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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: VID1139/2019
File Title: LESLEY COATMAN v COLONIAL FIRST STATE INVESTMENTS LIMITED & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 14/09/2021 11:55:47 AM 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.

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Form 17
Rule 8.05(1)(a)



Further Amended Statement of Claim

No. VID1139 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

Lesley Coatman

Applicant

Colonial First State Investments Limited (ACN 002 348 352) and another named in the schedule

Respondents

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NOTE AS TO TERMINOLOGY:

In this Further Amended Statement of Claim:

- (a) capitalised terms not otherwise defined in this or subsequent sections are defined in Schedule A; ~~and~~
- (b) ~~any reference to a document identification number beginning with "CBA" is a reference to a document tendered in evidence in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry with the same identification number.~~

A. THE PARTIES

1. The Applicant brings this proceeding as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on her own behalf and on behalf of the Group Members described in paragraph 2.

2. The Applicant and the persons whom she represents (**Group Members**) are persons who are not a Justice, Registrar, District Registrar or Deputy District Registrar of the High Court of Australia or the Federal Court of Australia, and fall within at least one of the following categories:

- (a) are or at any time were a member of the Colonial First State FirstChoice Superannuation Trust (ABN 26 458 298 557) (**FirstChoice Fund**) who had attributed to them an Accrued Default Amount (**ADA**) in the FirstChoice Employer Super product (**FCES**) (an **FCES ADA**) that was transferred by the First Respondent (**Colonial**) on or about 12 November 2016 or on or about 24 May 2017 into a MySuper Product in FCES (an **FCES ADA Member**);

OR

- (b) at any time received payment from a deceased FCES ADA Member of all or part of the interest of that FCES ADA Member attributable to an FCES ADA transferred in the circumstances set out in subparagraph (a);

OR

- (c) satisfy both of the following paragraphs:
 - (i) were the spouse of a person who was an FCES ADA Member; and
 - (ii) pursuant to 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 that Act, at any time received a transfer from

the FCES ADA Member of all or part of the FCES ADA Member's interest attributable to an FCES ADA transferred in the circumstances set out in subparagraph (a).

3. As at the date of the commencement of this proceeding, there were seven or more persons who had claims against the Respondents in respect of the matters set out in this Further Amended Statement of Claim.
4. Colonial is and at all material times has been:
 - (a) a company incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**);
 - (b) the trustee of the FirstChoice Fund;
 - (c) an RSE Licensee under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**); and
 - (d) a holder of an Australian Financial Services Licence (**AFSL**).
5. The Second Respondent (**Elkins**):
 - (a) is a natural person;
 - (b) was between 1 January 2013 and 5 September 2016 (inclusive) and between 24 March 2017 and 2 August 2019 (inclusive) a director of Colonial;
 - (c) was from at least 17 March 2014 to at least 5 September 2016 (inclusive) and between 24 March 2017 and 2 August 2019 (inclusive) a member of Colonial's Board Investment Committee; and
 - (d) was from on or around 9 August 2012 to 5 September 2016 (inclusive) and from 24 March 2017 to 9 July 2019 (inclusive), the executive general manager of the Colonial First State business, which included Colonial.

B. THE COMMONWEALTH BANK OF AUSTRALIA GROUP

6. Commonwealth Bank of Australia (ACN 123 123 124) (**CBA**) is:
 - (a) a company incorporated under the Corporations Act;
 - (b) an Associate, Related Body Corporate, Holding Company and Ultimate Holding Company of Colonial; and
 - (c) Ultimate Holding Company of a group of companies including but not limited to:

- (i) Colonial;
- (ii) Count Financial Limited;
- (iii) BW Financial Advice Limited;
- (iv) Commonwealth Financial Planning Limited;
- (v) Financial Wisdom Limited;
- (vi) The Colonial Mutual Life Assurance Society Limited;
- (vii) Colonial First Managed Infrastructure Limited;
- (viii) Colonial First Stage Asset Management (Australia) Limited;
- (ix) Realindex Investments Pty Limited;
- (x) Avanteos Investments Limited;
- (xi) Avanteos Pty Ltd; and
- (xii) Colonial First Stage Investments Limited,

(CBA Group).

C. THE FUNDS

7. The FirstChoice Fund is and at all material times has been:

- (a) a trust constituted and governed by a trust deed dated 29 April 1998 as amended from time to time (**Trust Deed**); and
- (b) a Superannuation Fund, a Regulated Superannuation Fund, a Superannuation Entity, a Public Offer Superannuation Fund and a Registrable Superannuation Entity.

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**].
- ii. Deed of Amendment dated 8 September 2017 [**CBA.0517.0173.0001**].
- iii. Deed of Amendment dated 17 December 2014 [**CFS.500.003.0032**].
- iv. Deed of Amendment No. 1 and No. 2 dated 2 April 2015 [**CFS.500.003.0029**; **CFS.500.003.0021**].
- v. Deed of Amendment dated 18 January 2017 [**CFS.500.003.0016**].
- vi. Deed of Amendment dated 15 March 2017 [**CFS.500.003.0011**].

vii. Deed of Amendment dated 28 March 2017 [**CFS.500.003.0005**].

8. At all material times, Colonial has offered in the FirstChoice Fund superannuation products, including FCES and the FirstChoice Personal Super and Pension product (**FCPS**).
- 8A. From at least 30 July 2012 until a date as yet unknown, the Colonial First State business, which included the FirstChoice Fund, was a business unit of the Wealth Management division (**Wealth Management**) within the CBA Group.

C1. THE NATURE OF AND THE RIGHTS AND OBLIGATIONS RELATING TO AN FCES ADA

- 8B. At all material times:
- (a) FCES ADAs were constituted entirely by contributions made by the FCES ADA Member and/or the FCES ADA Member's employers to the FirstChoice Fund, along with investment returns on those contributions, net of fees, commissions and any other charges; and
 - (b) those contributions were made for the exclusive use and enjoyment of the FCES ADA Member and/or their permitted successors and assigns.
- 8C. At all material times, each FCES ADA was comprised of:
- (a) preserved benefits, within the meaning of r 6.03 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**); and/or
 - (b) restricted non-preserved benefits, within the meaning of r 6.08 of the SIS Regulations; and/or
 - (c) unrestricted non-preserved benefits, within the meaning of rr 6.10 and 6.12 of the SIS Regulations.
- 8D. At all material times, where some or all of a FCES ADA was comprised of:
- (a) preserved benefits; and/or
 - (b) restricted non-preserved benefits;

upon satisfaction by the FCES ADA Member of a condition of release, that part of the FCES ADA that was comprised of preserved benefits or restricted non-preserved

benefits was able to be cashed by the FCES ADA Member subject to any applicable cashing restrictions.

Particulars

- i. SIS Regulations, rr 6.18 and 6.19, Sch. 1 (Conditions of release of benefits), Pt 1 (Regulated superannuation funds) – column 3 (**Condition of Release**).

8E. At all material times, where some or all of a FCES ADA was comprised of unrestricted non-preserved benefits, the FCES ADA Member was able to cash that part of the FCES ADA at any time.

Particulars

- i. SIS Regulations, r 6.20.

8F. At all material times, an FCES ADA Member held a beneficial interest in all the property, rights and income of the FirstChoice Fund as a whole.

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [CBA.0517.0173.0001], cls 1.3 (definition of “Assets”) and 2.1.

8G. At all material times:

- (a) for each FCES ADA Member, Colonial was required to keep a Member Contribution Account, a Compulsory Contribution Account and an Employer Contribution Account (**FCES ADA Accounts**);

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 1.3 (definition of “Member Contribution Account”, “Compulsory Contribution Account” and “Employer Contribution Account”), cl 14.1, Sch A - cl A5.1.
 - ii. The combined total of the FCES ADA Accounts for each FCES ADA Member was the value of the FCES ADA for that member: SIS Act, s 20B.
- (b) for each FCES ADA Member, Colonial was required to credit contributions by or for the member to specific FCES ADA Accounts maintained for the member in accordance with the trust terms;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], Sch A - cl A5.1.

- ii. SIS Regulations, r 7.07H.
- (c) on accepting contributions or other amounts for a FCES ADA Member which were not to be credited to a Plan Reserve (as defined in the Trust Deed), Colonial was required, within three business days after receiving the contribution and relevant FCES ADA Member information, to allocate to the FCES ADA Member undivided beneficial interests (**Units**) in a portfolio, or portfolios, of assets and liabilities maintained within the FirstChoice Fund (**Investment Portfolio**) that Colonial had divided into Units, as notified by the FCES ADA Member and as permitted by Colonial;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 1.3 (definition of “Plan Reserve”, “Investment Portfolio”, “Units”), cl 11.1(a).
 - ii. SIS Regulations, r 7.07H.
 - iii. Product Disclosure Statement dated 18 November 2013 [**CFS.001.004.7280 at 7283**].
- (d) Colonial was required to debit any insurance premiums paid and credit any insurance proceeds received in respect of the FCES ADA Member to their respective FCES ADA Accounts;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl A5.2.
- (e) to the extent that clause 11.1(a) of the Trust Deed did not apply, Colonial was required to allocate Units to the FCES ADA Member, subject to the requirements of the SIS Act and other superannuation laws:
- (i) in a MySuper Product;
 - (ii) in the absence of a MySuper Product, in one or more Investment Portfolios; or
 - (iii) notwithstanding an authorisation to offer a MySuper Product, in one or more Investment Portfolios as Colonial considered appropriate;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 11.1(b).
- (f) Colonial was required to allocate Units to a FCES ADA Member, or to a Plan Reserve (as defined), by dividing:
- (i) the amount applied to the Investment Portfolio less any taxes, costs, charges, expenses or fees which Colonial could deduct in respect of the amount; by
 - (ii) the issue price of Units in that Investment Portfolio on the issue date;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 11.3.
- (g) Colonial could cancel any Units (including fractions of units) allocated to a FCES ADA Member to:
- (i) pay any benefit to the FCES ADA Member;
 - (ii) transfer property, rights and income from the FirstChoice Fund;
 - (iii) meet any taxes, costs, charges, expenses or fees or provisions for any of them that Colonial considered appropriate in relation to the FCES ADA Member; or
 - (iv) switch an amount to another Investment Portfolio;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 12.1.
- (h) Colonial was required to record in each FCES ADA Account:
- (i) contributions and transfers to the FirstChoice Fund in respect of an FCES ADA Member which the FCES rules required to be credited to the account;
 - (ii) any other amount received by Colonial in respect of an FCES ADA Member which the FCES rules required to be credited to the account;
 - (iii) any insurance premiums which the FCES rules required to be debited to the account;

- (iv) movements in the value of Units allotted to the account which had not been cancelled;
 - (v) any taxes, costs, charges, expenses or fees that Colonial decided to debit to the account;
 - (vi) any liabilities of the FirstChoice Fund (including any amount payable to Colonial) which Colonial decided to debit to the account;
 - (vii) any current or future tax benefit, liability or credit which Colonial decided to record on the account;
 - (viii) amounts paid from the FirstChoice Fund (including benefits and transfers) in respect of an FCES ADA Member from the FCES ADA Account;
 - (ix) amounts transferred to or from other accounts or a Plan Reserve (as defined) from or to the account;
 - (x) any provisions for any payments from the account in respect of an FCES ADA Member;
 - (xi) any amounts transferred, rolled over or allotted to or from the account in respect of a contributions splitting application; and
 - (xii) any other matters or amounts which Colonial considered appropriate,
- (together, the **FCES ADA Obligations**).

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 14.2.

8H. At all material times, an FCES ADA Member had the following rights as a member of the FirstChoice Fund:

- (a) the right to request that Colonial change the whole or part of their benefit under a Division or Plan (as defined in the Trust Deed) to another Division or Plan in the FirstChoice Fund, providing Colonial approved of the change and the FCES ADA Member met any eligibility requirements;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 4.7.

- (b) the right to request that Colonial change the whole or part of their benefit under a Class (as defined in the Trust Deed) to another Class in the FirstChoice Fund, provided Colonial approved of the change and the FCES ADA Member satisfied any terms or conditions in respect of the Class;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cls 1.3 (definition of "Class") and 4.7AA.
- (c) the right to apply to Colonial to rollover or transfer their withdrawal benefit to another superannuation fund, approved deposit fund, annuity or retirement savings account, which request Colonial was required to comply with;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 4.9.
- ii. SIS Regulations, rr 6.33 and 6.33A.
- (d) the right to apply to Colonial to rollover, transfer, or allot an amount of benefits of their spouse, that is equal to an amount of the splitable contributions made by, or on behalf of the FCES ADA Member, in the previous financial year;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 5.6.
- ii. SIS Regulations, r 6.44.
- (e) the right to be paid a benefit (if entitled) by way of the transfer by Colonial of assets (property, rights and income of the fund) to the FCES ADA Member or their nominee;

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 8.16.
- (f) when they were entitled to a benefit, the right to request that Colonial defer payment of that benefit or part of it; and

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 8.1.

- (g) the right to elect to switch amounts between Investment Portfolios attributable to them (**Investment Direction**), if Colonial permitted the switch and the manner in which the switch was to take place,

Particulars

- i. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 13.1.
- ii. SIS Act, s 58(2).
- iii. SIS Regulations, r 4.02A.

(together, the **FCES ADA Rights**).

- 8I. By reason of the matters alleged at paragraphs 8D and 8E above, FCES ADA Members, who had FCES ADAs which were in part or whole:

- (a) preserved benefits or restricted non-preserved benefits where a ~~condition of release~~Condition of Release was satisfied; and/or
- (b) unrestricted non-preserved benefits;

had a present right to receive payment in respect of those benefits on their election to do so and subject to any applicable cashing restrictions.

Particulars

- i. SIS Regulations, rr 6.18 and 6.19, Sch. 1 (Conditions of release of benefits), Pt 1 (Regulated superannuation funds) – column 3.
- ii. Cashing restrictions do not apply in respect of 8I(b).

- 8J. By reason of the matters alleged at paragraphs 8B, 8F and 8G above, where some or all of a FCES ADA was comprised of preserved benefits and/or restricted non-preserved benefits, and no ~~condition of release~~Condition of Release had been satisfied in relation to those preserved and/or restricted non-preserved benefits, FCES ADA Members had a present right to direct, control and manage their FCES ADA in accordance with the applicable regulatory scheme and trust instruments and a present right to receive payment in the future in respect of that part of their FCES ADA.

D. OBLIGATIONS OF COLONIAL AS TRUSTEE

SIS Act Covenants

9. Pursuant to the SIS Act, and for the purposes of that Act, the terms of the Trust Deed were at all material times, and continue to be, part of the Governing Rules of the FirstChoice Fund.
10. At all material times up to 30 June 2013 (inclusive), pursuant to s 52 of the SIS Act (as then in force), the Governing Rules of the FirstChoice Fund were taken to contain covenants by Colonial:
 - (a) to exercise the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide (**Pre-2013 Care and Skill Covenant**); and
 - (b) to ensure that its duties and powers were performed and exercised in the best interests of the beneficiaries (**Pre-2013 Best Interests Covenant**).
11. At all material times since 1 July 2013 (inclusive), pursuant to s 52 of the SIS Act, the Governing Rules of the FirstChoice Fund have been taken to contain covenants by Colonial:
 - (a) to exercise, in relation to all matters affecting the FirstChoice Fund, the same degree of care, skill and diligence as a prudent person, whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity, would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries which it makes investments (**Care and Skill Covenant**);
 - (b) to perform its duties and exercise its powers in the best interests of the beneficiaries (**Best Interests Covenant**); and
 - (c) where there is a conflict between its duties to the beneficiaries, or the interests of the beneficiaries, and its duties to any other person or the interests of it or an Associate of it:
 - (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;
 - (ii) to ensure that the duties to the beneficiaries are met despite the conflict;
 - (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and

(iv) to comply with the prudential standards in relation to conflicts,

(No Conflicts Covenant).

12. By s 55(1) of the SIS Act (as in force prior to its repeal on 6 April 2019), Colonial was required:
- (a) at all material times up to 30 June 2013 (inclusive), not to contravene the covenants set out at paragraph 10 above;
 - (b) and at all material times from 1 July 2013 (inclusive), not to contravene the covenants set out at paragraph 11 above; and
 - (c) at all material times, not to contravene any covenant contained, or taken to be contained, in the Governing Rules of the FirstChoice Fund.
13. Pursuant to s 7 of the SIS Act, the requirements of the SIS Act apply and applied despite any provision in the Governing Rules of a Fund.

Obligations at general law

14. Further or in the alternative, at all material times up to 30 June 2013 (inclusive), each of the covenants set out in paragraph 4-10 above was, and at all material times from 1 July 2013 (inclusive), each of the covenants set out in paragraph 11 above has been, an implied term of the Trust Deed (the **Implied Terms**).
15. Further or in the alternative, at all material times, Colonial owed and owes to the beneficiaries of the FirstChoice Fund:
- (a) a duty to carry out the terms of the Trust (**Duty to Perform the Trust Terms**);
 - (b) a duty to deal with the assets of the relevant Fund in the best interests of the beneficiaries of the Fund (**Best Interests Duty**);
 - (c) a duty to exercise care, diligence and skill of a prudent professional trustee in the management and investment of the assets of the relevant Fund (**Duty of Prudent Management**);
 - (d) (subject, since 1 July 2013, to s 58B of the SIS Act) a duty to avoid, in performing its role as trustee of a Fund:
 - (i) conflicts between its duties to beneficiaries and the interests of beneficiaries, on the one hand, and its personal interests or interests of associated third parties;

- (ii) further or alternatively, engagements with associated third parties which are inconsistent with its duties to beneficiaries and the interests of beneficiaries,

(General Law Conflicts Duty); and

- (e) (subject, since 1 July 2013, to s 58B of the SIS Act) a duty to avoid obtaining, and to avoid associated third parties obtaining, unauthorised profits by reason of acting as trustee of a Fund **(General Law Profits Duty)**.

Particulars

- i. The duties arise at law from the relationship between Colonial as trustee and beneficiaries of the FirstChoice Fund.

E. OBLIGATIONS OF DIRECTORS OF COLONIAL

16. At all material times since 1 July 2013, pursuant to s 52A of the SIS Act, the Governing Rules of the FirstChoice Fund have been taken to contain a covenant by each director of Colonial:

- (a) to exercise, in relation to all matters affecting the FirstChoice Fund the same degree of care, skill and diligence as a prudent Superannuation Entity director would exercise in relation to an entity where he or she is a director of the trustee of the entity and that trustee makes investments on behalf of the entity's beneficiaries **(Director's Care and Skill Covenant)**;
- (b) to perform the director's duties and exercise the director's powers as director of the corporate trustee in the best interests of the beneficiaries **(Director's Best Interests Covenant)**;
- (c) where there is a conflict between the duties of the director to the beneficiaries, or the interests of the beneficiaries, and the duties of the director to any other person or the interests of the director, the corporate trustee or an associate of the director or corporate trustee:
 - (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;
 - (ii) to ensure that the duties to the beneficiaries are met despite the conflict;
 - (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and

(iv) to comply with the prudential standards in relation to conflicts, **(Director's No Conflicts Covenant)**; and

(d) to exercise a reasonable degree of care and diligence for the purposes of ensuring that the corporate trustee carries out the covenants referred to in s 52 of the SIS Act **(Director's Diligence Covenant)**.

17. By s 55(1) of the SIS Act (as in force prior to its repeal on 6 April 2019), the directors of Colonial were required at all material times since 1 July 2013 not to contravene the covenants set out at paragraph 16 above or a covenant contained, or taken to be contained, in the Governing Rules of the FirstChoice Fund.

F. MYSUPER RIGHTS AND OBLIGATIONS

17A. If an RSE Licensee made an application under s 29S of the SIS Act for authority to offer a class of beneficial interest in a regulated superannuation fund as a MySuper ~~product~~Product, the RSE Licensee was required to:

- (a) make an election in accordance with s 29SAA of the SIS Act; and
- (b) give effect to the election made in accordance with s 29SAA of the SIS Act.

Particulars

- i. Section 29S(2)(f)(i) of the SIS Act.
- ii. Section 29E(6B) of the SIS Act.

18. If an RSE Licensee that made an application before 1 July 2017 (**MySuper Application**) for authority from the Australian Prudential Regulation Authority (**APRA**) to offer a class of beneficial interest in a Regulated Superannuation Fund as a MySuper Product, made elections in accordance with s 387(1)(a) to (c) of the SIS Act, the RSE Licensee was taken to make an election in accordance with s 29SAA of the SIS Act (**ADA Transfer Election**).

18A. At all material times, an RSE Licensee (as a trustee of an RSE) was required not to charge members with a beneficial interest in a MySuper ~~product~~Product for payment of conflicted remuneration (the **Conflicted Remuneration Obligation**).

Particulars

- i. Pursuant to s 29S of the SIS Act, a MySuper Application was required to be accompanied by an election not to charge MySuper members for payment of conflicted remuneration in accordance with s 29SAC of the SIS Act.

18B. At all material times, in respect of a MySuper ~~product~~Product, an RSE Licensee (as a trustee of an RSE) was required to ensure that, inter alia, the following obligations were satisfied:

- (a) a single diversified investment strategy was adopted in relation to assets of the fund to the extent that they were attributed to the MySuper ~~product~~Product;
- (b) all members who held a beneficial interest in the MySuper ~~product~~Product are entitled to have access to the same options, benefits and facilities (except with respect to the benefit provided by risk insurance);
- (c) amounts were attributed to members in relation to their beneficial interest in the MySuper ~~product~~Product in a way that did not stream gains or losses relating to any assets of the fund to only some of those members (except as permitted under a lifecycle exception); and
- (d) the same process was to be adopted in attributing amounts to members in relation to their beneficial interest in the MySuper ~~product~~Product (except as necessary to allow for fee subsidisation by employers),

(the **Beneficial MySuper Obligations**).

Particulars

- i. Pursuant to section 29T(1)(g) of the SIS Act, in authorising a MySuper Application, APRA was required to be satisfied that governing rules of the fund had the characteristics specified in s 29TC of the SIS Act.

18C. At all material times, in respect of a MySuper ~~product~~Product, an RSE Licensee (as a trustee of an RSE) was required to ensure that:

- (a) only the following types of fees, as defined in s 29V(2) to (9) of the SIS Act, were charged in respect of the beneficial interest of a member in a MySuper Product:
 - (i) an administration fee;
 - (ii) an investment fee on a cost recovery basis;
 - (iii) a buy-sell spread fee;

- (iv) a switching fee;
 - (v) an exit fee;
 - (vi) an advice fee; and
 - (vii) an insurance fee on a cost recovery basis; and
- (b) one of the charging rules as set out in s 29VA of the SIS Act was satisfied in respect of any fee charged in relation to a beneficial interest in a MySuper ~~product~~Product,

(the **MySuper Fee Obligations**).

Particulars

- i. Pursuant to ss 29V and 29VC of the SIS Act, upon obtaining authority from APRA, an RSE Licensee was only permitted to charge the types of fees alleged in paragraph 18C(a).
 - ii. Consolidated Deed incorporating amendments up to and including 28 March 2017 [**CBA.0517.0173.0001**], cl 25.5.
- 18E. Pursuant to s 29VD of the SIS Act, where fees were payable to an investment manager by reference to the performance of investments made by the investment manager on behalf of the RSE Licensee (as a trustee of an RSE), the RSE Licensee was required to ensure that:
- (a) any base fee charged in addition to a performance-based fee was to be set at a level lower than it would have been if the arrangement with the investment manager did not include a performance-based fee;
 - (b) the performance-based fee was determined over a period determined appropriate to investments to which the performance-based fee related; and
 - (c) the performance-based fee was to be calculated in a way that included disincentives for poorly performing investments,

(the **MySuper Investment Fee Obligations**).

- 18F. Pursuant to s 29VN of the SIS Act, an RSE Licensee (as a trustee of an RSE) was required to:
- (a) promote the financial interests of the beneficiaries of the fund who hold a MySuper ~~product~~Product, in particular returns to those beneficiaries (after the deduction of fees, costs and taxes); and

- (b) determine on an annual basis whether the beneficiaries of the fund who hold the MySuper ~~product~~ Product are disadvantaged, in comparison to the beneficiaries of other funds who hold a MySuper ~~product~~ Product within those other funds, and to include such determination in the investment strategy for the fund.

(the **MySuper Financial Interests Obligations**).

19. Pursuant to Prudential Standard SPS 410 MySuper Transition (**SPS 410**), each RSE Licensee that received authority from APRA to offer a class of beneficial interest in a regulated superannuation fund as a MySuper Product (**Authority**), and made an ADA Transfer Election, was required:
 - (a) by no later than 1 July 2013, to prepare a transition plan (**Transition Plan**) approved by the Board of the RSE Licensee in respect of each Registrable Superannuation Entity within its business operations which held an ADA;
 - (b) after 1 July 2013, to regularly review and give effect to the Transition Plan;
 - (c) by no later than 30 September 2013, and quarterly thereafter, to identify all members holding an ADA in each Registrable Superannuation Entity within its business operations;
 - (d) (unless the RSE Licensee met the criteria set out paragraph 4 of SPS 410) by no later than 30 June 2016, to identify one or more MySuper Products to which ADAs in a Registrable Superannuation Entity could be attributed after:
 - (i) determining that MySuper Product or those MySuper Products to be suitable having regard to the matters in subparagraphs 11(a) to (c) of SPS 410 (**Suitability Determination**); and
 - (ii) forming the view that the attribution of members' ADAs to that MySuper Product or those MySuper Products would promote the financial interests of those members or that class of members (**Promotion of Financial Interests Determination**);
 - (e) (unless the RSE Licensee met the criteria set out paragraph 4 of SPS 410) to either:
 - (i) attribute ADAs to a MySuper Product identified following the Suitability Determination and the Promotion of Financial Interests Determination, no later than 120 days from the day of notification of a member in

accordance with Regulation 9.46 of the *SIS Regulations* (**ADA Transfer**); or

- (ii) where a member had directed the RSE Licensee in writing within 90 days of notification of the member, attribute the ADA of the member to another MySuper Product or investment option within a Choice Product in the Registrable Superannuation Entity, and
- (f) attribute ADAs to a MySuper Product at the earliest opportunity possible where it was in the best interests of beneficiaries to do so.

Particulars

- i. Prudential Practice Guide SPG 410 – MySuper Transition dated February 2013 stated ADA Transfers should occur at “*the earliest opportunity possible where it is in the best interests of beneficiaries to do so*”; “*Notwithstanding that the legislation allows for an RSE licensee to move accrued default amounts at any time up until 30 June 2017, APRA expects that the transfer to a MySuper product would be made much earlier than 1 July 2017 when it is in the best interests of members. APRA would expect the RSE licensee's Transition Plan to reflect this approach*”; and “*In exercising its powers and performing its duties in the best interest of members, an RSE licensee would ordinarily consider the timing of the transition*” [CFS.002.619.0115 at 0118 and 0120].

20. Pursuant to s 1017BA of the Corporations Act and regs 7.9.07Q to 7.9.07W of the *Corporations Regulations* 2001 (Cth) (**Corporations Regs**), an RSE Licensee with Authority to offer a Lifecycle MySuper Product is and has at all material times since 31 December 2013 been required to make publicly available a product dashboard (**MySuper Dashboard**) for each Lifecycle Stage with the following information:

- (a) the return target for the Lifecycle Stage for the period of 10 years starting at the beginning of the financial year for which the MySuper Dashboard is or has been made publicly available (**Return Target**);
- (b) the return for the Lifecycle Stage or an equivalent stage of a predecessor product for the 10 financial years prior to the year for which the MySuper Dashboard is or has been made publicly available, or if the Lifecycle Stage or an equivalent stage of a predecessor product has been offered for less than 10 years, for the number of financial years the Lifecycle Stage or an equivalent stage of a predecessor product has been available (**Return**);

- (c) a comparison between the Return Target and the Return (**Return Comparison**);
- (d) the level of investment risk for the Lifecycle Stage for the financial year for which the MySuper Dashboard is or has been made publicly available (**Investment Risk**); and
- (e) a statement of fees and other costs for the financial year for which the MySuper Dashboard is or has been made publicly available (**Fees and Costs**).

20A. Pursuant to regulation 9.46A of the SIS Regulations, from the date of making the ADA Transfer Election, Colonial was required to provide the Applicant and Group Members with periodic notices in writing setting out:

- (a) details of their FCES ADA including their ADA amount;
- (b) Colonial's obligation to move their FCES ADA by 30 June 2017;
- (c) Colonial's obligation to promote their financial interests;
- (d) the name of the MySuper ~~product~~ Product it had identified (once it had done so); and
- (e) when the proposed move would occur,

(**Periodic Notice**).

G. DEFAULT INVESTMENT OPTIONS IN FCES

21. At all material times until at least 11 June 2013, Colonial offered default investment options in FCES:

- (a) that an employer could nominate as the default option into which were invested the assets of the FirstChoice Fund attributable to any FCES member who was an employee of the employer and who had not given Colonial an Investment Direction as to the investment option into which the assets of the FirstChoice Fund attributable to the member should be invested; or
- (b) if an employer did not nominate a default investment option and no Investment Direction was given by the employee, into which Colonial determined from time to time the assets of the FirstChoice Fund attributable to that employee would be and were invested,

(**Default Investment Options**).

Particulars

- i. Investment options that were also Default Investment Options offered by Colonial included but were not limited to FirstChoice Moderate and FirstChoice Balanced.
- ii. FirstChoice Employer Super Product Disclosure Statement dated 28 May 2012. [CFS.002.659.7137].

22. From 1 January 2013 (inclusive), amounts invested in Default Investment Options in accordance with one of the procedures set out in paragraph 21 above were FCES ADAs.

Particulars

- i. The amounts were deemed ADAs by operation of s 20B of the SIS Act.

23. At all material times from 1 January 2013, a member to whom an FCES ADA was attributable (**Default Member**) continued to have an FCES ADA attributable to them unless and until:

- (a) a direction was given to Colonial by the Default Member to transfer the FCES ADA:

- (i) to investment options in Choice Products in the FirstChoice Fund (other than those that had prior to 11 June 2013 been Default Investment Options in which those amounts had been invested); or
- (ii) to funds outside the FirstChoice Fund,

and Colonial transferred the FCES ADA in accordance with the direction;

- (b) the FCES ADA became the subject of an ADA Transfer; or

- (c) a direction was given to Colonial by the Default Member to remain invested in the Default Investment Options in which those amounts had been invested prior to 11 June 2013 (**Retention Direction**) and the FCES ADA remained invested in accordance with that direction.

24. At all material times unless and until FCES ADAs were transferred in accordance with one of the procedures set out at paragraph 23(a) or (b) above, Colonial paid, and in some cases continues to pay, Conflicted Remuneration to Financial Services Licensees, or representatives of Financial Service Licensees, who, because of the nature of the Conflicted Remuneration or the circumstances in which it was given:

- (a) could reasonably be expected to have been influenced in the choice of the financial product advice they recommended to the Default Member or the Default Member's employer; or
- (b) could reasonably be expected to have been influenced in the financial product advice they gave to the Default Member or the Default Member's employer,

(Conflicted Financial Advisers).

Particulars

- i. FirstChoice Employer Super Product Disclosure Statement dated 18 November 2013 [**CFS.001.004.7280**].
- ii. FirstChoice Employer Super Product Disclosure Statement dated 19 May 2014 [**CFS.001.004.8052**].
- iii. FirstChoice Employer Super Product Disclosure Statement dated 18 May 2015, page 11 [**CFS.001.005.1907**].
- iv. FirstChoice Employer Super Product Disclosure Statement dated 16 May 2016 [**CFS.001.005.4048**].

25. At all material times, some Conflicted Financial Advisers who received, and in some cases continue to receive, Conflicted Remuneration, in the circumstances stated in paragraph 24 above, are or were:

- (a) companies in the CBA Group;
- (b) employees of companies in the CBA Group;
- (c) Authorised Representatives of companies in the CBA Group; or
- (d) employees or Authorised Representatives of corporate Authorised Representatives of companies in the CBA Group,

(CBA Conflicted Financial Advisers).

Particulars

- i. The applicant repeats the matters pleaded at paragraph 6 above.
- ii. Email from Chris Micallef to Michael Williams dated 1 May 2015 with subject line "RE: Accrued Default Amounts" [**CBA.0001.0457.0095**].
- iii. Colonial Financial Statement for year ended 30 June 2013 providing for trailing commission fee expenses paid to entities within the wholly owned CBA Group [**CBA.0517.0170.0167**].

- iv. Colonial Financial Statement for year ended 30 June 2014 providing for trailing commission fee expenses paid to entities within the wholly owned CBA Group **[CBA.0517.0170.0209]**.
 - v. Colonial Financial Statement for year ended 30 June 2015 providing for trailing commission fee expenses paid to related parties within the CBA Group **[CBA.0517.0170.0246]**.
 - vi. Colonial Financial Statement for year ended 30 June 2016 providing for trailing commission fee expenses paid to related parties within the CBA Group **[CBA.0517.0170.0333]**.
26. Conflicted Remuneration paid in the circumstances stated in paragraph 24 above, was paid by Colonial to Conflicted Financial Advisers, including CBA Conflicted Financial Advisers, from the fees charged to Default Members.

Particulars

- i. FirstChoice Employer Super Product Disclosure Statement dated 18 May 2015. **[CFS.001.005.1907]**.
- ii. Colonial Financial Statement for year ended 30 June 2013 providing for trailing commission fee expenses paid to entities within the wholly owned CBA Group **[CBA.0517.0170.0167]**.
- iii. Colonial Financial Statement for year ended 30 June 2014 providing for trailing commission fee expenses paid to entities within the wholly owned CBA Group **[CBA.0517.0170.0209]**.
- iv. Colonial Financial Statement for year ended 30 June 2015 providing for trailing commission fee expenses paid to related parties within the CBA Group **[CBA.0517.0170.0246]**.
- v. Colonial Financial Statement for year ended 30 June 2016 providing for trailing commission fee expenses paid to related parties within the CBA Group **[CBA.0517.0170.0333]**.
- vi. First Choice Employer Super Product Disclosure Statement dated 18 November 2013 **[CFS.001.004.7280]**.
- vii. First Choice Employer Super Product Disclosure Statement dated 19 May 2014 **[CFS.001.004.8052]**.
- viii. First Choice Employer Super Product Disclosure Statement dated 16 May 2016 **[CFS.001.005.4048]**.

- 26A. By at least 8 February 2013, Colonial had identified that the transfer of ADAs to MySuper by 1 July 2017 would result in the loss of all ongoing adviser revenue within existing balances.

Particulars

- i. Document entitled "Business Stakeholder Requirements" [CFS.301.052.5596]. Under "Revenue Requirements and Impacts" at [5645], CBA noted to *"minimise to the extent possible, amounts of FUM in Accrued Default Amount prior to 1 July 2017. Priority: Business Critical"*. At [5609], it was noted that the *"Accrued default amounts will be transferred to MySuper by 1 July 2017. Hence all ongoing revenue will be lost"* and at [5627] that *"the impact on corporate super advisers will be significant due to the combination of: the introduction of a MySuper option for members; and FOFA banned conflicted remuneration within superannuation funds"*.
- ii. A later draft version of that document [CFS.301.052.3585 at 3585] also identified an additional revenue requirement to *"maximise member opt out of ADA transition to MySuper by 1 July 2017"* and *"Any accrued default amounts transferred to MySuper by 1 July 2017 will mean loss of all ongoing adviser revenue within existing balance"*.

- 26B. By at least 8 April 2013, Colonial had determined that the transfer of FCES ADAs would occur in 2016 or 2017 partly to allow commission paying options to remain as commission paying options until that time.

Particulars

- i. Email from David Wiener, Relationship Manager, to Gray Foreman, Senior Financial Planner at Partner Financial Group, dated 26 April 2013 [CBA.0001.0441.0096].
- ii. Draft presentation entitled "FirstChoice Employer Super changes" dated 8 April 2013 [CFS.002.571.3071].
- iii. A Project Steering Group minutes noted that *"MH raised a concern about the loss of revenue to advisers if we bring the transition forward. He would like to understand what is currently being done by advisers to retain the funds in FCPS"*. [CFS.301.032.1365].

- 26C. From time to time from at least 15 May 2012, Colonial took steps to encourage some Conflicted Financial Advisers, including CBA Conflicted Financial Advisers, to encourage Default Members to provide Colonial with a Retention Direction.

Particulars

- i. Colonial made or caused to be made phone calls and sent or caused to be sent emails and/or letters to some Conflicted Financial Advisers encouraging them to contact Default Members in relation to making a Retention Direction: see email from Sam Wall, Head of Superannuation, to financial adviser, dated 26 August 2013 [**CFS.002.580.6788**] and email from Cheryl McMahon, Relationship Manager, to financial adviser, dated 25 March 2014 [**CBA.0001.0436.0616**].
- ii. Presentation entitled "MySuper Roadmap" dated 15 May 2012 [**CFS.002.047.2457**].

26D. From time to time from around December 2014, Colonial:

- (a) took steps to encourage some Default Members to provide Colonial with a Retention Direction; and/or
- (b) failed to disclose to Default Members any conflict of interest between the interests of those Default Members and the interests of Conflicted Financial Advisers.

Particulars

- i. Colonial made or caused to be made phone calls and sent or caused to be sent emails and/or letters to some Default Members encouraging them to make a Retention Direction.
- iii. Emails between Leroy Qian, Investment Analyst, and Peter Dymond, Executive Manager of Product and Investments, on 3 December 2014 noting in respect to FCES member communications: "*the objective is also to retain members in the traditional options*" [**CFS.301.112.4574**].
- iv. Emails between Peter Dymond, Executive Manager of Product and Investments, and Scott Tully, Head of Investments, dated 3 December 2014 noting in respect to FCES member communications: "*this one could be that default members in FCES Lifestages are being targeted to keep ADA amount in existing*" [**CFS.301.112.4601**].
- v. Emails between David Wiener, Corporate Superannuation Relationship Manager, and financial adviser, dated 17 March 2015, noting in respect to FCES member communications: "*we will be running a heavy marketing campaign to get members to confirm their existing investment strategy as we get nearer the time of transfer to encourage members to maintain their existing investment option for pre FOFA balances*" [**CBA.0001.0441.1205**].

- vi. Document entitled "Q&As for Contribution directions (s29WA and ADA)" dated 1 December 2015 [CBA.0001.0474.0635].

27. [Not used]

H. COLONIAL'S MYSUPER PRODUCT IN THE FIRSTCHOICE FUND

- 28. On 21 February 2013, Colonial made a MySuper Application to APRA for Authority to offer a MySuper Product within the FirstChoice Fund.
- 29. By its MySuper Application, Colonial made an ADA Transfer Election.
- 30. On 19 April 2013, Colonial received Authority from APRA to offer a MySuper Product within the FirstChoice Fund.
- 31. By 11 June 2013, Colonial had:
 - (a) established a Lifecycle MySuper Product referred to as **FirstChoice Lifestage** as a subset of FCES; and
 - (b) commenced receiving contributions into the FirstChoice Lifestage product.

Particulars

- i. Email from Chris Micallef to Murray Bennett dated 29 Sep 2015 [CBA.0001.0452.1313].
32. From 11 June 2013, members invested in the FirstChoice Lifestage product have been invested by Colonial according to their year of birth in the following Lifecycle Stages:
- (a) in respect of members born between 1945 and 1949 (inclusive), in FirstChoice Lifestage 1945-49;
 - (b) in respect of members born between 1950 and 1954 (inclusive), in FirstChoice Lifestage 1950-54;
 - (c) in respect of members born between 1955 and 1959 (inclusive), in FirstChoice Lifestage 1955-59;
 - (d) in respect of members born between 1960 and 1964 (inclusive), in FirstChoice Lifestage 1960-64;
 - (e) in respect of members born between 1965 and 1969 (inclusive), in FirstChoice Lifestage 1965-69;
 - (f) in respect of members born between 1970 and 1974 (inclusive), in FirstChoice Lifestage 1970-74;

- (g) in respect of members born between 1975 and 1979 (inclusive), in FirstChoice Lifestage 1975-79;
- (h) in respect of members born between 1980 and 1984 (inclusive), in FirstChoice Lifestage 1980-84;
- (i) in respect of members born between 1985 and 1989 (inclusive), in FirstChoice Lifestage 1985-89;
- (j) in respect of members born between 1990 and 1994 (inclusive), in FirstChoice Lifestage 1990-94; and
- (k) in respect of members born between 1995 and 1999 (inclusive), in FirstChoice Lifestage 1995-99.

(each an **Investment Option**).

Particulars

- i. MySuper Dashboard dated 30 June 2019 for each FirstChoice Lifestage Investment Option referred to in paragraph 32 above, accessed from: <https://www3.colonialfirststate.com.au/personal/products/mysuper-dashboard.html> on 10 October 2019.
33. At all material times from 31 December 2013, Colonial has held, collated and/or generated information for the purposes of making publicly available a MySuper Dashboard for each Investment Option, including:
- (a) the Return Target;
 - (b) the Return;
 - (c) the Return Comparison;
 - (d) the Investment Risk; and
 - (e) the Fees and Costs,
- for each Investment Option.

I. COLONIAL'S MYSUPER PRODUCT MONITORING

34. On 3 June 2014:
- (a) Colonial's management addressed its Board as to the outcome of its determination of the adequacy of scale in the FirstChoice Lifestage product, as required to be undertaken by s 29VN(b) of the SIS Act; and

- (b) the Colonial Board determined that members who held the FirstChoice Lifestage product were not disadvantaged in comparison to the beneficiaries of other funds who held a MySuper Product (an **Adequacy of Scale Determination**).

Particulars

- i. Minutes of Colonial Board meeting dated 3 June 2014 [**CBA.1004.0020.1272**].
 - ii. Paper No. CFSIL 36/2014 to the Colonial Board dated 3 June 2014 [**CBA.1004.0083.0004**].
35. Between 4 June 2014 to 1 February 2016, the Colonial Board did not make an Adequacy of Scale Determination.
36. On 2 February 2016:
- (a) Colonial's management provided assurances to the Colonial Board that, as at 30 June 2015, MySuper members of the FirstChoice Fund were not disadvantaged in comparison to MySuper Product members in other funds;
 - (b) Colonial's management told the Colonial Board that an Adequacy of Scale Determination had not been conducted for the 2015 financial year due to the ADA transition and that this constituted a technical breach;
 - (c) the Colonial Board retrospectively ratified that as at 30 June 2015, MySuper members of the FirstChoice Fund were not disadvantaged in comparison to MySuper Product members in other funds;
 - (d) Colonial's management addressed its Board as to the outcome of its Adequacy of Scale Determination as at 2 February 2016; and
 - (e) the Colonial Board determined that, as at 2 February 2016, MySuper members of the FirstChoice Fund were not disadvantaged in comparison to the beneficiaries of other funds who held a MySuper Product.

Particulars

- i. Minutes of Colonial Board meeting dated 2 February 2016 [**CBA.1004.0024.6879**].
 - ii. Paper No. CFSIL 07 to the Colonial Board dated 2 February 2016 [**CBA.1004.0070.0001**].
37. On 24 February 2017:

- (a) Colonial's management addressed its Board as to the outcome of its Adequacy of Scale Determination; and
- (b) the Colonial Board determined that members who held the FirstChoice Lifestage product were not disadvantaged in comparison to the beneficiaries of other funds who held a MySuper Product.

Particulars

- i. Minutes of Colonial Board meeting dated 24 February 2017 [CBA.1004.0027.6811].
 - ii. Paper No. CFSIL 15 to the Colonial Board dated 24 February 2017 [CBA.1004.0070.0021].
38. From at least 3 June 2014, the directors of Colonial, including Elkins, knew or ought to have known, and it was the case, that:
- (a) FCES had sufficient scale in its assets and member numbers to ensure that the fees charged to members with an interest in the FirstChoice Lifestage product were competitive compared to fees charged to members with an interest in other comparable MySuper Products on the market;
 - (b) Colonial was capable of negotiating market competitive pricing for investments attributed to the FirstChoice Lifestage product through an inter-funding model with Colonial's underlying wholesale investment pools;
 - (c) a quarterly review was undertaken of all investments and fund managers associated with the FirstChoice Lifestage product to ensure that the assets attributable to that product remained scalable, compliant with legal and regulatory requirements and in satisfaction of the objectives of Colonial as trustee;
 - (d) all of the superannuation products offered by funds for which Colonial was trustee were managed through a single in-house purpose-built administration system (the **Funds Management System**);
 - (e) the purpose of the Funds Management System was to create greater administrative scale and reduce the costs associated with upgrading systems;
 - (f) all of the superannuation products offered by funds for which Colonial was trustee were managed by an in-house administration team; and/or
 - (g) assets attributable to the FirstChoice Lifestage product were priced on a daily basis using actual asset values.

Particulars

- i. Minutes of Colonial Board meeting dated 3 June 2014 [**CBA.1004.0020.1272**].
- ii. Paper No. CFSIL 36/2014 to the Colonial Board dated 3 June 2014 [**CBA.1004.0083.0004**].
- iii. Minutes of Colonial Board meeting dated 2 February 2016 [**CBA.1004.0024.6879**].
- iv. Paper No. CFSIL 07 to the Colonial Board dated 2 February 2016 [**CBA.1004.0070.0001**].
- v. Minutes of Colonial Board meeting dated 24 February 2017 [**CBA.1004.0027.6811**].
- vi. Paper No. CFSIL 15 to the Colonial Board dated 24 February 2017 [**CBA.1004.0070.0021**].

J. FCPS ADA TRANSFERS

38A. On 6 March 2014, Colonial informed APRA that:

- (a) Colonial would be unable to comply with the requirements of section 29WA of the SIS Act, in breach of section 29JA of the SIS Act, to pay contributions of members of FCPS in relation to which no direction has been given into a MySuper ~~product~~Product; and
- (b) there were errors in the system used by Colonial to identify members who had an FCPS ADA such that Colonial's system had failed to identify some members with an FCPS ADA who had been transferred into FCPS.

Particulars

- i. Letter from Peter Sutherland on behalf of Colonial to APRA dated 6 March 2014 [**CFS.002.103.1625**].
39. On 19 March 2014, Elkins informed APRA that Colonial proposed to approve the commencement of the attribution of ADAs of 13,000 FCPS members to a MySuper Product by 30 April 2014 and to commence the relevant ADA Transfer process for those ADAs immediately after that approval.

Particulars

- i. Letter from Linda Elkins to Robyn McMahon dated 19 March 2014 [**CBA.0001.0451.0200**].
40. On 30 April 2014, the Colonial Board:

- (a) approved Commonwealth Essential Super (**CES**) as a suitable MySuper Product for the transfer of ADAs of affected members within FCPS;
- (b) noted that Colonial was satisfied that the transfer of ADAs of affected members from FCPS to CES promoted the financial interests of those members; and
- (c) noted that Colonial was satisfied that the benefits and features of CES were suitable when compared to other appropriate MySuper Products.

Particulars

- i. Minutes of Colonial Board Meeting dated 30 April 2014 [**CBA.1004.0020.1247**].

40A. From 7 September 2014 to 11 August 2016, Colonial transferred FCPS members to CES in the following tranches:

- (a) on 7 September 2014, approximately 3,330 members representing \$117m in Funds Under Management (**FUM**);
- (b) on 9 January 2015, approximately 870 members representing \$28m FUM;
- (c) on 23 March 2015, approximately 563 members representing \$15.4m in FUM;
- (d) On 3 September 2015, approximately 359 members representing \$6.4m in FUM;
- (e) On 4 March 2016, approximately 300 members representing \$4m in FUM;
- (f) On 27 April 2016, approximately 180 members representing \$5m in FUM;
- (g) On 11 August 2016, approximately 22,451 members representing \$279m in FUM.

Particulars

- i. Email from A Saxena to APRA titled "FW: Section 29WA update #9" [**CBA.0001.0451.0307**]
- ii. Email from A Saxena to APRA titled "s29WA - Update #11" [**CFS.301.094.3321**].
- iii. Email from N Clemence to APRA titled "s29WA – Update #13" [**CFS.301.094.3331**].
- iv. Email from A Saxena to APRA titled "s29WA - Update #16" [**CBA.0001.0451.0497**].
- v. Email from A Saxena to APRA titled "s29WA – Update #18" [**CBA.0001.0451.1177**].

- vi. Email from A Saxena to APRA titled “s29WA – Update #19 [**CFS.301.065.0191**].
41. By at least a date in November 2014, Colonial had systems and processes in place to commence transferring, and did so transfer, ADAs in FCPS to the MySuper Product in CES.

Particulars

- i. Email from Anvij Saxena to Katrina Ellis dated 2 April 2015 at 1.51pm with subject “s29WA – Update # 12” [**CBA.0001.0451.0426** at **0427**].
- ii. Further particulars will be provided after discovery.

K. COLONIAL’S MYSUPER TRANSITION PLANNING FOR FCES ADAS

42. On 3 December 2012, a draft Transition Plan which identified indicative figures for the number and value of ADAs to be transferred in all Registrable Superannuation Entities for which Colonial was trustee, including the FirstChoice Fund, was submitted to Colonial’s Board.

Particulars

- i. Board Paper CFSIL 97/2012 Transition Plan [**CFS.151.001.0095** at **0102**].
- 42A. By at least 14 June 2013, Colonial had formed the view that it would transfer the FCES ADAs into a MySuper Product as late as possible prior to 1 July 2017.

Particulars

- i. Email from Sam Wall to Paul Maddock dated 16 May 2013 [**CFS.002.574.0157**].
 - ii. Presentation entitled “FirstChoice Employer Super Changes” by Sam Wall, Head of Superannuation [**CFS.002.571.3071** at notes to **slide 1**].
 - iii. Email from Martin Hunt, Business Development Manager, to financial adviser, dated 6 August 2014 [**CBA.0001.0441.1001** at **1001**].
 - iv. Minutes of Colonial Board Meeting dated 14 June 2013 [**CBA.1004.0017.1751**].
 - v. Transition Plan approved by the Board on 14 June 2013 effective from 1 July 2013 [**CFS.301.031.0685**].
43. On 14 June 2013, with effect from 1 July 2013, the draft Transition Plan was approved by Colonial’s Board.

Particulars

- i. Minutes of Colonial Board Meeting dated 14 June 2013 [**CBA.1004.0017.1751**].

- 43A. By at least 22 August 2013, Colonial and Elkins knew that the MySuper ~~product~~ Product to which FCES ADAs would be transferred was FirstChoice LifeStage;

Particulars:

- i. Phase 1 and Phase 2 Summary Financials presentation by Linda Elkins dated 22 August 2013 [**CFS.002.087.8996** at Slide 26] referred to FCES ADAs being transferred to a product with “lifestages options”.
 - ii. By reason of the matters pleaded at paragraphs 31 and 32 above, FirstChoice LifeStage was the only MySuper ~~product~~ Product in the FirstChoice Fund with lifestages options.
44. By 30 September 2013, Colonial reported to APRA its calculations as to the number of members with ADAs in the FirstChoice Fund and the value of their aggregate ADAs.
- 44A. On or around 9 October 2013, Colonial wrote to the Applicant and Group Members confirming that the aim of MySuper was to provide the Applicant and Group Members with a low-cost and simple super product.

Particulars

- i. Letter to Lesley Coatman dated 9 October 2013 [**CFS.320.001.0085**].
- 44B. By at least 18 November 2013, Colonial:
- (a) had all the information necessary to make a Suitability Determination; and
 - (b) had all the information necessary to make a Promotion of Financial Interests Determination.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001 at 0033**].
- ii. Colonial FirstState Investments Limited MySuper Transition Plan dated 1 July 2013 [**CFS.301.031.0685**].
- iii. Product Disclosure Statement dated 18 November 2013 [**CFS.001.004.7280 at 7282**].
- iv. The matters pleaded at paragraph 44 above.
- v. Letter to Lesley Coatman dated 30 April 2013 [**CFS.320.001.0079**].
- vi. A flyer for advisers entitled “FirstChoice Lifestage – The smarter investment option that automatically adjusts to reflect your clients’ needs” dated around April 2013 stated that in the FirstChoice Lifestage product, clients would be in an

“option that matches their age, their asset allocation is tailored to suit their age group. This provides a more effective solution than a one size fits all single balanced default option” [CFS.301.025.0926 at 0927].

- vii. A flyer for members entitled “FirstChoice Lifestage – The smart investment option that adjusts as your needs change” dated around May 2013 [CFS.301.025.0864].
 - viii. Presentation entitled “Phase 1 and Phase 2 Summary Financials” by Linda Elkins dated 22 August 2013 which stated that the FCES ADAs “will be Lifestages options; FCP solution to be determined” [CFS.002.087.8996 at slide 26].
 - ix. A flyer entitled “Our MySuper Offering: FirstChoice Employer Super” dated 7 August 2013 stated “*On Friday 19 April 2013, we received authorisation from the Australian Prudential Regulation Authority (APRA) to offer a MySuper product. We were the first retail provider to be granted an authorisation. We’re now finalising our MySuper product that we’ll launch before the end of 2013*” and “*FirstChoice Lifestage is set up to be our MySuper default investment option*” [CFS.301.025.0866].
 - x. Draft presentation entitled “Selection of a MySuper product for Accrued Default Amounts (ADAs) in FirstChoice Employer Super” dated March 2016 “*to provide detailed information supporting the choice of FCE MySuper for the transfer of ADA balances in FCE*” [CFS.301.062.6709 at 6711].
- 44C. From at least 30 January 2014, Colonial commenced issuing Periodic Notices to FCES ADA Members in purported accordance with regulation 9.46A of the SIS Regulations advising that:
- (a) those members held an FCES ADA, and the amount of that FCES ADA;
 - (b) Colonial would be transferring FCES ADAs to the FirstChoice LifeStage product;
 - (c) Colonial had an obligation to promote the financial interests of members in its FirstChoice Lifestage account; and
 - (d) Colonial expected the transfer of the members’ FCES ADA to the FirstChoice Lifestage product to occur between July 2016 and June 2017.

Particulars

- i. Quarterly Statements of Lesley Coatman for period 1 July 2013 to 31 December 2013 [CFS.150.001.0157 at 0162] and 1 January 2014 to 30 June 2014 [CFS.150.001.0144 at 0151]: “*This money will be transferred to the relevant Lifestage option within FirstChoice, which is our MySuper product. We expect this transfer will occur between July 2016 and June 2017.*”

- ii. Half Yearly Statements of Lesley Coatman for period 1 July 2014 to 31 December 2014 [**CFS.150.001.0133 at 0138**], 1 January 2015 to 30 June 2015 [**CFS.150.001.0122 at 0127**] and 1 July 2015 to 31 December 2015 [**CFS.150.001.0108 at 0114**].
- iii. Email from Catherine Rose, Regulatory Reform Communications Manager dated 9 June 2015 entitled 'SIGN OFF: reg required ADA statement messages' [**CFS.002.625.1553**].

44D. By at least 3 December 2014, Colonial had formed the view that retaining FCES ADA Members in default investment options would not be in their financial interests.

Particulars

- i. Email from Peter Dymond, Executive Manager, Product and Investments, to Scott Tully, Head of Investments, dated 3 December 2014 [**CFS.301.112.4601**].

45. On 3 June 2014, with effect from 1 July 2014, an amended Transition Plan was approved by Colonial's Board. The amended Transition Plan provided that:

- (a) 160,896 FCES ADA Members with \$4,595,000,000 in ADAs had been identified by Colonial;
- (b) Colonial anticipated that it would take at least two years to plan the transfer of ADAs to MySuper Products, including the FirstChoice Lifestage product; and
- (c) the implementation of the transfer would not commence until July 2016 and would not be completed until June 2017.

Particulars

- i. Colonial First State Investments Limited MySuper Transition Plan dated 1 July 2014 (version 3.1) [**CBA.1004.0079.0014**].
- ii. Further particulars will be provided after discovery.

46. On 18 November 2013, 19 May 2014, 18 May 2015 and 16 May 2016, Colonial issued product disclosure statements for FCES which provided that any ADAs attributable to an FCES ADA Member in relation to which Colonial had not received a direction as to investment would be transferred to the relevant FirstChoice Lifestage option by 30 June 2017.

Particulars

- i. FirstChoice Employer Super Product Disclosure Statement dated 18 November 2013 [**CFS.001.004.7280**].

- ii. FirstChoice Employer Super Product Disclosure Statement dated 19 May 2014 [CFS.001.004.8052].
- iii. First Choice Employer Super Product Disclosure Statement dated 18 May 2015, page 1 [CFS.001.005.1907].
- iv. FirstChoice Employer Super Product Disclosure Statement dated 16 May 2016 [CFS.001.005.4048].

46A. By February 2015, Colonial had not commenced planning or settled the scope of the project to transition FCES ADAs to a MySuper ~~product~~Product.

Particulars

- i. Draft MySuper Business Plan dated 4 February 2015 [CFS.002.126.8748 at 8752].
- ii. Board Audit and Risk Committee Paper No. CFS BARC 06/2015 [CFS.151.001.0379 at 0382].

46B. From 30 June 2015, the Periodic Notice issued by Colonial omitted any reference to Colonial's obligation to promote the financial interests of members in the MySuper Product.

Particulars

- i. Periodic Notices: [CFS.150.001.0108]; [CFS.320.002.0257].

46C. By at least 29 March 2016, Colonial had identified that the average fees paid by FCES ADA Members would reduce from \$420 per annum to \$283 per annum following the ADA Transfers.

Particulars

- i. Presentation entitled "WMC 12096 – CFS ADA Transition to MySuper" dated 29 March 2016 [CFS.002.167.4981 at slide 15].

47. On 10 June 2016, the Colonial Board:

- (a) approved FirstChoice Lifestage as a suitable MySuper Product for FCES ADA Members; and
- (b) was informed that 91% of members with ADAs in FCES would be better off in the FirstChoice Lifestage MySuper Product.

Particulars

- i. Minutes of Colonial Board Meeting dated 10 June 2016 [CBA.1000.0005.0048].

- ii. Colonial Board Paper (No. CFSIL 08) for the Board meeting on 10 June 2016 [CFS.151.001.1048].
- iii. Further particulars will be provided after discovery.

48. The conduct of the Colonial Board pleaded at paragraph 47 above constituted a Suitability Determination (**Colonial Suitability Determination**) and a Promotion of Financial Interests Determination (**Colonial Promotion of Financial Interests Determination**).

L. FCES ADA TRANSFERS

48A. On or about 2 June 2016, Colonial became aware that:

- (a) some FCES ADA Members, later the subject of the Second ADA Transfer, had mistakenly not been identified by Colonial as having ADAs; and
- (b) the reason those FCES ADA Members had not been identified by Colonial as having ADAs was because there were errors in the system used by Colonial to identify members who had an FCES ADA such that Colonial's system had failed to identify some members with an FCES ADA who had been transferred into FCES.

Particulars

- i. Email from Maria O'Keefe titled "WMC12096 - CFS Transition_of_ADA to_MySuper project_weekly status report- GREEN" dated 2 June 2016 [CFS.152.001.0058 at 0061].
 - ii. Presentation entitled "WMC 12096 – CFS ADA Transition to MySuper" dated 7 June 2016 [CFS.003.271.3252 at 0006].
49. In July 2016, Colonial provided some FCES ADA Members a notice in writing of the expected transfer of their ADAs to the FirstChoice Lifestage product (**First Notice**).
50. On or about 12 November 2016, Colonial effected the transfer of approximately \$2,900,000,000 of FCES ADAs from the default option in the FirstChoice Fund to the FirstChoice Lifestage product for approximately 98,700 FCES ADA Members (**First ADA Transfer**).
51. In February 2017, Colonial provided the remaining FCES ADA Members a notice in writing of the expected transfer of their ADAs to the FirstChoice Lifestage product (**Second Notice**).

52. On or about 24 May 2017, Colonial effected the transfer of approximately \$342,000,000 of FCES ADAs from the default option in the FirstChoice Fund to the FirstChoice Lifestage product for approximately 3,400 FCES ADA Members (**Second ADA Transfer**).

M. CONFLICTING INTERESTS

Member fees and Colonial revenue

53. At all material times, after the ADA Transfers of FCES ADAs, the value of the fees charged by Colonial to most FCES ADA Members in respect of investment amounts transferred into FirstChoice Lifestage was less than the value of the fees charged by Colonial in respect of their FCES ADA before the ADA Transfers.

Particulars

- i. The matters pleaded at paragraph 46C above.
- 53A. On 26 June 2012, Colonial identified, and by at least 18 July 2012 Elkins knew or ought to have known, that the revenue derived by Colonial, CBA and/or the CBA Group in respect of ADAs would decline by up to \$52 million per annum following the transfer of those ADAs to a MySuper ~~product~~Product.

Particulars

- i. Email from Harvey Russell, Head of Advocacy, to Sam Wall and Nicolette Rubinsztein dated 26 June 2012 [**CFS.002.554.7677**] and attachment [**CFS.002.554.7678**].
- ii. Email from Rashadd Jadwat to Elkins and others dated 18 July 2012 [**CFS.301.052.1184**] and attachment [**CFS.002.554.7678**].
54. On or around January 2014, Colonial had formed the view that after the ADA Transfers of FCES ADAs, the revenue derived by Colonial, CBA and/or the CBA Group in respect of most FCES ADAs would decline.

Particulars

- i. Attachment to Paper No CFSIL 05 dated 2 February 2016 [**CFS.301.072.7722**].

Member fees and grandfathered trailing commissions

55. After the ADA Transfers of FCES ADAs, Conflicted Remuneration earned by Conflicted Financial Advisers, including CBA Conflicted Financial Advisers, in respect of FCES ADAs which became the subject of the ADA Transfers, ceased.

Particulars

- i. Email from Chris Micallef to Michael Williams dated 1 May 2015 with subject line "RE: Accrued Default Amounts" [CBA.0001.0457.0095].
 - ii. Email from Chris Micallef to Murray Bennett dated 29 September 2015 at 8.51pm with subject line "MySuper Accounts" [CBA.0001.0452.1313].
 - iii. Email from Louise Jones to Soula Cargakis dated 6 July 2016 at 4.14pm with subject line "CFS Update – Transfer of ADA accounts for FirstChoice Personal Super and FirstChoice Employer Super and timelines" [CBA.0001.0459.1788].
 - iv. Email from Paul Voges to Peter Ornsby dated 7 July 2016 at 3.14pm with subject line "CFS Update – Transfer of ADA accounts for FirstChoice Personal Super and FirstChoice Employer Super and timelines" [CBA.0001.0459.1839].
 - v. Further particulars will be provided after discovery.
56. After the ADA Transfers of FCES ADAs, fees charged to FCES members in respect of Conflicted Remuneration in respect of FCES ADAs which became the subject of the ADA Transfers, ceased.

N. CONTRAVENTIONS OF TRUSTEE COVENANTS

Contraventions of Care and Skill Covenants

57. A prudent trustee:
- (a) exercising the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide; and/or
 - (b) in the position of Colonial, whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity, in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments,

would have carried out the Suitability Determination and the Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable after:

- (i) receiving Authority to offer a MySuper Product in a Superannuation Entity;
- (ii) creating a MySuper Product in the Superannuation Entity; and

- (iii) identifying the members with an ADA in the Superannuation Entity.

Particulars

- i. The prudent trustee would have carried out the Suitability Determination and the Promotion of Financial Interests Determination as soon as reasonably practicable for the purposes of:
- a. determining whether the MySuper fund for which Authority had been received would be suitable and promote the financial interests of a member or class of members with an ADA in the Superannuation Entity; and
 - b. reviewing and giving effect to its Transition Plan, including the timing of the ADA Transfer.
- ii. Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].
58. Where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members individually or as a class for ADA Transfers to take place as soon as reasonably practicable, a prudent trustee:
- (a) exercising the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide; and/or
 - (b) in the position of Colonial, whose profession, business or employment is or includes acting as a trustee of a Superannuation Entity and investing money on behalf of beneficiaries of the Superannuation Entity, in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments,
- would have made the relevant ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015 further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].
59. By failing until 10 June 2016 to approve the FirstChoice Lifestage as a suitable MySuper Product for FCES ADA Members and determine whether the financial interests of members with ADAs in FCES would be promoted in the FirstChoice Lifestage MySuper Product, in circumstances where:
- (a) by ~~18-19~~ April 2013, Colonial had received Authority from APRA to offer a MySuper Product within the FirstChoice Fund;

- (aa) by at least 14 June 2013, Colonial had formed the view that it would transfer FCES ADAs into a MySuper ~~product~~ Product as late as possible before 1 July 2017 when it was required to do so;
- (b) by at least 11 June 2013, Colonial had established FirstChoice Lifestage as a MySuper Product in FCES;
- (bb) by 22 August 2013, Colonial and Elkins knew that the MySuper ~~product~~ Product to which FCES ADAs would be transferred was FirstChoice LifeStage;
- (c) by 30 September 2013, Colonial had reported to APRA its calculations as to the number of members with ADAs in the FirstChoice Fund and the value of their aggregate ADAs;
- (cc) by at least 18 November 2013, Colonial had all the information necessary to make a Suitability Determination and a Promotion of Financial Interests Determination;
- (d) from 31 December 2013, Colonial held, collated and/or generated information including relating to Return Targets, Returns, Return Comparisons, Investment Risk and Fees and Costs for each Investment Option in FirstChoice Lifestage;
- (dd) by at least 30 January 2014, Colonial had communicated to FCES ADA Members that it would transfer FCES ADAs into its MySuper ~~product~~ Product, FirstChoice LifeStage;
- (ddd) by 6 March 2014, Colonial knew that there were errors in the system used by Colonial to identify members who had an FCPS ADA such that it had failed to identify some members with an FCPS ADA who had been transferred into FCPS;
- (e) by 30 April 2014, Colonial's Board had approved CES as a suitable MySuper Product for FCPS Members and determined that the financial interests of members with ADAs in FCPS would be promoted in CES;
- (f) from at least 3 June 2014, directors on the Colonial Board knew, and it was the case, that:
 - (i) FCES had sufficient scale in its assets and member numbers to ensure that the fees charged to members with an interest in the FirstChoice Lifestage product were competitive compared to fees charged to

- members with an interest in other comparable MySuper Products on the market;
- (ii) Colonial was capable of negotiating market competitive pricing for investments attributed to the FirstChoice Lifestage product through an inter-funding model with Colonial's underlying wholesale investment pools;
 - (iii) a quarterly review was undertaken of all investments and fund managers associated with the FirstChoice Lifestage product to ensure that the assets attributable to that product remained scalable, compliant with legal and regulatory requirements and in satisfaction of the objectives of Colonial as trustee;
 - (iv) all of the superannuation products offered by funds for which Colonial was Trustee were managed through the Funds Management System;
 - (v) from at least 11 June 2013, assets attributable to FCES, including the FirstChoice Lifestage product, were priced on a daily basis using actual asset values;
 - (vi) all of the superannuation products offered by funds for which Colonial was trustee were managed through the Funds Management System, and the purpose of the Funds Management System was to create greater administrative scale and reduce the costs associated with upgrading systems; and/or
 - (vii) all of the superannuation products offered by funds for which Colonial was trustee were managed by an in-house administration team;
- (ff) by at least 3 December 2014, Colonial had formed the view that retaining FCES ADA Members in default investment options would not be in their best financial interests;
 - (g) by at least a date in November 2014, Colonial had systems and processes in place to commence transferring, and did so transfer, ADAs in FCPS to the MySuper Product in CES;
 - (h) by 18 November 2013, and again on 19 May 2014, 18 May 2015, 16 May 2016, Colonial had published a product disclosure statement which provided that ADAs attributable to FCES ADA Members for which Colonial had not

received a direction as to investment would be transferred from FCES to the FirstChoice Lifestage product by 30 June 2017; and/or

- (i) by February 2015, Colonial had not commenced planning or settled the scope of the project to transition FCES ADAs to a MySuper ~~product~~Product,

Colonial failed to carry out the Colonial Suitability Determination and the Colonial Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

60. By failing to effect the First ADA Transfer until on or about 12 November 2016, and the Second ADA Transfer until on or around 24 May 2017, in the circumstances:

- (a) set out at paragraph 59 above, separately or in any combination; and/or
- (b) where the Colonial Suitability Determination and the Colonial Promotion of Financial Interests Determination had determined, and if carried out earlier would have determined, that:
 - (i) the FirstChoice Lifestage MySuper Product was suitable for ADA Transfers from FCES; and
 - (ii) ADA transfers from FCES to the FirstChoice Lifestage MySuper Product would promote the financial interests of the class of members that held ADAs in FCES,

Colonial failed to effect the First and Second ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

61. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 59 above, separately or in any combination, Colonial contravened the Pre-2013 Care and Skill Covenant and the Care and Skill Covenant.

62. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 60 above, separately or in any combination, Colonial contravened the Pre-2013 Care and Skill Covenant and the Care and Skill Covenant.

Contraventions of Best Interests Covenants

63. A trustee of a Superannuation Entity:

- (a) performing the trustee's duties and exercising the trustee's powers in the best interests of members of the Superannuation Entity; and/or
- (b) ensuring that the trustee's duties are performed and the trustee's powers are exercised in the best interests of members of the Superannuation Entity,

would have carried out the Suitability Determination and the Promotion of Financial Interests Determination by no later than a date between 1 December 2013 to 31 May 2014, further and in the alternative, as soon as reasonably practicable after:

- (i) receiving Authority to offer a MySuper Product in a Superannuation Entity;
- (ii) creating a MySuper Product in the Superannuation Entity; and
- (iii) identifying the members with an ADA in the Superannuation Entity.

Particulars

- i. The trustee would have carried out the Suitability Determination and the Promotion of Financial Interests Determination for the purposes of:
 - a. determining whether the MySuper fund for which Authority had been received would be suitable and promote the financial interests of a member or class of members with an ADA in the Superannuation Entity; and
 - b. reviewing and giving effect to its Transition Plan, including the timing of the ADA Transfer.
- ii. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001 at 0012**].

64. Where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members individually or as a class for ADA Transfers to take place as soon as reasonably practicable, a trustee of a Superannuation Entity:

- (a) performing the trustee's duties and exercising the trustee's powers in the best interests of members of the Superannuation Entity; and/or
- (b) ensuring that the trustee's duties are performed and the trustee's powers are exercised in the best interests of members of the Superannuation Entity,

would have made the relevant ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

- 65. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 59 above, separately or in any combination, Colonial contravened the Pre-2013 Best Interests Covenant and the Best Interests Covenant.
- 66. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 60 above, separately or in any combination, Colonial contravened the Pre-2013 Best Interests Covenant and the Best Interests Covenant.

Contraventions of No Conflicts Covenant

- 67. For the reasons set out in paragraphs 53, 53A and 54 above, there was a conflict between:
 - (a) the interests of most FCES ADA Members who would be charged lower fees if the ADA Transfers occurred earlier; and
 - (b) the interests of Colonial whose revenue would decline if the ADA Transfers occurred earlier,
 (the **Revenue Conflict**).
- 68. For the reasons set out in paragraphs 55 and 56 above, there was a conflict between:
 - (a) the interests of Default Members who would be charged less fees in respect of Conflicted Remuneration if the ADA Transfers occurred earlier; and
 - (b) the interests of Conflicted Financial Advisers, including CBA Conflicted Financial Advisers if the ADA Transfers occurred earlier,
 (the **Trailing Commission Conflict**).

Particulars

The interests of Conflicted Financial Advisers would be adversely affected if an ADA Transfer occurred earlier as:

- i. Colonial would have less time to encourage Default Members to provide a Retention Direction;

- ii. Conflicted Financial Advisers, including CBA Conflicted Financial Advisers, would have less time to encourage Default Members to provide a Retention Direction; and/or
 - iii. in respect of investments in Default Investment Options for which no direction was received from a Default Member, Conflicted Financial Advisers, including CBA Conflicted Financial Advisers, would cease to receive Conflicted Remuneration earlier.
69. In the circumstances of the Revenue Conflict and/or the Trailing Commission Conflict, a trustee:
- (a) giving priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;
 - (b) ensuring that the duties to the beneficiaries are met despite any conflict with duties to and interests of other persons;
 - (c) ensuring that the interests of the beneficiaries are not adversely affected by the conflict; and
 - (d) complying with the prudential standards in relation to conflicts,
- would have carried out the Suitability Determination and the Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable after:
- (i) receiving Authority to offer a MySuper Product in a Superannuation Entity;
 - (ii) creating a MySuper Product in the Superannuation Entity; and
 - (iii) identifying the members with an ADA in the Superannuation Entity.

Particulars

- i. The trustee would have carried out the Suitability Determination and the Promotion of Financial Interests Determination as soon as reasonably practicable for the purposes of:
 - a. determining whether the MySuper fund for which Authority had been received would be suitable and promote the financial interests of a member or class of members with an ADA in the Superannuation Entity; and

b. reviewing and giving effect to its Transition Plan, including the timing of the ADA Transfer, in a manner that would promote the interests of a member or class of members with an ADA in the Superannuation Entity.

ii. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

70. In the circumstances of the Revenue Conflict and/or the Trailing Commission Conflict, where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members as a class for ADA Transfers to take place as soon as reasonably practicable, a trustee:

- (a) giving priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;
- (b) ensuring that the duties to the beneficiaries are met despite any conflict with duties to and interests of other persons;
- (c) ensuring that the interests of the beneficiaries are not adversely affected by the conflict; and
- (d) complying with the prudential standards in relation to conflicts,

would have made the relevant ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable.

Particulars

i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

71. In the circumstances of the Revenue Conflict, by its acts and omissions and in the circumstances set out in paragraphs 59 and 60 above, separately or in any combination, Colonial failed to:

- (a) determine the interests of FCES ADA Members by carrying out the Colonial Suitability Determination and the Colonial Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative as soon as reasonably practicable;
- (b) effect the First and Second ADA Transfers as soon as reasonably practicable, further and in the alternative, by no later than a date between 1 July 2015 and 31 December 2015.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

72. In the premises, Colonial contravened the No Conflicts Covenant by failing to:
 - (a) give priority to the duties to and interests of FCES ADA Members over the interests of CBA, the CBA Group and/or its own interests;
 - (b) ensure that the duties to FCES ADA Members were met despite the Revenue Conflict; and/or
 - (c) ensure that the interests of FCES ADA Members were not adversely affected by the Revenue Conflict.

73. In the circumstances of the Trailing Commission Conflict, by its acts and omissions and in the circumstances set out in paragraphs_26A, 26B, 26C, 26D, 59 and 60` above, separately or in any combination, Colonial failed to:
 - (a) determine the interests of Default Members by carrying out the Colonial Suitability Determination and the Colonial Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable;
 - (b) effect the First and Second ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable; and/or
 - (c) provide Default Members with sufficient or sufficiently balanced information on the basis of which those members could determine their own best interests with respect to any direction as to the investment of assets in the FirstChoice Fund attributable to them.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

74. In the premises, Colonial contravened the No Conflicts Covenant by failing to:
 - (a) give priority to the duties to and interests of Default Members over the interests of CBA, CBA Group, Conflicted Financial Advisers, CBA Conflicted Financial Advisers and/or its own interests;
 - (b) ensure that the duties to Default Members were met despite the Trailing Commission Conflict; and/or

- (c) ensure that the interests of Default Members were not adversely affected by the Trailing Commission Conflict.

O. BREACHES OF GENERAL LAW OBLIGATIONS

75. Further or in the alternative, in respect of the contraventions of covenants set out in section N above:

- (a) by engaging in conduct giving rise to any or all of the contraventions, Colonial breached the Implied Terms;

(aa) by engaging in the conduct giving rise to any or all of the contraventions, Colonial breached the Duty to Perform the Trust Terms;

- (b) by engaging in conduct giving rise to any or all of the contraventions, Colonial breached the Best Interests Duty;

- (c) by engaging in conduct giving rise to any or all of the contraventions, Colonial breached the Duty of Prudent Management;

- (d) by engaging in conduct giving rise to any or all of the contraventions of the No Conflicts Covenant, Colonial breached the General Law Conflicts Duty; and/or

- (e) by engaging in conduct giving rise to any or all of the contraventions:

- (i) Colonial has earned profits by charging higher fees than it otherwise would have;

Particulars

- i. The matters set out in paragraphs 53 and 53A above and the particulars thereto.
- (ii) further or in the alternative, Colonial has enabled CBA and/or the CBA Group to earn profits for the reason set out at in the preceding paragraph;

Particulars

- i. The relationship between Colonial, CBA and CBA Group as pleaded at paragraph 6 above.
- ii. The matters set out in paragraphs 53, 53A and 54 above and the particulars thereto.

- (iii) further or in the alternative, Colonial has enabled Conflicted Financial Advisers, including CBA Conflicted Financial Advisers, to earn profits by receiving Conflicted Remuneration,

Particulars

- i. The matters set out in paragraphs 53, 53A and 54 above and the particulars thereto.

and thereby breached the General Law Profits Duty.

P. INVOLVEMENT IN TRUSTEE CONTRAVENTIONS OF COVENANTS

76. Between 1 January 2013 and 5 September 2016 (inclusive) and between 24 March 2017 and 1 July 2017 (inclusive) Elkins attended and participated in meetings of the Colonial Board.
77. Between on or around 9 August 2012 and 5 September 2016 (inclusive) and between 24 March 2017 and 1 July 2017 (inclusive), in her capacity as executive general manager of the Colonial First State business, which included the FirstChoice Fund, Elkins was responsible for the Product Division, the Strategy Division, the Client Operations Division, the Fund Services Division and the Marketing and Distribution Division of that business.
- 77A. Between on or around 9 August 2012 and 5 September 2016 (inclusive) and between 24 March 2017 and 1 July 2017 (inclusive), in her capacity as executive general manager of the Colonial First State business, Elkins was responsible for:
- (a) preparing papers for the Colonial Board; and
 - (b) preparing management in relation to papers they were presenting to the Colonial Board.

Particulars

- i. Individual Director Linda Elkins Performance Report (2014)
[CBA.1004.0043.1213 at 1219].
- 77B. In the premises, Elkins was involved or ought to have been involved in the preparation, or was otherwise aware or ought to have been aware, of papers presented to the Board in relation to:
- (a) Colonial's intention to seek approval from APRA to offer a MySuper ~~product~~ Product in FCES from 1 July 2013;
 - (b) amendments to the Trust Deed necessary to offer a MySuper ~~product~~ Product in FCES;

- (c) documentation required to obtain approval from APRA to offer a MySuper ~~product~~ Product in FCES, including draft transition plans;
- (d) approval of a fee schedule for the MySuper ~~product~~ Product in FCES;
- (e) the Promotion of Financial Interests Determination and the Suitability Determination with respect to the transfer of FCPS ADAs to CES;
- (f) the Colonial Promotion of Financial Interests Determination and the Colonial Suitability Determination; and
- (g) annual Adequacy of Scale Determinations in relation to the FCES MySuper product and the CES MySuper ~~product~~ Product.

Particulars

- i. As to the matters pleaded at subparagraphs 77B(a), (b) and (c), Paper No. CFSIL 97/2012 relating to draft transition plan prepared for Board Meeting on 3 December 2012 [**CFS.151.001.0095**].
 - ii. As to the matters pleaded at subparagraph 77B(c), minutes of board meeting dated 30 September 2013 and references therein to Paper No. CFSIL 112/2103 [sic] [**CBA.1004.0018.1525**~~CFS.1004.0018.1525~~] and Paper No. CFSIL 112/2013 [**CFS.152.004.0001**].
 - iii. As to the matters pleaded at subparagraph 77B(d), minutes of board meeting dated 30 April 2014 and references therein to Paper No. CFSIL 28/2014 [**CBA.1004.0020.1247**~~CBA.1000.0020.1247~~] and Paper No. CFSIL 28/2014 [**CFS.151.001.0176**].
 - iv. As to the matters pleaded at subparagraph 77B(e), minutes of board meeting dated 10 June 2016 and references therein to Paper No. CFSIL 08 [**CBA.1000.0005.0048**] and Paper No. CFSIL 08 [**CFS.151.001.1048**].
 - v. As to the matters pleaded at subparagraph 77B(f), minutes of board meeting dated 3 June 2014 and references therein to Paper No. FSIL 36/2014 [sic] [**CBA.1004.0020.1272**] and Paper No. CFSIL 36/2014 [**CBA.1004.0083.0004**].
78. Between at least 17 March 2014 to 5 September 2016 (inclusive) and between 24 March 2017 and 1 July 2017 (inclusive) in her capacity as a member of the Board Investment Committee, Elkins was involved or ought to have been involved in the preparation or gathering, or otherwise had knowledge or ought to have had knowledge, of information relating to:
- (a) whether the investment objectives of Colonial in respect of the FirstChoice Fund were being met;
 - (b) the performance of investments in the FirstChoice Fund;

- (c) reports prepared for the Colonial Board on issues material to the FirstChoice Fund;
- (d) investment options offered in the FirstChoice Fund, including new investment options, changes to existing investment options and removal of investment options;
- (e) investment strategies adopted in respect of the FirstChoice Fund, including new investment strategies, changes to existing investment strategies and removal of investment strategies; and/or
- (f) management or performance fees in relation to the FirstChoice Fund, including any changes to those fees.

Particulars

- i. Board Investment Committee Charter dated 5 February 2017
[CBA.1004.0007.0104]

78A. From at least 30 July 2012, in her capacity as a member of the Executive Steering Group of the Regulatory Reform Committee of Wealth Management and executive general manager of the Colonial First State business, Elkins chaired the Operational Steering Group for the Colonial First State business.

Particulars

- i. Wealth Management Regulatory Reforms Governance Structure dated 30 July 2012 [CFS.301.143.6926].

78B. At all relevant times, the Operational Steering Group for the Colonial First State business was responsible for:

- (a) receiving interpretations of legislation and regulations relating to the MySuper reforms from the Rules Committee of Wealth Management for the purposes of executing those interpretations within the Colonial First State business;
- (b) assessing the impact of and best options for meeting the requirements of legislation and regulations relating to the MySuper reforms within the Colonial First State business;
- (c) making operational decisions for the Colonial First State business, including in relation to the execution of MySuper reforms;
- (d) making recommendations to the Executive Steering Group of the Regulatory Reform Committee of Wealth Management on issues such as resourcing,

processes, trade offs and change management relating to the execution of the MySuper reforms within the Colonial First State business; and

- (e) executing projects relating to the MySuper reforms within the Colonial First State business in line with relevant dates.

Particulars

- i. Wealth Management Regulatory Reforms Governance Structure dated 30 July 2012 [**CFS.301.143.6926**].
- ii. Operational Steering Group – minutes of meetings [**CFS.301.032.3970**; **CFS.002.155.2229**; **CFS.002.203.8629**; **CFS.301.140.0010**].

78C. Between 16 November 2012 and 5 September 2016 (inclusive) and between 24 March 2017 and 1 July 2017 (inclusive), in her capacity as member of Colonial's Risk Committee and attendee of Colonial's Board Audit and Risk Committee, Elkins was involved in:

- (a) approving strategies and policies to identify, understand and manage material risks faced by Colonial and ensuring that such strategies and policies complied with legislative and regulatory obligations;
- (b) receiving reports from management in relation to key risks faced by Colonial and reporting such risks to the Colonial Board;
- (c) reviewing compliance with laws, regulations, prudential standards, codes of practice and internal policies and standards applicable to Colonial and the FirstChoice Fund;
- (d) reviewing regulator reports in relation to Colonial and ensuring management action in relation to any issues raised;
- (e) receiving reports from Colonial's Chief Risk Officer in relation to Colonial's regulatory relations (including significant correspondence with regulators) and reporting any significant issues to the Colonial Board;
- (f) receiving management reporting to assist in assessing Colonial's compliance with relevant laws, regulations, license conditions, regulator guidelines, prudential standards and industry standards; and
- (g) reporting any significant breaches or other significant matters to the Colonial Board.

Particulars

- i. Board Audit and Risk Committee Charter dated 2 May 2017 [CBA.1004.0007.0101].
- ii. CFSIL Risk Committee agenda and papers dated 16 November 2012 [CFS.301.028.3565], 24 November 2015 [CFS.301.045.3400_E], 18 February 2016 [CFS.301.046.0520_E] and 19 May 2016 [CFS.301.046.4533_E].
- iii. CFSIL Risk Appetite Statement prepared by Linda Elkins dated June 2013 [CFS.301.132.7614].

78D. By at least 21 June 2012, Elkins was aware that APRA's expectation was that ADAs ought to be transferred at the earliest possible opportunity where it was in the best interests of members to do so.

Particulars

- i. Email by Julian Cabarrus, Senior Manager Advocacy & Regulatory Affairs dated 21 June 2012 forwarded to Linda Elkins [CFS.002.358.7041].
- ii. Email by Peter Chun, General Manager of Products and Investments to Peter Sutherland, General Manager of Wealth Risk Management dated 27 February 2014 copied Linda Elkins and noted "*APRA has a strong view for trustees to move ADAs as soon as practicable*" [CFS.002.102.2509].
- iii. Email by Peter Taylor, Chief Risk Officer to Linda Elkins dated 17 August 2014 noted that "*APRA has been bothering us to accelerate the ADA plan as at 31 December 2013...*" [CFS.002.113.8251].

79. By reason of the matters pleaded at paragraph 76 to 78D above, including Elkins':

- (a) attendance and participation in, and preparation of papers for, meetings of the Colonial Board at relevant times;
- (b) knowledge of Colonial's products, policies and practices, and information obtained or caused to be obtained from Colonial's books and records and CBA Group employees in her role as executive general manager of the Colonial First State business at relevant times;
- (c) knowledge of Colonial's products, policies and practices, and information obtained or caused to be obtained from Colonial's books and records and CBA Group employees, in her role as a member of Colonial's Board Investment Committee at relevant times;

- (d) knowledge of Colonial's products, policies and practices, and information obtained or caused to be obtained from Colonial's books and records and CBA Group employees, in her role as a member of Colonial's Risk Committee and attendee of Colonial's Board Audit and Risk Committee at relevant times;
- (e) knowledge of Colonial's products, policies and practices, and information obtained or caused to be obtained from Colonial's books and records and CBA Group employees, in her role as a member of the Executive Steering Group of the Regulatory Reform Committee of Wealth Management at relevant times;
- (f) knowledge of Colonial's products, policies and practices, and information obtained or caused to be obtained from Colonial's books and records and CBA Group employees, in her role as chair of the Operational Steering Committee for the Colonial First State business at relevant times,

Elkins knew, or ought to have known, of the matters set out at paragraphs 21 to 50 and 52 to 56.

- 80. By reason of the matters pleaded at paragraph 79 above, Elkins was concerned in, or otherwise party to, Colonial's acts and omissions set out in paragraphs 59 and 60 above, separately or in any combination.
- 81. In the premises, Elkins was involved in one or more of the contraventions referred to in section N above.

Q. CONTRAVENTIONS OF DIRECTOR'S COVENANTS

Contraventions of Director's Care and Skill Covenant

- 82. A prudent person in the position of a director of Colonial, whose profession, business or employment is or includes acting as a director of a trustee of a Superannuation Entity that invests money on behalf of beneficiaries of the Superannuation Entity, in relation to that Superannuation Entity would have taken steps to cause the trustee to carry out the Suitability Determination and the Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable after:
 - (a) the trustee received Authority to offer a MySuper Product in the Superannuation Entity;
 - (b) a MySuper Product was created in the Superannuation Entity; and/or
 - (c) members with an ADA in the Superannuation Entity were identified.

Particulars

- i. The prudent person would have taken the steps pleaded for the purposes of enabling the trustee to:
 - a. determine whether the MySuper fund for which Authority had been received would be suitable and promote the financial interests of a member or class of members with an ADA in the Superannuation Entity; and
 - b. review and give effect to its Transition Plan, including the timing of any ADA Transfer.
 - ii. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001 at 0012**].
83. Where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members individually or as a class for ADA Transfers to take place as soon as reasonably practicable, a prudent person in the position of a director of Colonial, whose profession, business or employment is or includes acting as a director of a trustee of a Superannuation Entity that invests money on behalf of beneficiaries of the Superannuation Entity, in relation to that Superannuation Entity, would have taken steps to cause the trustee to make the relevant ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001 at 0012**].
84. In circumstances where:
- (a) Colonial failed until 10 June 2016 to carry out the Colonial Suitability Determination and the Colonial Promotion of Financial Interests Determination;
 - (b) by ~~48~~19 April 2013, Colonial had received Authority from APRA to offer a MySuper Product within the FirstChoice Fund;
 - (c) by 11 June 2013, Colonial had established FirstChoice Lifestage as a MySuper Product in FCES;
 - (d) by 30 September 2013, Colonial had reported to APRA its calculations as to the number of members with ADAs in the FirstChoice Fund and the value of their aggregate ADAs;

- (e) from 31 December 2013, Colonial held, collated and/or generated information including relating to Return Targets, Returns, Return Comparisons, Investment Risk and Fees and Costs for each Investment Option in FirstChoice Lifestage;
- (f) by 30 April 2014, Colonial's Board had approved CES as a suitable MySuper Product for FCPS Members and determined that the financial interests of members with ADAs in FCPS would be promoted in CES; and
- (g) from at least 3 June 2014, Elkins, as a member of the Colonial Board, knew, and it was the case, that:
 - (i) FCES had sufficient scale in its assets and member numbers to ensure that the fees charged to members with an interest in the FirstChoice Lifestage product were competitive compared to fees charged to members with an interest in other comparable MySuper Products on the market;
 - (ii) Colonial was capable of negotiating market competitive pricing for investments attributed to the FirstChoice Lifestage product through an inter-funding model with Colonial's underlying wholesale investment pools;
 - (iii) a quarterly review was undertaken of all investments and fund managers associated with the FirstChoice Lifestage product to ensure that the assets attributable to that product remained scalable, compliant with legal and regulatory requirements and in satisfaction of the objectives of Colonial as trustee;
 - (iv) all of the superannuation products offered by funds for which Colonial was Trustee were managed through the Funds Management System;
 - (v) assets attributable to FCES, including the FirstChoice Lifestage product, were priced on a daily basis using actual asset values;
 - (vi) all of the superannuation products offered by funds for which Colonial was trustee were managed through the Funds Management System, and the purpose of the Funds Management System was to create greater administrative scale and reduce the costs associated with upgrading systems; and/or

- (vii) all of the superannuation products offered by funds for which Colonial was trustee were managed by an in-house administration team;
- (h) by at least a date in November 2014, Colonial had systems and processes in place to commence transferring, and did so transfer, ADAs in FCPS to the MySuper Product in CES; and/or
- (i) by 18 June 2015, Colonial had published a product disclosure statement which provided that ADAs attributable to FCES ADA Members for which Colonial had not received a direction as to investment would be transferred from FCES to the FirstChoice Lifestage product by 1 July 2017,

Elkins failed to take steps to cause Colonial to carry out the Suitability Determination and the Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

85. In the circumstances:

- (a) where Colonial failed to effect the First ADA Transfer until on or about 12 November 2016 and the Second ADA Transfer until on or about 24 May 2017;
- (b) set out at paragraph 84 above, separately or in any combination; and/or
- (c) where the Colonial Suitability Determination and the Colonial Promotion of Financial Interests Determination had determined, and if carried out earlier would have determined, that:
 - (i) the FirstChoice Lifestage MySuper Product was suitable for an ADA Transfer from FCES;
 - (ii) an ADA transfer from FCES to the FirstChoice Lifestage MySuper Product promoted the financial interests of the class of members that held ADAs in FCES,

Elkins failed to take steps to cause Colonial to effect the First and Second ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].
86. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 84 above, separately or in any combination, Elkins contravened the Director's Care and Skill Covenant.
87. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 85 above, separately or in any combination, Elkins contravened the Director's Care and Skill Covenant.

Contraventions of Director's Best Interests Covenant

88. A director of a trustee of a Superannuation Entity performing the director's duties and exercising the director's powers as director of the trustee of the Superannuation Entity in the best interests of beneficiaries would have taken steps to cause the trustee to carry out the Suitability Determination and the Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable after:
- (a) the trustee received Authority to offer a MySuper Product in the Superannuation Entity;
 - (b) a MySuper Product was created in the Superannuation Entity; and/or
 - (c) members with an ADA in the Superannuation Entity were identified.

Particulars

- i. The director of a trustee of Superannuation Entity would have taken the steps pleaded for the purposes of:
 - a. determining whether the MySuper fund for which Authority had been received would be suitable and promote the financial interests of a member or class of members with an ADA in the Superannuation Entity; and
 - b. enabling the trustee to review and give effect to its Transition Plan, including the timing of any ADA Transfer.
 - ii. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].
89. Where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members individually or as a class

for ADA Transfers to take place as soon as reasonably practicable, a director of a trustee of a Superannuation Entity performing the director's duties and exercising the director's powers as director of the trustee of the Superannuation Entity in the best interests of beneficiaries, would have taken steps to cause the trustee to make the relevant ADA Transfers as soon as reasonably practicable, further and in the alternative, by no later than a date between 1 July 2015 and 31 December 2015.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001 at 0012**].

- 90. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 84 above, separately or in any combination, Elkins contravened the Director's Best Interests Covenant.
- 91. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 85 above, separately or in any combination, Elkins contravened the Director's Best Interests Covenant.

Contravention of Director's No Conflicts Covenant

- 92. In the circumstances of the Revenue Conflict and/or the Trailing Commission Conflict, a director:
 - (a) giving priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;
 - (b) ensuring that the duties to the beneficiaries are met despite any conflict with duties to and interests of other persons;
 - (c) ensuring that the interests of the beneficiaries are not adversely affected by the conflict; and/or
 - (d) complying with the prudential standards in relation to conflicts,
 would have taken steps to cause the trustee to carry out the Suitability Determination and the Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2013, further and in the alternative, as soon as reasonably practicable after:
 - (i) the trustee received Authority to offer a MySuper Product in the Superannuation Entity;
 - (ii) a MySuper Product was created in the Superannuation Entity; and/or

- (iii) members with an ADA in the Superannuation Entity were identified.

Particulars

- i. The director would have taken the steps pleaded for the purposes of:
 - a. determining whether the MySuper fund for which Authority had been received would be suitable and promote the financial interests of a member or class of members with an ADA in the Superannuation Entity; and
 - b. enabling the trustee to review and give effect to its Transition Plan, including the timing of the ADA Transfer, in a manner that would promote the interests of a member or class of members with an ADA in the Superannuation Entity.
- ii. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].

93. Where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members individually or as a class for ADA Transfers to take place as soon as reasonably practicable, a director of a trustee of a Superannuation Entity:

- (a) giving priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons;
- (b) ensuring that the duties to the beneficiaries are met despite any conflict with duties to and interests of other persons;
- (c) ensuring that the interests of the beneficiaries are not adversely affected by the conflict; and/or
- (d) complying with the prudential standards in relation to conflicts,

would have taken steps to cause the trustee to make the relevant ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable, and would have provided members whose interests were subject to an ADA Transfer with sufficient and/or sufficiently balanced information on the basis of which those members could determine their own best interests with respect to any direction as to the investment of assets in the FirstChoice Fund attributable to them.

94. In the circumstances of the Revenue Conflict, by her acts and omissions and in the circumstances set out in paragraphs 84 and 85 above, separately or in any combination, Elkins failed to take steps to cause Colonial to:

- (a) determine the interests of FCES ADA Members by carrying out the Colonial Suitability Determination and the Colonial Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable; and/or
- (b) effect the First and Second ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**].
95. In the premises, Elkins contravened the Director's No Conflicts Covenant by failing to:
- (a) give priority to the duties to and interests of FCES ADA Members over the interests of CBA, the CBA Group and/or its own interests;
 - (b) ensure that the duties to FCES ADA Members were met despite the Revenue Conflict; and/or
 - (c) ensure that the interests of FCES ADA Members were not adversely affected by the Revenue Conflict.
96. In the circumstances of the Trailing Commission Conflict, by her acts and omissions and in the circumstances set out in paragraphs 26A, 26B, 26C, 26D, 84 and 85 above, separately or in any combination, Elkins failed to take steps to cause Colonial to:
- (a) determine the interests of Default Members by carrying out the Colonial Suitability Determination and the Colonial Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable;
 - (b) effect the First and Second ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable; and/or
 - (c) provide Default Members with sufficient and sufficiently balanced information on the basis of which those members could determine their own best interests with respect to any direction as to the investment of assets in the FirstChoice Fund attributable to them.

97. In the premises, Elkins contravened the Director's No Conflicts Covenant by failing to:
- (a) give priority to the duties to and interests of Default Members over the interests of CBA, the CBA Group, Conflicted Financial Advisers, CBA Conflicted Financial Advisers and/or its own interests;
 - (b) ensure that the duties to Default Members were met despite the Trailing Commission Conflict; and/or
 - (c) ensure that the interests of Default Members were not adversely affected by the Trailing Commission Conflict.

Contravention of Director's Diligence Covenant

98. In the premises set out in paragraphs sections E and N above, separately or in any combination, a director of a trustee of a Superannuation Entity exercising a reasonable degree of care and diligence for the purposes of ensuring that the trustee carries out the covenants referred to in s 52 of the SIS Act would have taken steps to ensure that the trustee of the Superannuation Entity carried out the Suitability Determination and the Promotion of Financial Interests Determination by no later than a date between 1 December 2013 and 31 May 2014, further and in the alternative, as soon as reasonably practicable after:
- (a) the trustee received Authority to offer a MySuper Product in the Superannuation Entity;
 - (b) a MySuper Product was created in the Superannuation Entity; and/or
 - (c) members with an ADA in the Superannuation Entity were identified.

Particulars

- i. The director of a trustee of Superannuation Entity would have taken the steps pleaded for the purposes of:
 - a. determining whether the MySuper fund for which Authority had been received would be suitable and promote the financial interests of a member or class of members with an ADA in the Superannuation Entity; and
 - b. enabling the trustee to review and give effect to its Transition Plan, including the timing of any ADA Transfer.
- ii. Expert Report of Stephen Huppert dated 15 March 2021 [**EXP.LEC.004.0001** at **0012**]

99. In the premises set out in sections E and N above, separately or in any combination, where the outcome of the Promotion of Financial Interests Determination showed that it was in the financial interests of FCES ADA Members individually or as a class for ADA Transfers to take place as soon as reasonably practicable, a director of a trustee of a Superannuation Entity exercising a reasonable degree of care and diligence for the purposes of ensuring that the trustee carries out the covenants referred to in s 52 of the SIS Act would have taken steps to cause the trustee to make the relevant ADA Transfers by no later than a date between 1 July 2015 and 31 December 2015, further and in the alternative, as soon as reasonably practicable.

Particulars

- i. Expert Report of Stephen Huppert dated 15 March 2021 [EXP.LEC.004.0001 at 0012].
100. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 84 above, separately or in any combination, Elkins contravened the Director's Diligence Covenant.
101. In the premises, by the acts and omissions and in the circumstances pleaded in paragraph 85 above, separately or in any combination, Elkins contravened the Director's Diligence Covenant.

Q1. CAUSATION OF LOSS AND DAMAGE

- 101A. At all material times and for so long as they remained members of the FirstChoice Fund, FCES ADA Members had:
- (a) the FCES ADA Rights;
 - (b) the right to have Colonial deal with their FCES ADA consistently with the FCES ADA Obligations;
 - (c) the right to due administration of the FirstChoice Fund in accordance with the Implied Terms and the express terms of the Trust Deed and applicable superannuation laws, including the right to enforce the FCES ADA Rights and their right to have Colonial deal with their FCES ADA consistently with the FCES ADA Obligations.
- 101B. At all material times from the date of the First ADA Transfer, FCES ADA Members who had their FCES ADAs transferred in the First ADA Transfer had, in addition to the rights set out in paragraph 101A above, the right to have Colonial deal with their FCES ADA consistently with the Conflicted Remuneration Obligation, the Beneficial

MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations.

101C. At all material times from the date of the Second ADA Transfer, FCES ADA Members who had their FCES ADAs transferred in the Second ADA Transfer had, in addition to the rights set out in paragraph 101A above, the right to have Colonial deal with their FCES ADA consistently with the Conflicted Remuneration Obligation, the Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations.

101D. But for:

- (a) one or more of the contraventions of trustee contraventions alleged in Section N above and the contraventions of director contraventions alleged in Section Q above; and/or
- (b) one or more of the breaches of general law duties alleged in Section O above, FCES ADA Members would have had their FCES ADAs transferred to ~~the a MySuper FirstChoice Lifestage~~ product on the date in advance of the First ADA Transfer and the Second ADA transfer being a date ascertained in conformity with when the obligation or duty fell for proper performance as pleaded in Sections N, Q and/or O above.

101E. By reason of the failure to transfer the FCES ADAs on the dates pleaded in paragraph 101D above, FCES ADA Members whose FCES ADA was transferred in the First ADA Transfer were denied the right to have their FCES ADA dealt with by Colonial consistently with the Conflicted Remuneration Obligation, the Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations, from the date on which the First ADA Transfers ought to have occurred until the date of the First ADA Transfer.

101F. By reason of the failure to transfer the FCES ADAs on the dates pleaded in paragraph 101D above, FCES ADA Members whose FCES ADA was transferred in the Second ADA Transfer were denied the right to have their FCES ADA dealt with by Colonial consistently with the Conflicted Remuneration Obligation, the Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations, from the date on which the Second ADA Transfers ought to have occurred until the date of the Second ADA Transfer.

101G. The denial of rights referred to in paragraphs 101E and 101F above constituted loss and damage to the FCES ADA Members referred to in those paragraphs.

101H. Further, the denial of rights referred to in paragraphs 101E and 101F above resulted in:

- (a) additional fees being wrongly deducted from FCES ADA Members' FCES ADA Accounts during the period in which the First Respondent failed, by reason of one or more of the contraventions alleged in Section N above (Trustee SIS Act Contraventions), to transfer the member's FCES ADA to a FirstChoice Lifestage product (Wrongful Delay Period); and/or
- (b) lower investment returns being achieved in respect of FCES ADA Members' FCES ADA Accounts during such Wrongful Delay Period arising from either:
 - (i) the unit price for Default Investment Options incorporating additional or higher rates of fees than if the transfer to a FirstChoice Lifestage product had occurred; and/or
 - (ii) the Default Investment Options underperforming the relevant FirstChoice Lifestage product; and
- (c) loss consequential on (a) and (b) above in that, during the period after the FCES ADA Member's FCES ADA had been transferred to a FirstChoice Lifestage product, the FCES ADA Member had that much less funds than he or she ought to have had in the FirstChoice Lifestage product and earning the returns under that product,

and therefore a reduction in the credits and/or an increase in the debits that Colonial attributed to each FCES ADA Account and a consequent diminishment or depletion of the FirstChoice Fund which was there to meet such account balances.

~~101H. Further, the denial of rights referred to in paragraphs 101E and 101F resulted in:~~

- ~~(a) the fees and commissions charged in respect of each FCES ADA to have been higher;~~
- ~~(b) the investment returns in respect of each FCES ADA to have been lower;~~
- ~~(c) loss or damage consequential to the loss or damage in paragraphs (a) and (b) above;~~

~~and therefore a reduction in the credits and an increase in the debits that Colonial attributed to each FCES ADA Account and a consequent diminishment or depletion of the fund which was there to meet such account balances.~~

~~101I. In the premises, the quantum of loss and damage suffered by each FCES ADA Member is:~~

~~(a) to the extent that an FCES ADA Member as at the date of judgment continues to hold an FCES ADA in the FirstChoice Fund, the difference between the value of their FCES ADA Accounts as at the date of judgment and the value that their FCES ADA Accounts would have had as at that date but for the contraventions alleged in Sections N and Q, separately or in any combination, or the breaches alleged in Section O, separately or in any combination; and/or~~

~~(b) to the extent that an FCES ADA Member as at the date of judgment has transferred (including by way of rollover or allotment) or received some payment in respect of part or all of their FCES ADA between the date of the contraventions and/or breaches and the date of judgment and to that extent no longer holds an FCES ADA in the FirstChoice Fund, the difference between the value of their FCES ADA Account in respect of the relevant portion of their FCES ADA as at the date that they exited the FirstChoice Fund and the value that their FCES ADA Account in respect of that portion of their FCES ADA would have had at that date but for the contraventions alleged in Sections N and Q, separately or in any combination, or the breaches alleged in Section O, separately or in any combination together with such continuing loss as they suffered thereafter by reason that the money available to them post exit, for such use as they put it post-exit (whether by roll-over to another fund or otherwise) was that much less than it would have been but for the contraventions or breaches or combinations of them.~~

Category 1 Group Members – Former FCES ADA Members

101I. Group Members (including the Applicant) who were FCES ADA Members, and as at the date of judgment, were no longer a member of the FirstChoice Fund and have received a payment in respect of the Group Member's interest attributable to an FCES ADA (Category 1 Group Members), suffered the loss and damage pleaded in paragraphs 101E to 101H.

Category 2 Group Members – Current FCES ADA Members

101J. Group Members who were FCES ADA Members, and as at the date of judgment, remain a member of the FirstChoice Fund and have satisfied a Condition of Release with nil cashing restrictions (**Category 2 Group Members**), suffered the loss and damage pleaded in paragraphs 101E to 101H.

101K. Group Members who were FCES ADA Members, and as at the date of judgment, remain a member of the FirstChoice Fund and have satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions) (also **Category 2 Group Members**), suffered the loss and damage pleaded in paragraphs 101E to 101H.

101L. Group Members who were FCES ADA Members, and as at the date of judgment, remain a member of the FirstChoice Fund and have not satisfied a Condition of Release (also **Category 2 Group Members**), suffered the loss and damage pleaded in paragraphs 101E to 101H.

Category 3 Group Members – Transferred unrestricted former FCES ADA Members

101M. Group Members who were FCES ADA Members, and as at the date of judgment, no longer has an interest in the FirstChoice Fund, having rolled over or transferred such interest into another superannuation fund and having satisfied a Condition of Release with nil cashing restrictions (**Category 3 Group Members**), suffered the loss and damage pleaded in paragraphs 101E to 101H.

Category 4 Group Members – Transferred restricted former FCES ADA Members

101N. Group Members who were FCES ADA Members, and as at the date of judgment, no longer has an interest in the FirstChoice Fund, having rolled over or transferred such interest into another superannuation fund and having satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions) (**Category 4 Group Members**), suffered the loss and damage pleaded in paragraphs 101E to 101H.

101O. Group Members who were FCES ADA Members, and as at the date of judgment, no longer has an interest in the FirstChoice Fund, having rolled over or transferred such interest into another superannuation fund and have not satisfied a Condition of Release (also **Category 4 Group Members**), suffered the loss and damage pleaded in paragraphs 101E to 101H.

Causation of Loss or Damage – Group Members in Categories 1 to 4

101P. The loss or damage pleaded at paragraphs 101I to 101O above was suffered by reason of one or more of the contraventions pleaded in Sections N and Q, and/or one or more of the breaches of general law obligations pleaded in Section O.

Category 5 Group Members – claiming because of deceased FCES ADA Member

101Q. Further, Group Members referred to in paragraph 2(b) above, suffered loss and damage by reason that the amount or interest which the Group Member received from the deceased FCES ADA Member on inheritance, was that much less than it would have been had the deceased FCES ADA Member, prior to their death, not suffered the loss and damage as set out in paragraphs 101E to 101H.

Category 6 Group Members – claiming because of spousal FCES ADA Member

101R. Group Members referred to in paragraph 2(c) above who have satisfied a Condition of Release with nil cashing restrictions (**Category 6 Group Members**), suffered loss and damage by reason that the amount or interest which the Group Member received from the spousal FCES ADA Member on transfer under order, settlement or agreement under the Family Law Act, was that much less than it would have been had the spousal FCES ADA Member, prior to that transfer, not suffered the loss and damage as set out in paragraphs 101E to 101H.

101S. Group Members referred to in paragraph 2(c) above who have satisfied a Condition of Release (other than a Condition of Release with nil cashing restriction) (also **Category 6 Group Members**), suffered loss and damage by reason that the amount or interest which the Group Member received from the spousal FCES ADA Member on transfer under order, settlement or agreement under the Family Law Act, was that much less than it would have been had the spousal FCES ADA Member, prior to that transfer, not suffered the loss and damage as set out in paragraphs 101E to 101H.

101T. Group Members referred to in paragraph 2(c) above who have not satisfied a Condition of Release (also **Category 6 Group Members**), suffered loss and damage by reason that the amount or interest which the Group Member received from the spousal FCES ADA Member on transfer under order, settlement or agreement under the Family Law Act, was that much less than it would have been had the spousal FCES ADA Member, prior to that transfer, not suffered the loss and damage as set out in paragraphs 101E to 101H.

Causation of Loss or Damage – Group Members in Categories 5 and 6

101U. The loss or damage pleaded at paragraphs 101Q to 101T above was suffered by reason of one or more of the contraventions pleaded in Sections N and Q, and/or one or more of the breaches of general law obligations pleaded in Section O.

R. HARM TO THE APPLICANT AND GROUP MEMBERS

Harm to the Applicant

102. The Applicant:

- (a) was born on 27 April 1955;
- (b) was, from 27 February 2008 to 21 January 2019 (inclusive), a member of the FirstChoice Fund;
- (c) was, between 27 February 2008 and 11 November 2016 (inclusive), invested in the FirstChoice Moderate investment option in FCES;
- (d) had, from 11 June 2013, new employer contributions attributed to the FirstChoice Lifestage 1955-59 investment option;
- (e) held until on or about 11 November 2016 an FCES ADA of \$16,093.88 (**Applicant's ADA**); and
- (f) did not, at any material time, provide an Investment Direction to Colonial as to the investment of the Applicant's ADA.

103. On or about 12 November 2016, the Applicant's ADA was transferred as part of the First ADA Transfer into the FirstChoice Lifestage 1955-59 Investment Option.

103A. By reason of the matters pleaded at paragraphs 102 and 103 above, the matters pleaded at paragraphs 101A and 101B above applied to the Applicant as an FCES ADA Member and the Applicant's ADA as an FCES ADA.

103B. But for:

- (a) one or more of the contraventions of trustee covenants alleged in Section N above and the contraventions of director covenants alleged in Section Q above; and/or
- (b) one or more of the breaches of general law duties alleged in Section O above, the Applicant's ADA would have been transferred into the FirstChoice Lifestage 1955-59 Investment Option by a date in advance of the First ADA Transfer, being a date

ascertained in conformity with when the obligation or duty fell for proper performance as pleaded in Sections N, Q and/or O above.

103C. By reason of the failure to transfer the Applicant's ADA on the date pleaded in paragraph 103B above, the Applicant was denied the right to have the Applicant's ADA dealt with by Colonial consistently with the Conflicted Remuneration Obligation, the Beneficial MySuper Obligations, the MySuper Fee Obligations, the MySuper Investment Fee Obligations, and the MySuper Financial Interests Obligations, from the date on which the First ADA Transfers ought to have occurred until the date of the First ADA Transfer.

103D. The denial of the rights referred to in paragraph 103C above constituted loss and damage to the Applicant.

103E. The denial of rights referred to in paragraphs 103C and 103D resulted in:

(a) additional fees being wrongly deducted from, and/or lower investment returns being achieved in respect of, the Applicant's FCES ADA Account during the Wrongful Delay Period;

(b) loss consequential on (a) above in that, during the period after the Applicant's FCES ADA had been transferred to the FirstChoice Lifestage 1955-59 Investment Option, the Applicant had that much less funds than she ought to have had in the FirstChoice Lifestage 1955-59 Investment Option and earning the returns under that product,

~~(a) the fees and commissions charged in respect of the Applicant's ADA to have been higher;~~

~~(b) the investment returns in respect of the Applicant's ADA to have been lower;~~

~~(c) loss or damage consequential to the loss or damage in paragraphs (a) and (b) above,~~

and therefore a reduction in the credits and an increase in the debits that Colonial attributed to the Applicant's ADA Account and a consequent diminishment or depletion of the fund which was there to meet such account balance.

103F. By January 2019, the Applicant:

(a) had met a ~~condition of release~~ Condition of Release of benefits with nil cashing restrictions, ~~in accordance with Schedule 1 of the SIS Regulations;~~

(b) had reached the age of 55;

- (c) had an unrestricted non-preserved benefit in the FirstChoice Fund; and
- (d) had requested a withdrawal of her balance in the FirstChoice Fund, which request was effected by Colonial on 21 January 2019 in an amount diminished by reason of the denial of rights pleaded in paragraphs 103C and 103D and the consequences pleaded in paragraph 103E.

Particulars

- i. Withdrawal Confirmation dated 21 January 2019 [**LEC.500.001.0002**].
- ii. FirstChoice Employer Super Product Disclosure Statement dated 18 May 2015, page 2 [**CFS.001.005.1907**].

103G. Further, by reason of the matters pleaded at paragraphs 103C to 103D above, and the consequences pleaded in paragraph 103E, the Applicant suffered loss or damage in the form of a diminished receipt and such consequential loss as she suffered thereafter.

~~103G. In the premises, the quantum of loss and damage suffered by the Applicant is the difference between the value that her FCES ADA Account had on 21 January 2019 and the value that her FCES ADA Account would have had at that date but for the contraventions alleged in Sections N and Q, separately or in any combination, or the breaches alleged in Section O, separately or in any combination, together with such continuing loss as she suffered thereafter by reason that the money available to her after she withdrew her balance, for such use as she put it after withdrawal, was that much less than it would have been but for the contraventions or breaches or combinations of them.~~

Particulars

- ~~i. Had Colonial transferred the Applicant's ADA to FirstChoice Lifestage in the period 1 July 2015 to 31 December 2015, the Applicant's balance would have been between \$215 and \$426 higher (excluding interest) as at 12 November 2016: Report of Andrew Ross [**EXP.LEC.002.0001**] and Appendix D [**EXP.LEC.003.0001**].~~

104. In the premises, each of the contraventions of the SIS Act pleaded in sections N and Q above, separately or in any combination, have caused the Applicant, directly and consequentially, loss and damage.

105. Further or in the alternative to the matters pleaded at paragraph 104 above, in the premises, each of the breaches of general law obligations by Colonial set out in

section O above, separately or in any combination, have caused the Applicant, directly and consequentially, loss and damage.

105AA. In the premises, the amount of loss and damage suffered by the Applicant is the difference between the value that her FCES ADA Account had on 21 January 2019 and the value that her FCES ADA Account would have had at that date but for the contraventions alleged in Sections N and Q, separately or in any combination, or the breaches alleged in Section O, separately or in any combination, together with such consequential loss as she suffered thereafter by reason that the money available to her after she withdrew her balance, for such use as she put it after withdrawal, was that much less than it would have been but for the contraventions or breaches or combinations of them.

Particulars

- i. Had Colonial transferred the Applicant's ADA to FirstChoice Lifestage in the period 1 July 2015 to 31 December 2015, the Applicant's balance would have been between \$215 and \$426 higher (excluding interest) as at 12 November 2016: Report of Andrew Ross [EXP.LEC.002.0001] and Appendix D [EXP.LEC.003.0001].
- ii. The applicant is also entitled to pre-judgment interest from 12 November 2016 to 21 January 2019 to compensate the Applicant for consequential loss on her lower account balance, and thereafter to the date of judgment to compensate the Applicant for loss of use of the money under usual pre-judgment interest principles.

Harm to Group Members

105A. By reason of the matters pleaded at paragraph 2 above, each Group Member either:

- (a) was an FCES ADA Member and had an FCES ADA at the time of the contraventions of the SIS Act pleaded in sections N and Q above and the general law breaches pleaded in section O above; or
- (b) in the circumstances set out in paragraphs 2(b) or (c) above, received a payment or transfer from an FCES ADA Member who, at the time of the contraventions of the SIS Act pleaded in sections N and Q above and the general law breaches pleaded in section O above, had an FCES ADA.

105B. Each FCES ADA that a Group Member had an interest in or now derives an interest from in the manner pleaded in paragraph 105A above, was affected by the matters and in the manner pleaded at paragraphs 101A to 101U above.

105C. Each FCES ADA Member whose FCES ADA is referred to in paragraph 105B above was affected by the matters and in the manner pleaded at paragraphs 101A to 101U† above.

105D. In the premises:

- (a) each Group Member who was an FCES ADA Member at the time of the contraventions of the SIS Act pleaded in sections N and Q above and the general law breaches pleaded in section O above, was affected by the matters and in the manner pleaded at paragraphs 101A to 101P† above; and
- (b) each Group Member who received a payment or transfer or inheritance from an FCES ADA Member who, at the time of the contraventions of the SIS Act pleaded in sections N and Q above and the general law breaches pleaded in section O above, had an FCES ADA, was affected by the matters and in the manner pleaded at paragraphs 101A to 101U† above, by reason that the money transferred to or received by that Group Member from the FCES ADA Account relating to the FCES ADA was that much less than it would have been but for the contraventions and/or breaches or combinations of them.

106. By reason of the matters pleaded at paragraph 105D above, each of the contraventions of the SIS Act pleaded at in sections N and/or Q above, separately or in any combination, have caused, and continue to cause, each Group Member, directly and consequentially, the following loss and or damage.:

Category 1 Group Members

- (a) in the case of a Group Member who, as at the date of judgment, is no longer a member of the FirstChoice Fund and has received payment in respect of the member's interest attributable to an FCES ADA, the amount by which the Group Member's receipt had been diminished and such consequential loss as the Group Member suffered thereafter;

Category 2 Group Members

- (b) in the case of a Group Member who was an FCES ADA Member and who, as at the date of judgment, remains a member of the FirstChoice Fund and:
 - (i) has satisfied a Condition of Release with nil cashing restrictions; or
 - (ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which that Group Member's interest in the FirstChoice Fund has been diminished as at the date of judgment;

Category 3 and Category 4 Group Members

(c) in the case of a Group Member who was an FCES ADA Member, but who, at the date of judgment, no longer has an interest in the FirstChoice Fund, having rolled over or transferred such interest into another superannuation fund, and:

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which the Group Member's interest in the other superannuation fund has been diminished as at the date of judgment;

Category 5 Group Members

(d) in the case of a Group Member who was not an FCES ADA Member and who received a payment from a deceased FCES ADA Member as referred to at paragraph 2(b) above, the amount by which the Group Member's receipt has been diminished and such consequential loss as the Group Member suffered thereafter;

Category 6 Group Members

(e) in the case of a Group Member who was not an FCES ADA Member and who received a transfer from a spousal FCES ADA Member as referred to at paragraph 2(c) above and, as at the date of judgment:

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which the Group Member's transfer has been diminished and such consequential loss as the Group Member suffered thereafter.

107. Further or alternatively, by reason of the matters pleaded at paragraph 105D above, each of the breaches of general law obligations by Colonial set out in section O above, separately or in any combination, have caused, and continue to cause, the Group Members, directly and consequentially, the following loss and/or damage:

Category 1 Group Members

(a) in the case of a Group Member who, as at the date of judgment, is no longer a member of the FirstChoice Fund and has received payment in respect of the member's interest attributable to an FCES ADA, the amount by which the Group Member's receipt had been diminished and such consequential loss as the Group Member suffered thereafter;

Category 2 Group Members

(b) in the case of a Group Member who was an FCES ADA Member and who, as at the date of judgment, remains a member of the FirstChoice Fund and:

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which that Group Member's interest in the FirstChoice Fund has been diminished as at the date of judgment and such consequential loss as the Group Member suffered thereafter;

Category 3 and Category 4 Group Members

(c) in the case of a Group Member who was an FCES ADA Member, but who, at the date of judgment, no longer has an interest in the FirstChoice Fund, having rolled over or transferred such interest into another superannuation fund, and

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which the Group Member's interest in the other superannuation fund has been diminished as at the date of judgment;

Category 5 Group Members

(d) in the case of a Group Member who was not an FCES ADA Member and who received a payment from a deceased FCES ADA Member as referred to at paragraph 2(b) above, the amount by which the Group Member's receipt has been diminished and such consequential loss as the Group Member suffered thereafter;

Category 6 Group Members

(e) in the case of a Group Member who was not an FCES ADA Member and who received a transfer from a spousal FCES ADA Member as referred to at paragraph 2(c) above and, as at the date of judgment:

(i) has satisfied a Condition of Release with nil cashing restrictions; or

(ii) has satisfied a Condition of Release (other than a Condition of Release with nil cashing restrictions); or

(iii) has not satisfied any Condition of Release,

the amount by which the Group Member's transfer has been diminished and such consequential loss as the Group Member suffered thereafter.

108. The quantum amount of loss or damage suffered by each Group Member:

~~(a) for each Group Member who was an FCES ADA Member at the time of the contraventions of the SIS Act pleaded in sections N and Q above and the general law breaches pleaded in section O above, is as set out at paragraph 4011 above; and~~

Category 1 Group Members

(aa) who is no longer a member of the FirstChoice Fund and has received payment in respect of the Group Member's interest in the FirstChoice Fund, is the difference between the amount of their receipt and amount that they would have received as at the date of their receipt but for the contraventions alleged in Sections N and Q, separately or in any combination, or the breaches alleged in Section O, separately or in any combination, together with such consequential loss as they suffered thereafter by reason that the money received by the Group Member, for such use as they put it, was that much less than it would have been but for the contraventions or breaches or

combinations of them, grossed up to the extent necessary to account for the application of taxation laws as set out in paragraph 5(a)(iv) of the Further Amended Originating Application;

Category 2 Group Members

- (a) who was an FCES ADA Member and who, as at the date of judgment, holds an interest in the FirstChoice Fund, is the difference between the value of their interest in the FirstChoice Fund as at the date of judgment and the value that their interest in the FirstChoice Fund would have had as at that date but for the contraventions alleged in Sections N and Q, separately or in any combination, or the breaches alleged in Section O, separately or in any combination, grossed up to the extent necessary to account for the application of taxation laws as set out in paragraph 5(a)(iv) of the Further Amended Originating Application;

Category 3 and Category 4 Group Members

- (bb) who was an FCES ADA Member and who, as at the date of judgment, no longer has an interest in the FirstChoice Fund, having rolled over or transferred such interest into another superannuation fund, is the difference between the value of their interest in the other superannuation fund as at the date of judgment and the value that their interest in that other superannuation fund would have had as at that date but for the contraventions alleged in Sections N and Q, separately or in any combination, or the breaches alleged in Section O, separately or in any combination, grossed up to the extent necessary to account for the application of taxation laws as set out in paragraph 5(a)(iv) of the Further Amended Originating Application; and

Category 5 and Category 6 Group Members

- (b) ~~each Group Member~~ who was not an FCES ADA Member and who received a payment or transfer from an FCES ADA Member ~~who, at the time of the contraventions of the SIS Act pleaded in sections N and Q above and the general law breaches pleaded in section O above, had an FCES ADA,~~ is the the difference between the amount of money transferred to or received by that Group Member ~~from the FCES ADA Account relating to the FCES ADA and~~ the amount that would have been so transferred to or received by that Group Member but for the contraventions alleged in Sections N and Q, separately or

in any combination, or the breaches alleged in Section O, separately or in any combination, together with such consequential continuing loss as they suffered thereafter by reason that the money so transferred to or received by the Group Member, for such use as they put it, was that much less than it would have been but for the contraventions or breaches or combinations of them, grossed up to the extent necessary to account for the application of taxation laws as set out in paragraph 5(a)(iv) of the Further Amended Originating Application.

S. DUE ADMINISTRATION OF FIRSTCHOICE FUND AND EQUITABLE COMPENSATION

109. The Applicant has standing, as a former beneficiary of the FirstChoice Fund and/or as a representative for Group Members who remain members of the FirstChoice Fund and/or who are former members of the FirstChoice Fund, to bring a suit in equity to compel the due administration of the FirstChoice Fund.

110. Pursuant to such suit, the Court has jurisdiction to examine whether the First Respondent has breached its general law obligations pleaded in Section O above, and if so whether such breaches have caused loss or damage to members of the FirstChoice Fund and what relief should flow in respect of such loss.

111. Further, the Applicant has standing, as a former member of the FirstChoice Fund and as representative for Group Members who are or were members of the FirstChoice Fund, to bring a suit in equity seeking the remedy of equitable compensation in respect of any breaches by the First Respondent of its general law obligations pleaded in Section O above which have caused loss or damage to current or former members of the FirstChoice Fund, such equitable compensation to be constituted by:

Category 2 Group Members

(a) an adjustment of the account balances of such Group Members who remain members of the FirstChoice Fund and restoration of the FirstChoice Fund;
and

Category 1, 3 and 4 Group Members

(b) an amount of money being payable directly to such Group Members who are former members of the FirstChoice Fund;

or an injunction to like effect.

112. By reason of the matters pleaded Section O above, the Respondents have engaged in a breach of their general law duties in their delay in transferring FCES ADA Members to the FirstChoice Lifestage product which has resulted in increased fees and/or lower investment returns.

113. The harm flowing from the breaches of duty is:

(a) the diminution of the FirstChoice Fund;

Category 2 Group Members

(b) the diminution of the account balances and unit entitlements of FCES ADA Members' remaining beneficiaries;

Category 1, 3 and 4 Group Members

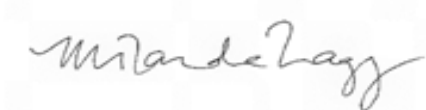
(c) the diminution of receipts and transfers in respect of FCES ADA Members who have departed the FirstChoice Fund.

114. Each of the Group Members, to the extent they fall within any of the categories set out in paragraphs 101I to 101O above, has an interest that is protected by equity in such suit referred to in paragraphs 109 and 111.

115. Equity requires that the appropriate form or forms of relief be fashioned so that, as far as possible, all such Group Members, are restored to the position they would have been in had the breaches not occurred.

AND THE APPLICANT CLAIMS, for herself and on behalf of the Group Members the relief set out in the Further Amended Originating Application.

Date: 13 September 2021



Signed by Miranda Nagy
Lawyer for the Applicant

This pleading was prepared by Shipra Chordia and Adam Hochroth of counsel, and settled by Nicholas Owens SC.

SCHEDULE A – Defined TermsPart 1 – terms defined in this document

Defined term	Definition contained in paragraph
ADA	2(a)
ADA Transfer	19(e)(i)
ADA Transfer Election	18
Adequacy of Scale Determination	34(b)
AFSL	4(d)
Applicant's ADA	102(e)
APRA	18
Authority	19
Beneficial MySuper Obligations	18B
Best Interests Covenant	11(b)
Best Interests Duty	15(b)
<u>Category 1 Group Members</u>	<u>101H</u>
<u>Category 2 Group Members</u>	<u>101J, 101K, 101L</u>
<u>Category 3 Group Members</u>	<u>101M</u>
<u>Category 4 Group Members</u>	<u>101N, 101O</u>
<u>Category 5 Group Members</u>	<u>101Q</u>
<u>Category 6 Group Members</u>	<u>101R, 101S, 101T</u>
Care and Skill Covenant	11(a)
CBA	6
CBA Conflicted Financial Advisers	25
CBA Group	6
CES	40(a)
Colonial	2(a)
Colonial Promotion of Financial Interests Determination	48
Colonial Suitability Determination	48
Conflicted Financial Advisers	24
Conflicted Remuneration Obligations	18A
Corporations Act	4(a)
Corporations Regs	20

Defined term	Definition contained in paragraph
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Default Member	23
Director's Best Interests Covenant	16(b)
Director's Care and Skill Covenant	16(a)
Director's Diligence Covenant	16(d)
Director's No Conflicts Covenant	16(c)
Duty of Prudent Management	15(c)
Duty to Perform the Trust Terms	15(a)
Elkins	5
<u>Family Law Act</u>	<u>2(c)</u>
FCES	2(a)
FCES ADA	2(a)
FCES ADA Accounts	8G(a)
FCES ADA Member	2(a)
FCES ADA Obligations	8G
FCES ADA Rights	8H
FCPS	8
Fees and Costs	20(e)
First ADA Transfer	50
First Notice	49
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FirstChoice Lifestage	31(a)
Funds Management System	38(d)
Funds Under Management	40A(a)
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General Law Profits Duty	15(e)
Group Members	2
Implied Terms	14
Investment Direction	8H(g)
Investment Option	32
Investment Portfolio	8G(c)
Investment Risk	20(d)

Defined term	Definition contained in paragraph
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MySuper Dashboard	20
MySuper Fee Obligations	18C
MySuper Financial Interests Obligations	18F
MySuper Investment Fee Obligations	18E
No Conflicts Covenant	11(c)
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SIS Regulations	8C
SPS 410	19
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Transition Plan	19(a)
Trust Deed	7(a)
<u>Trustee SIS Act Contraventions</u>	<u>101H(a)</u>
Units	8G(c)
Wealth Management	8A
<u>Wrongful Delay Period</u>	<u>101H(a)</u>

Part 2 – terms defined in relevant legislation

A term in Column 1 used in this Statement of Claim means the term within the meaning of the section stated in Column 2 of the Act or Regulations stated in Column 3.

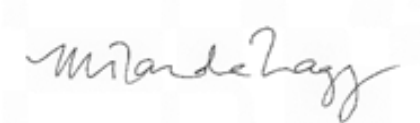
Column 1	Column 2	Column 3
Accrued Default Amount	20B	SIS Act
Associate	12	SIS Act
Authorised Representative	916A; 761A	Corporations Act
Choice Product	10	SIS Act
Closely-Held Subsidiary	214(2)	Corporations Act
<u>Condition of Release</u>	<u>6.18 and 6.19, Sch. 1</u>	<u>SIS Regs</u>
Conflicted Remuneration	963A	Corporations Act
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Financial Services Licensee	761A	Corporations Act
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Public Offer Superannuation Fund	18	SIS Act
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Periodic Notice	9.46A	SIS Regulations
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RSE Licence	10	SIS Act
RSE Licensee	10	SIS Act

Column 1	Column 2	Column 3
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Superannuation Entity	10	SIS Act
Superannuation Fund	10	SIS Act

Certificate of lawyer

I, Miranda Nagy, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 13 September 2021

A handwritten signature in cursive script that reads "Miranda Nagy". The signature is written in black ink on a light-colored background.

Signed by Miranda Nagy
Lawyer for the Applicant

Schedule

No. VID1139 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

Respondents

Second Respondent: Linda Maree Elkins