
  - (c) CFSIL Customer Remediation Framework Version 2, which applied from 26 October 2015 to 26 October 2016: **KWM.003.001.0079**, and

- (d) CFSIL Customer Remediation Framework Version 3, which applied from 27 October 2016 to at least 30 December 2016: **KWM.003.001.0001**.

Actions taken by CFSIL in relation to the remediation of the Section 29WA Issues

42. From around March 2014, CFSIL conducted calls (either through its own staff or through a third-party provider engaged by CFSIL to conduct the calls on its behalf) with at least 8,452 members in respect of whom CFSIL had accepted Undirected Contributions into FirstChoice Personal Super between 1 January 2014 and 14 April 2014 in breach of its Section 29WA Obligation (**Initial Affected Members**) in order to obtain an Investment Direction.
43. On or about 22 April 2014, CFSIL sent letters to 12,911 of the Initial Affected Members (which letters included the statements set out in paragraph 66 below) in order to obtain an Investment Direction (**April 2014 Letter**).
44. On 29 April 2014, APRA sent a letter to CFSIL regarding the Section 29WA Issues: *Letter from Robyn McMahon, General Manager — Diversified Institutions Division to Linda Elkins, Executive General Manager CFSIL dated 29 April 2014, CBA.0002.2430.2199 (APRA's 29 April 2014 Letter)*. Attachment A to APRA's 29 April 2014 Letter set out the following summary of CFSIL's rectification plan to deal with the breach:

The plan involves:

- Contacting all affected members by phone or letter during March to July 2014 in order to obtain a valid investment direction;
- For those members from whom CFSIL is successful in obtaining a valid investment direction, their existing balances will no longer be accrued default amounts (ADAs) and contributions can continue to be accepted into the current investment option;
- For those members from whom CFSIL is unsuccessful in obtaining a valid investment direction, CFSIL will develop a proposal for an accrued default amount (ADA) transition process, including identification of a suitable MySuper product, to move the ADAs and contributions received since 1 January 2014 to the identified MySuper product;
- At the Board meeting on 30 April 2014 proposals will be put to the Board for approval of:
  - o which MySuper product is suitable, based on an appropriate process that considers members' best interests: and
  - o the ADA transition process;
- Following Board approval of the ADA transition process and suitable MySuper product, a letter will be sent to the relevant members providing them with a 90 day window during which they can indicate that they do not want the ADA transition to occur;
- At the end of the 90 day window, all affected members from whom CFSIL has been unsuccessful in obtaining a valid investment direction (for contributions or the ADAs) will have their entire interest in FirstChoice Personal Super moved to the suitable MySuper product;
- Providing APRA with fortnightly updates during the implementation of this plan; and
- This plan will be complete by early September 2014.

45. APRA's 29 April 2014 Letter stated in part:

Attachment A summarises the aspects of your plan to deal with the breach. APRA's understanding is that under this plan rectification for all affected members will be complete by early September 2014 as members will either have given investment direction indicating they wish to stay in FirstChoice Personal Super or they will have been moved to a MySuper product. Subject to any matters that may arise from the information requests below, this plan is acceptable to APRA.

In addition, APRA requests further information on:

1. CFSIL's plans for communicating with contributing employers who will be impacted once a member is moved to a MySuper product; and
2. CFSIL's position on compensation for members who are affected by this breach. APRA expects that in the event of any significant breach such as this, the need for appropriate compensation is considered by the RSE licensee to ensure that affected members are no worse off than if the breach hadn't occurred. In this case, no worse off than if their post-1 January 2014 contributions had been placed in a MySuper product on receipt.

APRA will not be in a position to finalise its position on the reported breach until we receive your response on these outstanding matters.

#### **Managing the risk of further breaches of S.29WA**

CFSIL has informed APRA that there are approximately 70,000 accounts in FirstChoice Personal Super with accrued default amounts (ADAs). Of these accounts approximately 14,000 have received a contribution since 1 January 2014 and are being dealt with via the outlined rectification process. For the remaining accounts, approximately 56,000, CFSIL has informed APRA that it has been at least two years since there has been contribution activity in these accounts. APRA recommends that CFSIL put in place appropriate controls and monitoring to avoid any further breach of S.29WA. From a conversation with CFSIL on 22 April 2014 we understand that work is underway to consider steps CFSIL can take to address this risk such as introducing a phone campaign for the remaining ADA members to obtain a valid investment direction and bringing forward the date for ADA transition earlier than 2016.

46. At a meeting of the CFSIL Board on 30 April 2014, the CFSIL Board considered a paper from Sam Wall (Acting General Manager Product & Investments) and Bruce Tait (Senior Product Manager Superannuation): *Paper entitled 'Contributions received without member investment direction', CBA.1004.0091.0001 (April 2014 Board Paper)*. The paper included the following recommendations:

2.1 It is recommended that the Board, in its capacity as RSE Trustee:

- note the identified breach of section 29WA of SIS and the remediation process being undertaken and proposed in this paper;
- approve CES as a suitable MySuper product to which an Affected Member's ADA within FCPS can be attributed once the Trustee is satisfied:
  - o the attribution of the Affected Members' ADA to CES promotes the financial interests of the Affected Members; and
  - o the benefits and features of CES are suitable when compared to other appropriate MySuper products.
- approve the attribution of the Affected Members' ADA to CES where no contrary instruction is provided by the Affected Member and no other remediation has been achieved by August 2014;
- note that any changes to the Trustee's Transition Plan giving effect to the proposed remediation will be tabled at the next Board meeting;
- note that consideration will be given to the Trustee's Compensation Policy in remediating the issue; and
- approve the delegation to the Executive General Manager, Colonial First State, to implement communications and the movements of the Affected Members' ADA to CES.

47. Under the heading "Remediation process", the April 2014 Board Paper stated as follows:

4.1 All members of FCPS that have had contributions made to their account contrary to the requirements of section 29WA are being contacted in order to obtain a valid member investment direction that satisfies the requirements.

The communication plan includes:

Telephone calls to the Affected Members. These are being conducted by internal Client Services staff as well as by an external service provider (Salmat).

EI Affected Member mailing with response coupon.

Adviser email to all advisers with Affected Members as clients.

4.2 All correspondence and call scripts have been reviewed by CFS Legal.

4.3. Where a satisfactory direction cannot be obtained from the Affected Member, it is proposed that the Affected Member's ADA be transferred to CES in compliance with SIS to attribute all ADA to a suitable MySuper product before 1 July 2017.

4.4. The above process is believed to be in the best interests of members because it gives members the opportunity to provide the required direction and in doing so to ratify their earlier decision to direct contributions to FCPS and into the investment default established on their account. All Affected Members have made an active decision to direct contributions to FCPS. This decision would be made by the Affected Member knowing the details of their account (including investment default, insurance, etc) and it is reasonable to assume that members have made this decision based on their own best interest.

48. The April 2014 Board Paper also noted CFSIL's previous correspondence with APRA in relation to the Section 29WA Issues:

4.6. A breach notice has been lodged with APRA. Discussions have also been held with APRA detailing the breach and the proposed remediation plan. APRA has confirmed that it is satisfied with the proposed process for remediation as outlined in this paper.

49. The April 2014 Board Paper stated the following in relation to the recommendation that the CES Fund's MySuper Product be approved as a suitable MySuper product to which the ADAs of Initial Affected Members from whom an Investment Direction was not obtained could be attributed:

4.9. CES has been proposed because CFS believes that it fits well with the needs of the Affected Members and promotes the financial interests of the Affected Members

4.10. In particular, CFS highlights:

The transfer of the Affected Members' ADA will be made pursuant to ADA transfer provisions under SIS which require the transfer of these amounts to be to a  MySuper product, including a MySuper product the Trustee is authorised to offer in another fund within its business operations. CES is a complying MySuper product offered from another fund offered by the Trustee and therefore meets this requirement.

The default investment option in CES is the Lifestage options. These options have a dynamic asset allocation that reduces exposure to higher risk growth assets as the member approaches retirement age. This is considered particularly appropriate for unengaged members. This aligns with the profile of the Affected Members being transferred.

CES also offers a limited number of 'Choice options' which provides the Affected Members the opportunity to diversify away from the Lifestage options if desired.

As CFSIL is the trustee of CES, the Trustee will be able to maintain control of the entire transfer process allowing for a more seamless transition and control of data quality.

- Transferring the ADA for the Affected Members enables the Affected Member to continue to invest with the Trustee, giving effect to their express choice to direct their contributions to Colonial First State.
- APRA requires a quick resolution to the breach. The transfer to CES is achievable within timeframe required by APRA.
- The insurance design offered by CES provides age based default levels of Death and Total and Permanent Disability (TPD) cover. The level of cover is adjusted as members move through different lifestages with the highest cover being provided when the member is between 31 and 40 years old. In addition, members have the flexibility to double or halve their insurance cover.
- The insurance offered in CES is provided by the same insurer as for FCPS and are therefore well understood by CFS.
- With widely expected re-pricing of insurance in the industry, CES has a premium guarantee period and is not expected to re-price in the near-term.
- CES offers very competitive pricing. Total cost to the member is 0.8% p.a. plus \$5/month. Appendix 1 shows the fee comparison with other leading public offer and industry funds.
- For those Affected Members who have their balances transferred to CES and also hold a CBA bank account, the Integration of CES into NetBank will provide the ability to view balances, switch investment options and make additional contributions through NetBank. CES also caters for those Affected Members that do not have NetBank access.
- CES provides all members with intra-fund advice (general advice only). This advice is provided by the CES Contact Centre.

4.12. Blocking contributions was not considered to be feasible as almost all contributions to FCPS are received electronically and straight-through processed.

...

5.3. CFS believes that for the reasons outlined in this paper, CES is a suitable MySuper product; and the transfer of the Affected Members' ADA to CES promotes the financial interests of those members.

...

#### Appendix 1 MySuper fee comparisons

Provider	Fund Name	Annual Member Fee	Management Cost (bp)	Cost for \$20k	Cost for \$50k
Life cycle funds					
Essential Super	LifeStage	\$60	80	\$220	\$460
AMP	SignatureSuper	\$83	104	\$291	\$603
BT	Super For Life	\$60	105	\$270	\$585
BT	Lifetime Super Employer	\$60	105	\$270	\$585
FCES	FC LifeStage	\$60	100	\$260	\$560
OnePath	ANZ Smart Choice Super	\$50	50	\$150	\$300

Non-life cycle funds					
MLC	MasterKey Business Super	\$78	101	\$280	\$583
AMP	Flexible Super	\$99	65	\$229	\$424
Suncorp	WealthSmart Business	\$78	85	\$248	\$503
Suncorp	Suncorp Everyday Super	\$78	85	\$248	\$503
Sunsuper	Sunsuper For Life	\$65	67	\$199	\$400
AustralianSuper	Balanced	\$78	66	\$210	\$408
Catholic Superannuation	MyCatholicSuper (Balanced)	\$78	83	\$244	\$493
Health Employees Super	Core Pool (Balanced)	\$65	80	\$225	\$465
HOSTPLUS	Balanced option	\$78	91	\$260	\$533
Retail Employees Super	Core Strategy (Balanced)	\$57	73	\$203	\$422
Australian Catholic Super	MySuper Balanced	\$78	88	\$254	\$518
TWU Superannuation Fund	Balanced (MySuper)	\$78	115	\$308	\$653
Unisuper	Balanced	\$115	67	\$249	\$450
Construction & Building Unions Superannuation	Growth	\$78	87	\$252	\$513

Of the 22 MySuper products shown above, CES is rated:

- 6th lowest cost for members with an account balance of \$20,000; and
- 8th lowest cost for members with an account balance of \$50,000.

Annual member fee averages \$74 and ranges from \$50 (OnePath/ANZ) to \$115 (UniSuper). CES is equal 3rd lowest at \$60.

Management costs (includes administration fees, investment fees and indirect costs) average 85 bps and range from 50 bps (OnePath/ANZ) to 115 bps (TWU). CES is equal 8th lowest at 80 bps.

50. Under the heading "Alternative Options Considered", the paper stated:

5.4. Consideration was given to developing a block that could be applied to selected accounts. This is not recommended because:

- This would have a high development cost. The estimated build time was 6 to 8 weeks and would be required resources to be taken from other projects.

- This would also create potential issues for employers with SG contributions being returned and would result in a poor member experience.
- Development to allow access to a MySuper compliant product by FCPS members was investigated but is not feasible. A superannuation fund can only offer one MySuper product. The RSE's MySuper product is currently provided via FCES. To also offer MySuper in FCPS would require extensive changes in multiple areas and could not be achievable within the required timeframe.
- The transfer of relevant accounts and/or contributions to MySuper within FCES was also considered. This was not recommended because FCES does not currently allow members without linkage to an employer sponsor. To develop a retail category for members in FCES would require significant change in a large number of areas, such as the trust deed, communications and administration systems. Delivery within the required timeframe would not be possible and the costs would be very high

51. The minutes of the meeting (**CBA.5970.5000.0013**) accurately record the following in relation to the Board's consideration of the April 2014 Board Paper:

Messrs Wall and Sutherland presented the paper, highlighting that

- management is satisfied that Commonwealth Essential Super (CES) is a suitable MySuper product to receive Affected Members' Accrued Default Amounts (ADAs) where a member has not provided a valid direction on the basis that CES:

- o is a very competitive MySuper product and transfer of the ADAs to CES would be in the best interests of Affected Members;

- o meets the requirements of section 29WA of the SIS Act; and

- o has a high default level of insurance; and

- to date, management has received 4269 valid members directions and subject to approval, it is anticipated that a further 3000 directions will be received once letters are issued to Affected Members advising of the transfer of their ADAs to CES, including the option to opt-out. The proposed letter has been reviewed by Legal and APRA.

The Board, in its capacity as RSE Trustee, considered and discussed the paper:

- noting the identified breach of section 29WA of the SIS Act and the remediation process being undertaken as proposed in the paper;

- noting that CBA is a related party and having considered the options, it is in members' best interests to transfer Affected Members ADAs to CES where a valid direction cannot be obtained;

- noting that any changes to the Trustee's Transition Plan giving effect to the proposed remediation will be tabled at the next Board meeting;

- noting that consideration will be given to the Trustee's Compensation Policy in remediating the issue;

- approving CES as a suitable MySuper product to which an Affected Members' ADA within FirstChoice Personal Super can be transferred on the basis that the Trustee is satisfied:

- o the transfer of the Affected Members' ADA to CES promotes the financial interests of the Affected Members' and

- o the benefits and features of CES are suitable when compared to other appropriate MySuper products;

- approving the transfer of the Affected Members' ADA to CES where no contrary instruction is provided by the Affected Member and no other remediation has been achieved by August 2014; and

- approving the delegation to the Executive General Manager CFS, to implement communications and the movements of the Affected Members' ADA to CES.

52. By no later than 30 April 2014, CFSIL management had determined that CES Fund's MySuper Product was a suitable MySuper product into which the ADAs of Initial Affected Members could be transferred.

53. At a meeting of the CFSIL Board on 3 June 2014 (**June 2014 Board Meeting**), the CFSIL Board considered a paper from Sam Wall (Acting General Manager Product & Investments and Bruce Tait (Senior Product Manager Superannuation Product & Investments) regarding the Section 29WA Issues: *Paper entitled 'Contributions received without member investment direction' dated 3 June 2014, CBA.1004.0040.2028 at 2183 (June 2014 Board Paper)*.

54. The June 2014 Board Paper included a recommendation, inter alia, that the CFSIL Board approve the transfer of the ADAs of members in respect of whom CFSIL had accepted Undirected Contributions into FirstChoice Personal Super after 14 April 2014 in breach of its Section 29WA Obligation (**Subsequent Affected Members**) to CES Fund's MySuper Product in accordance with CFSIL's MySuper Transition Plan (as amended). In relation to CFSIL's MySuper Transition Plan, the June 2014 Board Paper stated:

6.1. In accordance with the Trustee's MySuper Transition Plan, the Plan has been reviewed and updated. The proposed amendments are included in the attached updated Plan, refer to Appendix A for details.

6.2. Key changes to the plan are:

- Noting the completion of the analysis and the identification of ADAs and the reporting of ADAs to APRA (Paragraph 4 of the Plan)
- Inclusion of the ongoing process to capture member investment directions received and ADA amounts adjusted (Paragraph 5.1 of the Plan).
- Revision of the timetable to include transition of accounts in breach of s29WA (Paragraph 5.6 of the Plan).

A copy of CFSIL's MySuper Transition Plan (as amended) and Appendix A were not included as part of the June 2014 Board Paper.

55. The June 2014 Board Paper stated further, in relation to the Section 29WA Issues:

4.1. An outbound call campaign has been undertaken using both internal and external resources. Where telephone contact details were available, multiple attempts were made to telephone all affected members. Where contact was successful, an investment direction was sought that would satisfy the requirements of section 29WA. APRA was advised of this process and was provided a copy of the call script.

4.2. Concurrent with the above call campaign, letters were sent to all affected members with a request that they provide the required investment direction by either telephoning CFS or by completing and returning a response coupon. APRA was provided a copy of the letter prior to the mailing and has been provided with updates on progress.

56. In relation to compensation, the June 2014 Board Paper stated:

5.1. A review of all affected members' accounts will be undertaken after completion of the transfers to CES. It is proposed that any members that have been disadvantaged as a result of the delayed compliance with s29WA will be compensated.

5.2. Ernst and Young are being engaged to undertake the calculation of compensation. Work has commenced on documenting methodology and detailing requirements.

5.3. The guiding principles for compensation are:

The amount of compensation will return the member to the financial position they would have been in if the breach had not occurred. i.e. if a CES account had been opened when the first contribution was received after 1 January 2014 and the pre-2014 balance had remained in FCPS.

- Where a member provides the required direction before the account balance is transferred to CES, no compensation will apply.
- Where a member closes their account in FCPS before the account balance is transferred to CES, no compensation will apply.
- The transfer to CES of the account balance that relates to pre- 2014 FUM is not subject to compensation (i.e. the compensation will be calculated on that part of the transfer that relates to contributions received after 1 January 2014).
- The amount of compensation will be calculated on the assumption that contributions received from 1 January 2014 should have been invested directly into the relevant Lifestage option in CES.
- Where the member has benefited because of the delay, there will be no adjustment made.
- Insurance premiums that would have been paid out of CES will not be included in the compensation calculation.
- The \$5/month administration fee payable in CES will be included in the compensation calculation.

57. The minutes of the June 2014 Board Meeting (**CBA.1004.0382.0307**) accurately record the following in relation to the Board's consideration of the June 2014 Board Paper:

29WA Compensation Update, Review of ADA Transition Policy and Review of MySuper Transition Plan

Mr Wall and Ms McLeod addressed the Board on the paper, highlighting:

- the proposed compensation policy for members;
- the proposed transition plan for accrued default amounts (ADAs) for affected members including the recent suggestion by APRA that the Board consider bringing forward the transition for 60,000 members. This suggestion has significant business implications as the original transition date is 2016;
- the communications strategy that has been implemented to contact the 15,000 affected members. At 16 May 2014, 8,000 members had not responded. Members who do not respond will be transitioned to Essential Super now rather than in 2016.

In response to questions from Directors, management advised that:

- APRA is concerned that over time members will make contributions to First State FirstChoice Superannuation Trust creating an s29WA breach. Management has implemented a number of manual processes to ensure that any such contributions are identified in a timely manner.

The Board requested that management:

- amend the MySuper Transition Plan to give effect to the rectification process as discussed; and
- provide a status update at the next Board meeting.

The Board, considered, and discussed the paper, and

- in its capacity as Trustee of the Colonial First State FirstChoice Superannuation Trust:
  - o noted the updated information regarding the identified breach of section 29WA of SIS and the rectification process being undertaken;
  - o noted that it may not be in the best interest of members with ADAs to transfer them to Commonwealth Essential Superannuation now;
  - o noted that robust processes are in place for the 60,000 members with ADAs;
  - o noted the principles and process in relation to the remediation of affected members; and
  - o subject to the incorporation of the requested changes, approved the changes to the Trustee's MySuper Transition Plan giving effect to the proposed rectification process.
- in its capacity as Trustee of Commonwealth Essential Super (CES):
  - o noted the potential conflict arising from the Board also being Trustee of the Colonial First State FirstChoice Superannuation Trust;
  - o confirmed that proper consideration was given to the best interests of the current members of CES and that in making its decision, the Trustee only had regard to the interests of those members; and
  - o approved the transfer of members into CES from the Personal division of the Colonial First State FirstChoice Superannuation Trust in accordance with the Transition Plan (as amended) for that fund.

58. On 6 June 2014, CFSIL sent an email to APRA in relation to the Section 29WA Issues: *Email from Narelle Smith to Katerina Ellis dated 6 June 2014, CBA.0002.2432.7968*. The email stated the following in relation to the June 2014 Board Meeting:

#### **Compensation Methodology**

The compensation principles to respond to APRA's requirement for a compensation methodology to be developed were discussed by the CFSIL Board at its meeting on 3 June. The agreed principles seek to ensure:

- Where compensation is required, the amount of compensation will return the member to the financial position they would have been in if the breach had not occurred. i.e. a Commonwealth Essential Super (CES) account opened when the first contribution was received after 1 Jan 2014 and the pre-2014 balance remains in FCPS
- Where the member has benefited because of the delay, there will be no adjustment made.

As previously noted Ernst & Young is being engaged to provide independent review of CFSIL's compensation methodology and calculations.

#### **CFSIL MySuper Transition Plan**

I can confirm that the CFSIL Board at its meeting on 3 June also approved changes to the CFSIL MySuper Transition Plan to give effect to the rectification. These changes include management of future contributions in breach of s29WA. The revised plan will be sent to APRA shortly.

The Board also discussed APRA's request to bring forward the ADA Transition Plan for members in FirstChoice Personal. The Board, after careful consideration, did not approve bringing this forward given:

- the potential operational risk associated with undertaking a significant transaction at this point in time with the regulatory reform projects currently underway;

- it may not be in the members best interest and they may be adversely affected if the ADA Transition Plan was bought forward;

the low probability of breaching Section 29WA in the future given the controls now in place;  
and

- the work already planned to engage with the relevant members and advisors regarding their intentions.

59. Following the June 2014 Board Meeting, CFSIL's MySuper Transition Plan was amended: *CFSIL MySuper Transition Plan dated 1 July 2014, CBA.0001.0451.0269; MySuper Transition Plan Addendum — 1 July 2014, CBA.0001.0451.0282 (Amended MySuper Transition Plan)*. The addendum to the Amended MySuper Transition Plan stated as follows:

#### **Purpose**

Section 29WA of SIS requires that where a trustee receives a contribution to the fund in relation to which it does not hold a valid investment direction from the member, it must pay that contribution to a MySuper product. This addendum sets out the process for transitioning FirstChoice Personal Super (FCPS) members' Accrued Default Amounts (ADA) to Commonwealth Essential Super (CES) where contributions in breach of section 29WA have been received after 14 April 2014 (the cut-off date for the initial tranche transferred to CES).

#### **Identification of relevant accounts**

A report will be run monthly to identify any accounts in FCPS where contributions have been accepted and the Trustee has not received the required direction from the member regarding how these contributions should be invested. As FCPS does not offer a MySuper product, these contributions will breach s29WA. There are a total of approximately 60,000 accounts that will require monitoring. Of these only 2,200 accounts have received any contributions within the last year and therefore the number of new accounts in breach is expected to be very small.

#### **Initial steps to remedy breach**

After the accounts have been identified, an outbound call program will be undertaken to contact the relevant members in order to obtain the required direction. This may also include emails to the members and contact with the members' advisers.

Where the required direction is not obtained through the above activities, letters will be sent quarterly notifying the member that the Trustee requires their direction in order to continue to accept contributions. The letter will include a response device and advise other methods to provide to required direction.

#### **Transition to CES under the ADA transition provisions in SIS**

For any accounts where the s29WA breach has not been resolved by the above activities, these accounts will be transferred to CES under the ADA transition provisions of SIS. These transfers will be done in tranches approximately each six months. The timing of each transfer will take into consideration other activities and commitments of the business but will not be delayed unduly.

For the first tranche, members will be notified in December 2014.

The timing of the last tranche will be determined based on the implementation of the final ADA transition from FCPS.

Any member compensation will be calculated in accordance with the principles agreed by the Board.

60. From no later than March 2014 to at least July 2016, CFSIL conducted calls (either through its own staff or through a third-party provider engaged by CFSIL to conduct the calls on its behalf) with the Subsequent Affected Members in order to obtain an Investment Direction over the phone.

61. During some of the calls referred to in paragraphs 42 and 60 above, in circumstances where, inter alia:

- (a) the member said words to the effect that he or she was comfortable with his or her existing investment options in FirstChoice Personal Super; and
- (b) the CFSIL representative said words to the effect that it would make a note to that effect on the member's account on their behalf;

CFSIL considered the member had provided an Investment Direction in accordance with section 29WA and accordingly did not thereafter treat contributions of the member to the FirstChoice Fund as a contribution to be paid into a MySuper product.<sup>1</sup>

62. CFSIL transferred the ADAs of the affected members in respect of whom it had not obtained an Investment Direction to the CES Fund's MySuper Product in the following tranches:

- (a) between 10 September 2014 and 23 September 2014, ADAs of 3,164 of the Initial Affected Members, representing approximately \$117 million in funds under management, were transferred to CES Fund's MySuper Product (**Tranche 1**);
- (b) between 12 January 2015 and 16 January 2015, ADAs of 848 of the Subsequent Affected Members in respect of whom CFSIL had accepted Undirected Contributions between 15 April 2014 and 24 June 2014, representing approximately \$28 million in funds under management, were transferred to CES Fund's MySuper Product (**Tranche 2**);
- (c) between 2 April 2015 and 7 April 2015, ADAs of 563 of the Subsequent Affected Members in respect of whom CFSIL had accepted Undirected Contributions between 25 June 2014 and 31 October 2014, representing approximately \$15.4 million in funds under management, were transferred to CES Fund's MySuper Product (**Tranche 3**);
- (d) between 9 September 2015 and 17 September 2015, ADAs of 363 of the Subsequent Affected Members in respect of whom CFSIL had accepted Undirected Contributions between 1 November 2014 and 30 April 2015, representing approximately \$6.4 million in funds under management, were transferred to CES Fund's MySuper Product (**Tranche 4**);
- (e) on 8 March 2016, ADAs of 253 of the Subsequent Affected Members in respect of whom CFSIL had accepted Undirected Contributions between 1 May 2015 and 31 October 2015, representing approximately \$4.3 million in funds under management, were transferred to CES Fund's MySuper Product (**Tranche 5**); and
- (f) between 11 August 2016 and 15 August 2016, ADAs of Subsequent Affected Members in respect of whom CFSIL had accepted Undirected Contributions between 1 November 2015 and August 2016 were transferred to CES Fund's MySuper Product, along with the remaining ADAs of members of FirstChoice Personal Super in respect of whom no section 29WA breach had arisen (**Tranche 7**).

63. CFSIL paid compensation to members whose ADAs were transferred as described in paragraph 62 above in respect of loss they had suffered as a result of CFSIL's failure to treat their Undirected Contributions in accordance with CFSIL's Section 29WA Obligation. That compensation was paid in accordance with:

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<sup>1</sup> For the avoidance of doubt, ASIC does not agree that the circumstances referred to above are the only circumstances in which CFSIL treated a member as having provided an Investment Direction in accordance with section 29WA and did not treat contributions of a member to the FirstChoice Fund as a contribution to be paid into a MySuper product.

- (a) CFSIL's compensation policy (see paragraph 41 above) in effect at the relevant time; and
- (b) the Board's position, as noted at the June 2014 Board Meeting (see paragraph 57 above).

### C.3. CFSIL's Call Documents

64. CFSIL provided its representatives who conducted the calls referred to in paragraphs 42 and 60 with various documents, including the following documents:

- (a) an untitled document with file name "s29WA script (2).docx": CBA.0001.0486.0003. This document was provided via an email dated 18 March 2014: CBA.0001.0486.0001.
- (b) a document entitled "APRA Callout Training Document March 2014": CBA.0001.0486.0025. This document was provided via an email dated 21 March 2014: CBA.0001.0486.0024.
- (c) a document entitled "Call out procedure": CBA.5970.0014.4259; and
- (d) a document entitled "Outbound call guide for ADA/ S29WA call-outs": CBA.5970.0014.4246.

65. APRA was provided with a copy of the document entitled "Outbound script for contribution directions" on 26 March 2014. In APRA's 29 April 2014 (as defined in paragraph 44 above), APRA wrote to CFSIL stating that CFSIL's rectification plan, which involved, inter alia, "*Contacting all affected members by phone or letter during March to July 2014 in order to obtain a valid investment direction*", was acceptable to APRA.

### C.4. Letter Contraventions

66. The April 2014 Letter (CBA.5970.0012.0012) referred to in paragraph 43 above, included the following statements:

#### **Investments selection — your urgent response is required**

Our records show that your account in FirstChoice Personal Super was set up following a transfer from another superannuation product. On transfer into FirstChoice Personal Super, your funds were invested into investment option(s) aligned to your holding in the previous product.

There has been a recent change to superannuation legislation which requires us to hold an investment direction from you in relation to future contributions paid into FirstChoice Personal Super. If a direction is not held by us, we are unable to accept contributions into your account. For this reason, we would like to confirm the investment option(s) into which you would like your contributions to be paid.

...

#### **What you need to do**

Simply sign and date the form enclosed confirming your investment selection and send it back to us using the reply paid envelope provided. Alternatively, you can call us on the number below to confirm your investment selection.

If you want to change the investment option(s), please refer to the Product Disclosure Statement available on our website, or discuss it with your financial adviser. Once you have chosen the investment option(s) you can advise us by phone. Alternatively, if you have transaction access to your account, you can make the change online by logging on to FirstNet at [colonialfirststate.com.au](http://colonialfirststate.com.au)

### What will happen if you do not reply

It is important that we receive your direction as soon as possible. If we do not receive your direction by 16 May 2014, we will commence the process to transfer your account into a MySuper product. This may result in transaction costs to you and the loss of any insurance cover you may currently have in FirstChoice Personal Super.

MySuper products are simple, low fee super products that meet certain minimum requirements that are set by the Government, including default levels of insurance.

If we do not receive your response by 16 May 2014, we will write to you with details of the transfer.

### Further information

If you have any questions, please contact your financial adviser or call us on 1800 232 232 Monday to Friday from 8am to 7pm Sydney time.

67. The reference in the April 2014 Letter to "a recent change to superannuation legislation" was a reference to the coming into effect of Section 29WA of the SIS Act.
68. On 4 April 2014, and prior to sending the April 2014 Letter to members, Peter Sutherland, who was at the time the General Manager Colonial First State and WM Advice, sent a copy of the final version of the April 2014 Letter (**CBA.5970.0200.0530**) to Katrina Ellis of APRA: **CBA.5970.0200.0529**. Peter Sutherland's email stated, in part:

Further to our meeting this morning please find attached and below:

- Final version of member communication letter that CFSIL is mailing to affected members from next week

...

Please let me know if you have any questions or would like to discuss. As agreed, I will provide a further update in two weeks.

69. On 4 April 2014, Katrina Ellis acknowledged receipt of Peter Sutherland's email (as described in paragraph 68 above): **CBA.5970.0240.0516**.
70. Again, in APRA's 29 April 2014 Letter (as referred to in paragraphs 44 and 45 above), APRA wrote to CFSIL stating that CFSIL's rectification plan, which involved, inter alia, "*Contacting all affected members by phone or letter during March to July 2014 in order to obtain a valid investment direction*", was acceptable to APRA.

### C.5. Call contraventions

71. The Calls to affected members referred to in paragraphs 42 and 60 above included the 70 calls identified in the Schedule (collectively, the **Subset of Calls**).
72. The Subset of Calls comprised (among other features) calls made to members:
- (a) who had not at the time of the calls given CFSIL an Investment Direction; and
  - (b) in respect of whom CFSIL had accepted Undirected Contributions into FirstChoice Personal Super after 14 April 2014 in breach of its Section 29WA Obligation.
73. During the Subset of Calls, the CFSIL representative and the member said words to the effect of those set out in the respective transcripts of the calls.<sup>2</sup>

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<sup>2</sup> Those transcripts are at Court Book B.1 to B.70, 162-637.

**C.6. Members who provided an investment direction**

74. 8,605 of the members affected by CFSIL's breach of its Section 29WA Obligation provided what CFSIL treated as a valid Investment Direction.
75. All members the subject of the Subset of Calls provided what CFSIL treated as a valid Investment Direction.

**D. Admissions**

***Admissions in respect of the April 2014 Letter***

76. By the April 2014 Letter, CFSIL represented that:
- (a) the member was required to take urgent action (in the form of providing an investment direction) in order for CFSIL to continue to receive the member's superannuation contributions;
  - (b) recent legislative changes required CFSIL to hold investment directions from its members; and
  - (c) the "recent change to superannuation legislation" referred to in the April 2014 Letter applied only to future contributions paid into FirstChoice Personal Super in relation to which CFSIL did not hold an investment direction but not to previous contributions paid into FirstChoice Personal Super in relation to which CFSIL had not held an investment direction,

**(Letter Representations)**

in circumstances where:

- (d) the member was not required to take action (in the form of providing an investment direction) in order for CFSIL to continue to receive the member's superannuation contributions;
  - (e) there were no recent changes to superannuation legislation which required CFSIL to hold investment directions from its members; and
  - (f) the "recent change to superannuation legislation" referred to in the April 2014 Letter applied to both future contributions paid into FirstChoice Personal Super in relation to which CFSIL did not hold an investment direction as well as previous contributions paid into FirstChoice Personal Super since 1 January 2014, in relation to which CFSIL had not held an investment direction.
77. The Letter Representations were:
- (a) made in trade or commerce;
  - (b) conduct in relation to a financial product (being a beneficial interest in a superannuation fund) within the meaning of section 12BAA of the ASIC Act and section 1023B of the Corporations Act;
  - (c) conduct in relation to financial services within the meaning of section 12BAB of the ASIC Act;
  - (d) made in connection with the supply or possible supply of financial services in that they were connected with the acquisition and issuing of a financial product, being a beneficial interest in a superannuation fund, within the meaning of section 12DB(1) of the ASIC Act;

- (e) concerning the need for services in that they concerned the need for CFSIL to hold, receive, process and/or take steps to obtain an investment direction from the member, within the meaning of section 12DB(1)(h) of the ASIC Act;
- (f) concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in that they concerned: (i) the effect of section 29WA of the SIS Act; and (ii) the existence of a condition to the effect that CFSIL was required to hold an investment direction (in relation to contributions of the member paid into FirstChoice Personal Super on and from 1 January 2014), within the meaning of section 12DB(1)(i) of the ASIC Act; and
- (g) likely to lead recipients of the April 2014 Letter into believing or assuming that each of the Letter Representations was true, when that was not the case.

CFSIL's admitted contraventions of section 12DA(1) of the ASIC Act and section 1041H of the Corporations Act

78. In the circumstances referred to in paragraphs 76 and 77 above, CFSIL engaged in misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in contravention of:
- (a) section 12DA(1) of the ASIC Act; and
  - (b) section 1041H of the Corporations Act.

CFSIL's admitted contraventions of section 12DB(1)(h) of the ASIC Act

79. In the circumstances referred to in paragraphs 76 and 77 above, CFSIL made false or misleading representations in contravention of section 12DB(1)(h) of the ASIC Act.

CFSIL's admitted contraventions of section 12DB(1)(i) of the ASIC Act

80. In the circumstances referred to in paragraphs 76 and 77 above, CFSIL made false or misleading representations in contravention of section 12DB(1)(i) of the ASIC Act.

**Subset of Calls**

81. In each of the 67 calls identified in row 2 of the Schedule, CFSIL represented that:
- (a) recent legislative changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case;
  - (b) recent legislative changes required CFSIL to obtain a direction, instruction or confirmation from the member in relation to the investment of their superannuation contributions, when that was not the case; and
  - (c) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case.
82. In the one call identified in row 1 of the Schedule, CFSIL represented that:
- (a) recent legislative changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case; and
  - (b) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case.

83. In the one call identified in row 3 of the Schedule, CFSIL represented that:
- (a) recent industry changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case;
  - (b) recent industry changes required CFSIL to obtain a direction, instruction or confirmation from the member in relation to the investment of their superannuation contributions, when that was not the case; and
  - (c) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case.
84. In the one call identified in row 4 of the Schedule, CFSIL represented that:
- (a) the regulator required, or alternatively requested, CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case; and
  - (b) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case.
85. In each of the 70 calls identified in the Schedule, CFSIL did not disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.
86. Each of the representations referred to in paragraph 81 to 84 above (**Call Representations**) was:
- (a) made in trade or commerce;
  - (b) conduct in relation to a financial product (being a beneficial interest in a superannuation fund) within the meaning of section 12BAA of the ASIC Act and section 1023B of the Corporations Act;
  - (c) conduct in relation to financial services within the meaning of section 12BAB of the ASIC Act;
  - (d) made in connection with the supply or possible supply of financial services in that they were connected with the acquisition and issuing of a financial product, being a beneficial interest in a superannuation fund, within the meaning of section 12DB(1) of the ASIC Act; and
  - (e) likely to lead recipients of the Subset of Calls into believing or assuming that each of the Call Representations made to them was true, when that was not the case.
87. Each of the Call Representations, other than the representation referred to in paragraphs 81(c), 82(b), 83(c) and 84(b), was a representation concerning the need for services in that they concerned the need for CFSIL to:
- (a) contact members in relation to the investment of their superannuation contributions; and/or
  - (b) hold, receive, process and/or take steps to obtain an investment direction from the member,
- within the meaning of section 12DB(1)(h) of the ASIC Act.

88. The Call Representations were each representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in that they concerned: (i) the effect of section 29WA of the SIS Act; and (ii) the existence of a condition that CFSIL was required to contact the members to obtain, that CFSIL was required to hold, and/or that the member was required to provide, an investment direction, within the meaning of section 12DB(1)(i) of the ASIC Act.

CFSIL's admitted contraventions of section 12DA(1) of the ASIC Act and 1041H of the Corporations Act

89. In the circumstances referred to in paragraphs 81 to 88 above in respect of the Subset of Calls, CFSIL engaged in conduct that was misleading or deceptive or likely to mislead and deceive in contravention of:
- (a) section 12DA(1) of the ASIC Act; and
  - (b) section 1041H of the Corporations Act.

CFSIL's admitted contraventions of section 12DB(1)(h) of the ASIC Act

90. In the circumstances referred to in paragraphs 81 to 88 above in each of the Subset of Calls, CFSIL made false or misleading representations in contravention of section 12DB(1)(h) of the ASIC Act.

CFSIL's admitted contraventions of section 12DB(1)(i) of the ASIC Act

91. In the circumstances referred to in paragraphs 81 to 88 above in each of the Subset of Calls, CFSIL made false or misleading representations in contravention of section 12DB(1)(i) of the ASIC Act.

CFSIL's admitted contraventions of section 949A(2) of the Corporations Act

92. In each of the 17 calls referred to in paragraphs 3, 6, 10, 14, 16, 17, 19 to 21, 25 to 29, 32, 34 and 35 of Annexure A to the ASOC (**Admitted 949A Calls**), the CFSIL employee expressly or impliedly made a recommendation or statement of opinion that the member should continue to have his or her superannuation contributions invested with FirstChoice Personal Super (**Advice**).
93. The Advice in each of the Admitted 949A Calls was intended to influence the member in making a decision in relation to her or his superannuation or could reasonably be regarded as being intended to have such an influence.
94. The Advice in each of the Admitted 949A Calls was not personal advice within the meaning of section 766B(3) of the Corporations Act.
95. The Advice in each of the Admitted 949A Calls was general advice within the meaning of section 766B(4) of the Corporations Act.
96. The Advice in each of the Admitted 949A Calls was provided to the members as retail clients within the meaning of section 761G(6)(b) of the Corporations Act.
97. The provision of Advice in each of the Admitted 949A Calls was:
- (a) conduct engaged in on behalf of CFSIL by an employee of CFSIL within the scope of the employee's actual or apparent authority; and/or
  - (b) by reason of section 769B(1) of the Corporations Act, taken to have been engaged in by CFSIL.

98. In each of the Admitted 949A Calls, CFSIL failed to warn the member that:
- (a) the advice had been prepared without taking account of the member's objectives, financial situation or needs;
  - (b) because of the circumstances referred to in subparagraph (a) above, the member should, before acting on the advice, consider the appropriateness of the advice, having regard to the member's objectives, financial situation and needs; and
  - (c) the member should obtain a Product Disclosure Statement relating to the product and consider the Statement before making any decision about whether to acquire the product.
99. In each of the Admitted 949A Calls, CFSIL contravened section 949A of the Corporations Act by engaging in the conduct alleged in paragraphs 92 to 98 above.

CFSIL's admitted contraventions of section 912A(1)(a)

100. By its conduct in each of:
- (a) making the Letter Representations in the circumstances referred to paragraphs [76] to [80] above;
  - (b) making the Call Representations in the circumstances referred to in paragraph [81] to [91] above;
  - (c) failing in the April 2014 Letter and the Subset of Calls to inform members that CFSIL had breached its legislative obligations by failing to treat the members' superannuation contributions since 1 January 2014 as being contributions to be paid into a MySuper product of the FirstChoice Fund; and
  - (d) failing in the Subset of Calls to inform members that:
    - (i) if CFSIL did not receive an investment direction from the members, it was required to transfer the members' superannuation contributions into a MySuper product; and
    - (ii) MySuper products were simple, low fee super products that met certain minimum requirements set by government, including default levels of insurance, as CFSIL believed to be the case,

CFSIL failed to do all things necessary to ensure the financial services covered by its financial services licence were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Corporations Act.

CFSIL's admitted contraventions of section 912A(1)(c)

101. In the circumstances referred to in this Part D, CFSIL failed to comply with financial services laws in contravention of section 912A(1)(c) of the Corporations Act.

**E. Agreed declarations**

102. By sending letters on or about 22 April 2014 to 12,911 members of its FirstChoice Personal Super product who had been identified as members from whom the Defendant (**CFSIL**) did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the *Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act) (Letters)*, CFSIL:
- (a) engaged in conduct, in trade or commerce:

- (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**); and
- (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act;

in that the Letters represented that:

- (d) the member was required to take urgent action (in the form of providing an investment direction) in order for CFSIL to continue to receive the members' superannuation contributions, when that was not the case;
- (e) recent legislative changes required CFSIL to hold investment directions from its members, when that was not the case; and
- (f) the "recent change to superannuation legislation" referred to in the Letters applied only to future contributions paid into FirstChoice Personal Super in relation to which CFSIL did not hold an investment direction but not to previous contributions paid into FirstChoice Personal Super in relation to which CFSIL had not held an investment direction, when that was not the case.

(collectively, **Letter Representations**).

103. Between 18 March 2014 and 21 July 2016, in 67 calls between CFSIL and members of its FirstChoice Personal Super product who had been identified as members from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL:

- (a) engaged in conduct, in trade or commerce:
  - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act; and
  - (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act;
- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,

in that:

- (d) CFSIL represented in the Calls that:
  - (i) recent legislative changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case;
  - (ii) recent legislative changes required CFSIL to obtain a direction, instruction or confirmation from the member in relation to the investment of their superannuation contributions, when that was not the case; and
  - (iii) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case; and
- (e) CFSIL failed to disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.

104. On 27 March 2014, in a call between CFSIL and a member of its FirstChoice Personal Super product who had been identified as a member from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL:

- (a) engaged in conduct, in trade or commerce:
  - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act; and
  - (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act;
- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,

in that:

- (d) CFSIL represented in the call that:
  - (i) recent legislative changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case; and
  - (ii) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case; and
- (e) CFSIL failed to disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.

105. On 18 March 2014, in a call between CFSIL and a member of its FirstChoice Personal Super product who had been identified as a member from whom CFSIL did not hold an investment

direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL:

- (a) engaged in conduct, in trade or commerce:
  - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act; and
  - (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act;
- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and
- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,

in that:

- (d) CFSIL represented in the call that:
  - (i) recent industry changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case;
  - (ii) recent industry changes required CFSIL to obtain a direction, instruction or confirmation from the member in relation to the investment of their superannuation contributions, when that was not the case; and
  - (iii) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case; and
- (e) CFSIL failed to disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member superannuation contributions into a MySuper product.

106. On 29 May 2014, in a call between CFSIL and a member of its FirstChoice Personal Super product who had been identified as a member from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL:

- (a) engaged in conduct, in trade or commerce:
  - (i) in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the Corporations Act; and
  - (ii) in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act;
- (b) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the need for any services in contravention of s 12DB(1)(h) of the ASIC Act; and

- (c) made, in trade or commerce, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,

in that:

- (d) CFSIL represented in the call that:
  - (i) the regulator required, or alternatively requested, CFSIL to contact the member in relation to the investment of the member's superannuation contributions, when that was not the case; and
  - (ii) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions, when that was not the case; and
- (e) failed to disclose that if CFSIL did not receive an investment direction from the member, it was required to transfer the member's superannuation contributions into a MySuper product.

107. Between 19 March 2014 and 18 June 2014, in 17 calls between CFSIL and members of its FirstChoice Personal Super product who had been identified as members from whom CFSIL did not hold an investment direction and had accepted superannuation contributions into the FirstChoice Personal Super product in breach of section 29WA of the SIS Act, CFSIL contravened s 949A of the Corporations Act by reason that in each of the calls, CFSIL:

- (a) provided general advice within the meaning of section 766B of the Corporations Act in that it made a recommendation or statement of opinion that the member should continue to have his or her superannuation contributions invested with FirstChoice Personal Super; and
- (b) failed to warn the member that:
  - (i) the advice had been prepared without taking account of the member's objectives, financial situation or needs;
  - (ii) because of the fact referred to in (i) above, the member should, before acting on the advice, consider the appropriateness of the advice, having regard to the member's objectives, financial situation and needs; and
  - (iii) the member should obtain a Product Disclosure Statement relating to the product and consider the Statement before making any decision about whether to acquire the product.

108. By its conduct in each of:

- (a) making the Letter Representations in the circumstances referred to in paragraph 102 above;
- (b) making the representations referred to in paragraphs 103 to 106 above (**Call Representations**) in the circumstances referred to therein;
- (c) failing in the Letters and in the calls referred to in paragraphs 103 to 106 above (**Calls**) to inform members that CFSIL had breached its legislative obligations by failing to treat the members' superannuation contributions since 1 January 2014 as being contributions to be paid into a MySuper product of the FirstChoice Fund; and
- (d) failing in the Calls to inform members that:

- (i) if CFSIL did not receive an investment direction from the members, it was required to transfer the members' superannuation contributions into a MySuper product; and
- (ii) MySuper products were simple, low fee super products that met certain minimum requirements set by government, including default levels of insurance, as CFSIL believed to be the case,

CFSIL failed to do all things necessary to ensure the financial services covered by its financial services licence were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Corporations Act.

109. By reason of the contraventions referred to in paragraphs 102 to 108 above, CFSIL failed to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act

Date: 2 September 2021



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Tom Jarvis  
Partner, Johnson Winter & Slattery  
Lawyer for the Plaintiff



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Ross McInnes  
Partner, Clayton Utz  
Lawyer for the Defendant

**SCHEDULE**

Row	Calls	Representations
1	Call referred to in paragraph 9 of Annexure A to the ASOC.	<p>CFSIL represented that:</p> <ul style="list-style-type: none"> <li>(a) recent legislative changes industry changes, required CFSIL to contact the member in relation to the investment of the member's superannuation contributions; and</li> <li>(b) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions.</li> </ul>
2	<p>Calls referred to in:</p> <ul style="list-style-type: none"> <li>- paragraphs 1A to 8, 10 to 13, 16 to 18, 20, 21, 24, 27 to 29, 33, 34 and 36 to 55 of Annexure A to the ASOC; and</li> <li>- paragraphs 1 to 17 of Annexure B to the ASOC.</li> </ul>	<p>CFSIL represented that:</p> <ul style="list-style-type: none"> <li>(a) recent legislative changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions;</li> <li>(b) recent legislative changes required CFSIL to obtain a direction, instruction or confirmation from the members in relation to the investment of their superannuation contributions (such as confirming whether they were happy or comfortable with their current investment options); and</li> <li>(c) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions</li> </ul>
3	Call referred to in paragraph 1 of Annexure A to the ASOC.	<p>CFSIL represented that:</p> <ul style="list-style-type: none"> <li>(a) recent industry changes required CFSIL to contact the member in relation to the investment of the member's superannuation contributions;</li> <li>(b) recent industry changes required CFSIL to obtain a direction, instruction or confirmation from the member in relation to the investment of their superannuation contributions; and</li> <li>(c) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions</li> </ul>
4	Call referred to in paragraph 32 of Annexure A to the ASOC.	<p>CFSIL represented that:</p> <ul style="list-style-type: none"> <li>(a) the regulator required, or alternatively requested, CFSIL to contact the member in relation to the investment of the members' superannuation contributions; and</li> <li>(b) the member was required to take action in the form of providing a direction, instruction or confirmation in relation to the investment of their superannuation contributions.</li> </ul>