

Proposed settlement distribution scheme

Coatman v Colonial First State Investments Limited & Anor

VID 1139 of 2019

BACKGROUND

- A. On 17 October 2019, Lesley Coatman (the **Applicant**), commenced proceeding VID 1139 of 2019 in the Federal Court of Australia (the **Proceeding**) on her own behalf and on behalf of the Group Members against Colonial First Statement Investments Limited (**Colonial**) and a former director of Colonial.
- B. On 1 April 2022, the parties to the Proceeding executed a Deed of Settlement (**Settlement Deed**) to resolve the claims of the Applicant and Group Members against the Respondents. The proposed settlement as set out in the Settlement Deed is subject to the approval of the Court pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (the **Act**).
- C. The Settlement Deed provides for Colonial to pay a total settlement amount of \$56.3 million on account of the claims of the Applicant and Group Members, interest and costs (**Settlement Sum**).
- D. The Applicant is represented by Maurice Blackburn. Subject to approval of the Court, Maurice Blackburn will be appointed as Settlement Administrator on the making of orders under s 33V of the Act and from that appointment will then cease to act on behalf of the Applicant.
- E. This Settlement Distribution Scheme sets out the principles (but not the operational mechanics) for the application and distribution of the Settlement Sum to or on behalf of the Group Members, after payment of the Applicant's Approved Costs.

1 Definitions

2FASOC means the Second Further Amended Statement of Claim in the proceeding filed on 17 March 2022.

Account Number means the unique identifier for the account in which the Group Member has or had an interest in the FirstChoice Fund (regardless of whether that account remains active).

ADA Transfer has the meaning set out in the Apportionment Formula Definitions in Annexure A.

Appeal Period means the period beginning on the date of the making of the Approval Orders (as defined in the Settlement Deed) and ending 49 days after that date.

Applicant means Lesley Coatman.

Applicant's Approved Costs means the costs payable to Maurice Blackburn in its capacity as solicitor for the Applicant and/or as Settlement Administrator as approved by the Court and an amount of not more than \$25,000 payable to the Applicant, subject to Court Approval.

Apportioned Amount means the amount of the Residual Settlement Sum apportioned to the Applicant and each Group Member in accordance with the Apportionment Formula, calculated by the Expert Consultant in accordance with clause 5.

Apportionment Formula means the formula set out in Annexure A.

Business Day means a day on which the banks are open for business in Sydney, NSW other than a Saturday, Sunday or public holiday in Sydney, NSW.

Cashed Out Group Member means a Group Member who has cashed out (redeemed or withdrawn) the entire superannuation balance in the account in their name in the FirstChoice Fund.

Colonial means Colonial First State Investments Limited.

Excluded Group Member has the meaning set out in the Apportionment Formula Definitions in Annexure A.

Family Law Settlement means an order or settlement in a *Family Law Act 1975* (Cth) proceeding or a superannuation agreement within the meaning of Part VIIIB of that Act.

FCES ADA means an accrued default amount in the FirstChoice Employer Super product in the FirstChoice Fund.

FirstChoice Fund means the Colonial First State FirstChoice Superannuation Trust ABN 26 458 298 557, of which Colonial is the Trustee.

Group Member means all persons who:

- (a) are group members in the Proceedings as defined in paragraph 2(a) of the 2FASOC who did not opt out of the Proceeding by 4pm on 31 January 2022 in accordance with orders made by the Court in the Proceeding on 18 November 2021;
- (b) are group members in the Proceedings as defined in paragraph 2(b) or 2(c) of the 2FASOC who did not opt out of the Proceeding by 4pm on 28 February 2022 in accordance with orders made by the Court in the Proceeding on 7 February 2022; and
- (c) are not the 11 group members specified in the list provided to the Court on 30 March 2022 who filed an opt out notice but did so after the deadline, who are deemed to have opted out of the Proceeding in accordance with order 9 of the orders made by the Court in the Proceeding on 6 April 2022.

Individual Average Notional Apportionment has the meaning set out in the Apportionment Formula Definitions in Annexure A.

No Loss Group Members has the meaning set out in the Apportionment Formula Definitions in Annexure A.

Payment Amount means:

- (a) for a Transferred Member who is not deceased and has not been the subject of an order or settlement in a *Family Law Act 1975* (Cth) (**Family Law Act**) proceeding or a superannuation agreement within the meaning of Part VIII B of the Family Law Act that resulted in the transfer of part of their interest attributable to an FCES ADA that was the subject of an ADA Transfer, 100% of the Apportioned Amount;
- (b) for a Group Member who has received a payment from a deceased Transferred Member's account of all or part of the interest of the Transferred Member attributable to an FCES ADA that was the subject of an ADA Transfer, a proportion of the Apportioned Amount for the deceased Transferred Member equal to the proportion of the deceased Transferred Member's interest in the FirstChoice Fund that the Group Member received;
- (c) for a Transferred Member who has been the subject of an order or settlement in a Family Law Act proceeding or a superannuation agreement within the meaning of Part VIII B of the Family Law Act that resulted in the transfer of all or part of their interest attributable to an FCES ADA that was the subject of an ADA Transfer to another Group Member, a proportion of the Apportioned Amount for the Transferred Member equal to the proportion of the Transferred Member's interest in the FirstChoice Fund that the Transferred Member retained;
- (d) for a Group Member who is not a Transferred Member and who has been the subject of an order or settlement in a Family Law Act proceeding or a superannuation agreement within the meaning of Part VIII B of the Family Law Act that resulted in the transfer of all or part of a Transferred Member's interest attributable to an FCES ADA that was the subject of an ADA Transfer to the Group Member, a proportion of the Apportioned Amount for the Transferred Member equal to the proportion of the Transferred Member's interest in the FirstChoice Fund that the Group Member received.

Proceeding means proceeding VID 1139 of 2019 commenced on 17 October 2019 in the Federal Court of Australia by the Applicant on her own behalf and on behalf of the Group Members against Colonial and a former director of Colonial.

Receiving Fund means the superannuation fund to which Colonial transferred the superannuation balance in the member account in the name of a Rolled Over Group Member.

Related Transferred Member means the Transferred Member to whom a Group Member's entitlement relates pursuant to paragraphs 2(b) and 2(c) of the 2FASOC.

Remaining Group Member means a Group Member who still has a member account in their name in the FirstChoice Fund.

Residual Settlement Sum means the Settlement Sum less the Applicant's Approved Costs, prior to the deduction of any amount of tax payable by Colonial in its capacity as trustee of the FirstChoice Fund in respect of the Residual Settlement Sum.

Rolled Over Group Member means a Group Member who gave instructions to Colonial to roll over the entire balance in the member account in their name in the FirstChoice Fund to another superannuation fund.

Settlement Administrator means the person authorised to enforce the Settlement Distribution Scheme on behalf of Group Members.

Settlement Distributor means the person or entity appointed to make payments to Group Members to administer the Settlement Distribution Scheme.

Settlement Sum means the total settlement amount of \$56.3 million to be paid by Colonial on account of the claims of the Applicant and Group Members, interest and costs.

Transferred Member means Group Members in the Proceedings as defined in paragraph 2(a) of the 2FASOC.

TVP means a trustee voluntary payment made to the Australian Taxation Office in accordance with the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth).

2 Settlement Administrator and Settlement Distributor

- (a) Maurice Blackburn is appointed as the Settlement Administrator.
- (b) Colonial is appointed as the Settlement Distributor.
- (c) The Settlement Distributor will appoint Ernst & Young (or in consultation with the Settlement Administrator, another independent expert consultant) (**Expert Consultant**) to:
 - (1) perform the calculations described in clause 5 below; and
 - (2) provide a report to the Court confirming that the Residual Settlement Sum has been paid by Colonial in accordance with clause 4(b) below and that amounts have been credited to superannuation accounts in the names of the Group Members or paid to Group Members or the Australian Taxation Office in accordance with clause 6 below.
- (d) The Settlement Distributor will report to the Expert Consultant and Settlement Administrator each amount calculated and paid to the Applicant and each Group Member in accordance with clause 6 below on a three monthly basis and within 10 Business Days of the conclusion of distribution of the Settlement Sum.
- (e) The Settlement Distributor will distribute the Settlement Sum within 12 months of the expiry of the Appeal Period, other than in exceptional circumstances, in which case the Settlement Distributor will report to the Court and the Settlement Administrator on the reasons for the delay and the steps that the Settlement Distributor proposes to take to address it.
- (f) The Settlement Distributor will report to the Court and the Settlement Administrator within 10 Business Days of the conclusion of distributing the Settlement Sum in accordance with clause 8 below.
- (g) The Settlement Administrator will within 20 Business Days of the conclusion of distributing the Settlement Sum, apply to the Court for orders dismissing the Proceeding with no order as to costs.

3 Supervision by the Federal Court

Consistently with Part IVA of the Act, the implementation of this Settlement Distribution Scheme is subject to the Court's supervision and in particular:

- (a) the Settlement Administrator is authorised to enforce this Settlement Distribution Scheme on behalf of Group Members; and
- (b) Notwithstanding (a) above, either the Settlement Administrator or the Settlement Distributor may refer any issues arising in relation to this Settlement Distribution Scheme or its administration for determination to the Court and if so doing must give each other at least 7 days notice of an intention to make such application and serve on the other all documents filed in any such application as soon as practicable after filing;
- (c) the Settlement Administrator is entitled to seek payment of its costs in relation to any such application or reference to the Court (other than in respect of the

application contemplated in clause 2(g) above) including from any remainder of the Residual Settlement Sum or otherwise, subject to the Court's approval.

4 Payment of the Settlement Sum

Within 14 days of the Court approving the Applicant's Approved Costs, Colonial will pay:

- (a) the Applicant's Approved Costs to Maurice Blackburn; and
- (b) the Residual Settlement Sum to the FirstChoice Fund.

The Settlement Sum will not be met from Colonial's Operational Risk Financial Requirement reserves, or otherwise met from any assets of the FirstChoice Fund.

5 Residual Settlement Sum

- (a) The Settlement Administrator will provide the Settlement Distributor with a list of any additional persons which it reasonably believes may be Group Members in the proceedings but are not recorded in the lists of Group Members provided by Herbert Smith Freehills on 21 January 2022, 1 February 2022 and 29 April 2022 as soon as possible after it forms that reasonable belief and in any event, within 7 days of the payment of the Residual Settlement Sum into the FirstChoice Fund. The Settlement Distributor will then conduct reviews of its internal records and advise the Settlement Administrator within 14 days whether those persons are in fact Group Members.
- (b) Within 28 days of payment of the Residual Settlement Sum to the FirstChoice Fund, the Expert Consultant will calculate the amount of the Residual Settlement Sum to be apportioned to the Applicant and each Group Member in accordance with the Apportionment Formula and provide a report to the Settlement Distributor and the Settlement Administrator setting out:
 - (1) the amount of the Residual Settlement Sum;
 - (2) the amount of any amount of tax payable by Colonial in its capacity as trustee of the FirstChoice Fund in respect of the Residual Settlement Sum;
 - (3) for the Applicant and Transferred Members who on the application of the Apportionment Formula are to receive a payment:
 - (A) the name of each such Transferred Member;
 - (B) the Individual Average Notional Apportionment for each such Transferred Member;
 - (C) the Apportioned Amount for each such Transferred Member;
 - (D) the date of birth of each such Transferred Member;
 - (E) the Account Number of each such Transferred Member;
 - (F) whether the Transferred Member has an active member account in the FirstChoice Fund;
 - (G) the default investment option(s) in which the ADA of each such Transferred Member was held prior to the ADA Transfer; and
 - (H) the MySuper Lifestage option into which the ADA of each such Transferred Member was transferred on the ADA Transfer;

- (4) for the Applicant and Transferred Members who on the application of the Apportionment Formula are not to receive a payment:
- (A) the name of each such Transferred Member;
 - (B) the Individual Average Notional Apportionment for each such Transferred Member;
 - (C) whether the Transferred Member is an Excluded Group Member or a No Loss Group Member;
 - (D) the date of birth of each such Transferred Member;
 - (E) the Account Number of each such Transferred Member;
 - (F) the default investment option(s) in which the ADA of each such Transferred Member was held prior to the ADA Transfer; and
 - (G) the MySuper Lifestage option into which the ADA of each such Transferred Member was transferred on the ADA Transfer.
- (5) For Group Members who are not Transferred Members and who on the application of the Apportionment Formula are to receive a payment:
- (A) the name of each such Group Member;
 - (B) the name of the Transferred Member to whom the Group Member's entitlement relates (**Related Transferred Member**);
 - (C) whether the Group Member falls within category 2(b) or 2(c) of the 2FASOC;
 - (D) the Payment Amount of each such Group Member;
 - (E) if applicable, the date of birth of the Group Member;
 - (F) if applicable, the Account Number of the Group Member; and
 - (G) whether the Group Member has an active account in the FirstChoice Fund.
- (6) For Group Members who are not Transferred Members and who on the application of the Apportionment Formula are not to receive a payment:
- (A) the name of each such Group Member;
 - (B) the name of the Related Transferred Member;
 - (C) whether the Group Member falls within category 2(b) or 2(c) of the 2FASOC;
 - (D) the Individual Average Notional Apportionment for the Related Transferred Member;
 - (E) whether the relevant Related Transferred Member is an Excluded Group Member or a No Loss Group Member;
 - (F) the date of birth of each such Related Transferred Member;
 - (G) the Account Number of each such Related Transferred Member;
 - (H) the default investment option(s) in which the ADA of each such Related Transferred Member was held prior to the ADA Transfer; and
 - (I) the MySuper Lifestage option into which the ADA of each such Related Transferred Member was transferred on the ADA Transfer.

6 Allocation to Group Members

- (a) After receiving the report referred to in clause 5(b) above and after the end of the Appeal Period, the Settlement Distributor will:
- (1) pay out of the FirstChoice Fund to the Applicant the Payment Amount (plus any amount of interest earned on the Residual Settlement Sum calculated on a pro rata basis) for the Applicant;
 - (2) pay out of the FirstChoice Fund to each Cashed Out Group Member the Payment Amount (plus any amount of interest earned on the Residual Settlement Sum calculated on a pro rata basis) for that Group Member in accordance with instructions received from the Cashed Out Group Member where the Group Member's account was closed within 12 months of the date of payment or (where the Group Member's account was closed over 12 months before the date of payment) by making a TVP;
 - (3) transfer to the relevant Receiving Fund the Payment Amount (plus any amount of interest earned on the Residual Settlement Sum calculated on a pro rata basis) for each Rolled Over Group Member either in accordance with instructions received from a Rolled Over Group Member where the Group Member's account was closed within 12 months of the date of payment or (where the Group Member's account was closed over 12 months before the date of payment) by making a TVP;
 - (4) adjust its records in respect of the member account in the FirstChoice Fund in the name of each Remaining Group Member by increasing the account balance by the Payment Amount (plus any amount of interest earned on the Residual Settlement Sum calculated on a pro rata basis) for the Relevant Remaining Group Member and acquiring units in the investment option or options in which that account balance is invested in the FirstChoice Fund;
 - (5) pay out of the FirstChoice Fund to each Group Member as defined in paragraph 2(b) of the 2FASOC, the Payment Amount (plus any amount of interest earned on the Residual Settlement Sum calculated on a pro rata basis) for that Group Member either in accordance with instructions received in respect of the Group Member where the Group Member's account was closed over within 12 months of the date of payment or (where the Group Member's account was closed over 12 months before the date of payment) by making a TVP;
 - (6) in respect of each Group Member as defined in paragraph 2(c) of the 2FASOC:
 - (A) if such Group Member is a Remaining Group Member, adjust its records in respect of that member account by increasing the account balance by the Payment Amount (plus any amount of interest earned on the Residual Settlement Sum calculated on a pro rata basis) by acquiring units in the investment option or options in which that account balance is invested in the FirstChoice Fund;
 - (B) if such Group Member had, but no longer has, a member account in their name in the FirstChoice Fund, pay or transfer the Payment Amount (plus any amount of interest earned on the Residual Settlement Sum calculated on a pro rata basis) in accordance with 6(a)(2) or 6(a)(3) above as appropriate.
- (b) If, after attempted distribution of the Payment Amounts (plus any amount of interest earned on the Residual Settlement Sum calculated on a pro rata basis) for Group Members referred to in 6(a)(1) to 6(a)(6) above, there remain Payment

Amounts which have not been able to be distributed the Settlement Distributor will make TVPs in respect of the undistributed Payment Amounts.

7 Member communications

- (a) At least 30 days before the distribution of any part of the Settlement Sum, the Settlement Distributor shall provide its proposed communications plan to the Settlement Administrator and the Settlement Administrator shall provide comment on it within 7 days which comments will be taken into account by the Settlement Distributor prior to finalising it. The communications plan will include
- (1) the type, and nature of the content, of the communications to be made to Group Members;
 - (2) any telephone script or Q&A being used or proposed to be used to respond to telephone enquiries from Group Members;
 - (3) a generic, simple, plain-English explanation of the methodology (including the Apportionment Formula) by which individual Payment Amounts have been calculated and the variables relevant to this (eg, the default investment product and which Lifestages product, and the relevant time period for the calculation) which can be provided to any Group Member seeking an explanation of the manner in which their individual Apportioned Amount was calculated.
- (b) The Settlement Distributor will respond as soon as practicable to written or telephone enquiries it receives from Group Members (including No Loss Group Members and Excluded Group Members).
- (c) The Settlement Administrator may refer enquiries from Group Members (including No Loss Group Members and Excluded Group Members) seeking information about the distribution of the Settlement Sum, their individual Apportioned Amount or Payment Amount, or the manner in which payment will be made, to the Settlement Distributor and the Settlement Distributor will respond as soon as reasonably practicable.
- (d) If, in the period until the Residual Settlement Sum is paid in accordance with clause 4, the Settlement Distributor is contacted by any Group Member wishing to notify a changed contact email address, physical address or telephone number, the Settlement Distributor will:
- (1) amend its records accordingly; and
 - (2) ensure that any written communication to the Group Member made after the date on which the Residual Settlement Sum is paid in accordance with clause 4, is sent to the Group Member's amended contact email address or physical address.
- (e) Where a Payment Amount has been credited to an active member account in the FirstChoice Fund in accordance with clause 6(a)(4) or clause 6(a)(6)(A) above, the Settlement Distributor will on the next periodic member statement for the member in whose name that account is held identify the amount credited to the member account as a result of the Settlement Distribution Scheme and include a notation on the member statement that the amount credited relates to the distribution of a class action settlement in proceedings *Lesley Coatman v Colonial First State Investments Limited* (Federal Court of Australia proceeding VID 1139 of 2019).
- (f) The Settlement Distributor will communicate with each Group Member who does not have an active member account in their name in the FirstChoice Fund by postal or email communication to their last known address held by the Settlement Distributor to inform them of their entitlement to receive the Payment Amount pursuant to the distribution of a class action settlement in proceedings *Lesley*

Coatman v Colonial First State Investments Limited (Federal Court of Australia proceeding VID 1139 of 2019 and the means by which the Payment Amount has been paid. For the avoidance of doubt, such communications will only be made where a Group Member has been paid a Payment Amount and will be made within 30 days of the date of payment.

8 Reporting by the Settlement Distributor

- (a) The Settlement Distributor shall, at three monthly intervals after the commencement of distribution of the Settlement Sum, report to the Settlement Administrator and the Expert Consultant on the following matters:
- (1) the total quantum of Payment Amounts distributed to Group Members in the preceding three months;
 - (2) the dates on which payments were made to Group Members, and the quantum of the payments made on each date and the number of Group Members paid on each date;
 - (3) the number of payments made:
 - (A) in cash;
 - (B) into an account in the FirstChoice Fund;
 - (C) into an account in another superannuation fund; and
 - (D) by a TVP;
 - (4) any other relevant matter as determined by the Settlement Distributor.
- (b) The Settlement Distributor's report to the Court at the conclusion of the distribution of the Settlement Sum shall identify the following matters:
- (1) the Residual Settlement Sum;
 - (2) the total quantum of Apportioned Amounts calculated by the Expert Consultant in accordance with clause 5(b);
 - (3) the total quantum of Payment Amounts distributed to Group Members;
 - (4) if the amounts in subclauses 8(b)(2) and 8(b)(3) differ, an explanation for this;
 - (5) the amounts representing the highest, lowest, mean and median payments to Group Members;
 - (6) the number of Group Members to whom a payment was made including:
 - (A) whether the payment was made in cash;
 - (B) whether the payment was made into an account in the FirstChoice Fund;
 - (C) whether the payment was made into an account in another superannuation fund; and
 - (D) whether the payment was made by a TVP;
 - (7) the number of Excluded Group Members;
 - (8) the number of No Loss Group Members;
 - (9) the dates on which payments were made to Group Members and the quantum of the payments made on each date and the number of Group Members paid on each date;

- (10) an explanation of the nature of any written communications made to Group Members in relation to the distribution of the Settlement Sum, and when and by what means those communications were made;
- (11) any other relevant matter as determined by the Settlement Distributor.

Annexure A – Apportionment Formula

Apportionment Formula definitions:

- **Actual ADA Transfer Date** means, in respect of a Member Account, the date that the ADA Transfer actually occurred.
- **ADA Transfer** means, in respect of a Member Account, the transfer of Accrued Default Amounts in that account by Colonial to a MySuper Product.
- **Aggregate Average Notional Apportionment** means the sum of each Individual Average Notional Apportionment for all Transferred Members other than No Loss Group Members and Excluded Group Members.
- **Difference Calculation** means, in respect of the Member Account in a Transferred Member's name:

$$T - A$$

where

T is the balance that would have been in that account as at the Actual ADA Transfer Date in respect of that Member Account had the ADA Transfer in respect of that account occurred on an earlier date (being a date in the period 1 July 2015 to 31 December 2015), applying the Ross Report Methodology; and

A is the actual balance in that account as at the Actual ADA Transfer Date in respect of that Member Account.

- **Excluded Group Member** means any Group Member for whose Individual Average Notional Apportionment is greater than \$0 and less than \$20.00. All amounts attributable to Excluded Group Members will be distributed among the Group Members who are not Excluded Group Members or No Loss Group Members.
- **Individual Average Notional Apportionment** means, in respect of each individual Transferred Member, the sum of the Difference Calculations in respect of the Member Account in that Transferred Member's name for each day in the period from 1 July 2015 to 31 December 2015 (inclusive), divided by the number of days in that period.
- **Member Account** means an account in the FirstChoice Fund in the name of a Transferred Member.
- **No Loss Group Members** means any Group Member for whose Individual Average Notional Apportionment is equal to or less than \$0.
- **Ross Report Methodology** means the expert report of Mr Andrew Ross dated 26 February 2021 and filed by the Applicant in the Proceeding which, in general terms, calculates loss as the difference between a counterfactual ADA balance, being what the ADA balance would have been if it had been transferred to the relevant MySuper investment option prior to the date on which the ADA balance was actually transferred, on any date prior to the date of actual transfer, taking into account:
 - (1) the investment returns achieved by the relevant MySuper investment option compared against the investment returns of the default investment option;
 - (2) the actual costs and fees (including insurance premiums) paid by the member; and
 - (3) the actual rebates and adjustments received by the member.

Apportionment Formula:

Apportioned Amount =

($\frac{\text{Individual Average Notional Apportionment}}{\text{Aggregate Average Notional Apportionment}}$) x Residual Settlement Sum x (1 – tax rate borne by the FirstChoice Fund with respect to the Member Account)