

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

No. VID551 of 2020

**Australian Securities and Investments Commission**  
Plaintiff

and

**Aware Financial Services Australia Limited (ACN 003 742 756)**  
Defendant

**STATEMENT OF AGREED FACTS FOR PENALTY HEARING**

**A. INTRODUCTION**

- 1 This Statement of Agreed Facts (**SOAF**) is made jointly by the Plaintiff, the Australian Securities and Investments Commission (**ASIC**), and the Defendant, Aware Financial Services Australia Limited (ACN 003 742 756) (**Aware**, also referred to as **StatePlus**) for the purpose of s 191 of the *Evidence Act 1995* (Cth). This document replaces the statement of agreed facts filed on 19 May 2021.
- 2 The SOAF relates to Proceeding No VID551 of 2020 commenced by ASIC against Aware on 21 August 2020 (**Proceeding**). By the Proceeding, ASIC has sought declarations that Aware contravened particular provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Corporations Act 2001* (Cth) (**Corporations Act**), and orders that it pay a pecuniary penalty to the Commonwealth as well as other ancillary orders.
- 3 The facts agreed in this document are agreed solely for the purpose of the Proceeding and do not constitute any agreed fact or admission outside of the Proceeding.
- 4 For the purposes of the Proceeding only, Aware admits that it contravened:
  - (a) s 12DI(3) of the ASIC Act; and
  - (b) s 912A(1)(a), (b) and (c) of the Corporations Act,in particular respects as set out in Section D (Admissions) of this SOAF.
- 5 Accompanying this Statement of Agreed Facts and forming part of it is a USB exhibit marked “SOAF” containing a bundle of the documents referred to below. An index of those documents is at **Schedule A**. A reference to a document by a Ringtail document identification number in this Statement of Agreed Facts is a reference to that document stored on the USB.

6 For the avoidance of doubt, the inclusion of a document in the exhibit does not constitute the making of any admission by the parties within the meaning of the Evidence Act as to any representations made in those documents.

7 In this SOAF, the **Relevant Period** means on and from 1 April 2013 to and including 30 June 2018, and the **Penalty Period** means on and from 21 August 2014 to and including 30 June 2018.

## **B. THE PARTIES**

### *ASIC*

8 ASIC is a body corporate which was established by s 7 of the ASIC Act and continues by operation of s 261 of the ASIC Act. It is entitled to sue by reason of s 8 of the ASIC Act.

### *Aware*

9 Aware is a body corporate incorporated according to law, able to be sued in its own name and the holder of Australian Financial Services Licence (**AFSL**) numbered 238430. Until 1 September 2020, Aware was known as State Super Financial Services Australia Limited and used the trading name “StatePlus”.

10 In 1992, the First State Superannuation Scheme (**First State Super**) now Aware Super (**Aware Super**) was established by the *First State Superannuation Act 1992* (NSW). In 1996, FSS Trustee Corporation (**FTC**) (now known as Aware Super Pty Limited) was established by the *Superannuation Administration Act 1996* (NSW) (**SA Act**). At all relevant times, FTC was trustee of First State Super. The SA Act also continued the existence of the corporation known as the State Authorities Superannuation Board as the SAS Trustee Corporation (**STC**).

11 State Super Financial Services Australia Limited (**StatePlus**) (known from 2020 as Aware Financial Services Australia Limited) was incorporated on 10 April 1989. Shortly after its incorporation, the shares in StatePlus were transferred to the predecessor corporation of STC. On 6 June 2016, STC sold its shareholding in StatePlus to a subsidiary of FTC, FSSSP Financial Services Pty Ltd (**FSSSP**). On 1 July 2019, through a series of internal transactions, FSSSP’s shareholding in StatePlus was sold (in exchange for a promissory note) to ultimately First State Super Product and Administration Services Pty Ltd (**FSSPAS**) as trustee for FSS Product Services Trust. Aware Super Pty Limited (formerly FTC) holds units in FSS Product Services Trust on trust for Aware Super. Aware Super Pty Limited (formerly FTC) holds shares in First State Super Holdings Pty Ltd on trust for Aware Super. First State Super Holdings Pty Ltd in turn holds shares in FSSPAS.

12 During the Relevant Period, Aware:

- (a) operated an integrated financial planning and funds management business and acted as trustee of public offer superannuation funds and public offer

managed investment schemes, earning revenue through fees charged to members of registrable superannuation entities and managed investment schemes in respect of which it was the trustee or responsible entity;

- (b) was the trustee and registrable superannuation entity licensee in respect of the:
  - (i) StatePlus Retirement Fund (R1055535, Fund ABN 86664654341), through which all StatePlus superannuation products were offered. The StatePlus Retirement Fund had four divisions: the Personal Retirement Division (see paragraph 16 below), the Allocated Pension or Term Allocated Pension Division (see paragraph 16), the Tailored Super Division (see paragraph 19) and the Flexible Income Division (see paragraph 19); and
  - (ii) StatePlus Fixed Term Pension Plan (R1055542, Fund ABN 57583186748) (see paragraph 17). The StatePlus Fixed Term Pension Plan was however closed to new members as of October 2004;
- (c) had (and has) offices and employee financial planners located throughout Australia, and was (and is) headquartered in Sydney; and
- (d) through its employee financial planners offered and provided financial product advice<sup>1</sup> to some members of the StatePlus Retirement Fund and StatePlus Fixed Term Pension Plan.

13 During the Relevant Period, the StatePlus Retirement Fund and StatePlus Fixed Term Pension Plan had not less than 63,000 member accounts and \$11.4 billion of funds under management. As at 30 June 2018, the StatePlus Retirement Fund had total assets of \$17.86 billion,<sup>2</sup> and Aware was paid a trustee fee (exclusive of GST) of \$159.06 million in respect of that fund for the year ending 30 June 2018.<sup>3</sup>

## C. FACTS

### *The superannuation products offered by Aware*

14 During the Relevant Period, a member of the StatePlus Retirement Fund held what was from time to time described internally at Aware as a “bundled [superannuation] product” or an “unbundled [superannuation] product”.

15 Prior to around 2 April 2013, Aware only issued “**bundled products**” in the StatePlus Retirement Fund or Fixed Term Pension Plan (which was closed to new members as

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<sup>1</sup> As defined in s 766B of the Corporations Act.

<sup>2</sup> StatePlus Retirement Fund, *Financial Statements for the Financial Year Ended 30 June 2018*, 5.

<sup>3</sup> *Ibid* at 15.

of October 2004). A member holding a bundled product as at 1 July 2013 could remain in it after 1 July 2013.

- 16 A member holding a superannuation interest in the Personal Retirement Division, Allocated Pension or Term Allocated Pension Division of the StatePlus Retirement Fund held a bundled product.
- 17 During the Relevant Period, members of the StatePlus Fixed Term Pension Plan held a bundled product.
- 18 An “**unbundled product**” did not include advice services in consideration for the non-negotiable investment fee paid. Instead, to receive personal advice, a member holding an unbundled product was required to either enter into an ongoing advice services agreement or a one-off advice agreement with Aware, and pay a separate advice fee (see paragraph 22 below).
- 19 From around 2 April 2013, save in limited instances, Aware only issued *unbundled* products in the StatePlus Retirement Fund. A member holding a superannuation interest in the Tailored Super Division or the Flexible Income Division of the StatePlus Retirement Fund held an unbundled product.
- 20 In the remainder of this SOAF, a member of StatePlus Retirement Fund or StatePlus Fixed Term Pension Plan invested in a bundled product is referred to as a “**Bundled Client**”. A member invested in an unbundled product and who had entered into an ongoing advice services agreement with Aware is referred to as an **Unbundled Advice Client**. A reference to **Advice Clients** is a reference to:
- (a) Bundled Clients who received written disclosure from ASFAL on or after 1 April 2013 that they would be provided with an Annual Review Service; and/or
  - (b) Unbundled Clients who entered into an ongoing advice service arrangement that included provision of an Annual Review Service.

### *Fees for advice services*

- 21 Bundled Clients paid a single non-negotiable fee between around 0.99% per annum and 1.5% per annum of their funds under management in the superannuation product (depending on the investment options in which the member was invested) for services that included investment management, administration and advice services. Aware allocated 0.75% per annum to the notional cost to Bundled Clients of advice services in respect of the StatePlus Retirement Fund.
- 22 Unbundled Advice Clients paid a fee of 0.75% per annum of funds under management to Aware for advice services.
- 23 Throughout the Relevant Period, Aware accepted payment of the fees identified above from Advice Clients monthly in instalments, by charging relevant member superannuation accounts (each such payment, an **Accepted Payment**).

***The Annual Review Service and representations made***

- 24 One advice service offered by Aware was an ongoing review. An ongoing review was a review by an Aware employed financial planner of a member's financial plan, strategy and investments. It involved an Aware financial planner meeting with the member, investigating and considering a member's personal circumstances, needs and objectives, and providing financial product advice.
- 25 Personal advice from Aware financial planners was recorded in either a statement of advice or record of advice, depending on the nature of the advice given, as required by Part 7.7, Division 3, Subdivision C (Requirement for a statement of advice to be given) of the Corporations Act. The statement or record of advice was provided to the applicable member.
- 26 From April 2013, Aware used forms of statements of advice and records of advice that described Aware's advice services as including provision of an annual ongoing review by Aware financial planners (that annual review, an **Annual Review Service**). Examples of templates of such statements of advice and records of advice are STS.9521.0009.0001 and STS.9521.0005.4533. Such statements of advice and records of advice contained statements such as (bolding additional):

*Our one-fee approach is simple. Advice services include:*

- *A financial planner who will assist by developing a financial plan for your future. [StatePlus] does not charge you a separate financial planning advice fee or a separate fee for ongoing advice;*
- *Ongoing personalised financial planning advice and professional service into the future;*
- ***Annual reviews and updates of your investments** provide peace of mind that your retirement and investment plans remain on track;*
- *Asset allocation advice designed to suit your attitude to risk, personal resources and ongoing financial needs.*

- 27 The provision to members of the statements of advice and records of advice as described in paragraph 26 represented to those members who received them that they would be provided an Annual Review Service, for payment of the investment fee (the **Annual Review Representation**). Annual Review Representations made by Aware did not vary having regard to the amount of a member's funds under management. The Respondent contends and the Applicant disputes that this representation was qualified in circumstances where a client had positively declined an Annual Review Service.

28 An Annual Review Representation was contained in statements of advice or records of advice used by Aware in respect of:

- (a) unbundled products, prior to around February 2015;<sup>4</sup>
- (b) bundled products, prior to around March 2019.<sup>5</sup>

29 Additionally, forms of statements of advice or records of advice used by Aware expressly conveyed that an Aware financial planner would be in contact to organise the Annual Review Service (**Contact Representation**). The forms of statements of advice or records of advice contained statements such as (bolding additional):

*Next Steps*

*What I'll do*

- *Prepare the paperwork for you to sign*
- *Send you confirmation once your transactions are complete*
- ***Organise an annual review to make sure you stay on track with your financial plan***

(example of a Contact Representation)

***Your next review is due in 12 months. We will be in touch nearer the time to organise a meeting date that suits you.***

(further example of a Contact Representation)

30 Contact Representations were contained in forms of statements of advice used by Aware in respect of bundled products, between 5 February 2015 and 15 May 2016, and in forms of records of advice used by Aware in respect of bundled products, in the period up to at least 30 June 2018. The Respondent contends and the Applicant disputes that this representation was qualified in circumstances where a client had positively declined an Annual Review Service.

31 In each year during the Relevant Period, it was Aware's experience that approximately 15% of clients declined to receive an Annual Review Service. Approximately 20% of Advice Clients attended appointments with their allocated Planners more than once per year.

***Non-provision of Annual Review Services to Advice Clients***

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<sup>4</sup> Statements of advice: Annexure K to the s912C response dated 23 December 2019 **RSF.1000.0002.0003** – Rows 185-187; Records of advice: Annexure K to the s912C response dated 23 December 2019 **RSF.1000.0002.0003** – Rows 92-98; **STS.5003.0001.1018** (Compliance Monitoring Review Report – Financial Advice).

<sup>5</sup> Statements of advice: Annexure K to the s912C response dated 23 December 2019 **RSF.1000.0002.0003** – Rows 185-219; 230-235; Records of advice: Annexure K to the s912C response dated 23 December 2019 **RSF.1000.0002.0003** – Rows 92-165.

*Bundled Clients*

- 32 An Annual Review Representation was made in statements or records of advice provided to approximately 74% of Bundled Clients – which equates to approximately 40,000 Bundled Clients – who had an open account for at least one year during the Relevant Period, including 27,567 Affected Bundled Clients referred to in Annexure B to the Concise Statement.
- 33 From 1 April 2013 to early 2018, Aware did not provide an Annual Review Service to approximately 27,500 Bundled Clients who had received an Annual Review Representation on or after 1 April 2013, and had not, in an annual period thereafter, declined it, by failing to conduct at least one annual review of those client's investments over a 12 month period.
- 34 This involved a failure to provide approximately 39,681 Annual Review Services in that time to those Bundled Clients described as Affected Bundled Clients in the Concise Statement.
- 35 At least 17,500 of those Affected Bundled Clients received an Annual Review Representation for the first time in the Relevant Period on or after 21 August 2013. All failures to provide an Annual Review Service to them in the Relevant Period occurred in the Penalty Period.
- 36 In addition, 1,187 Bundled Clients, having received one or more Annual Review Representations, did not receive an Annual Review Service in a single annual period ending between early 2018 and August 2018.

*Unbundled Advice Clients*

- 37 It was a term of ongoing advice services arrangements with Unbundled Advice Clients that they be provided an Annual Review Service, unless the client positively declined it.
- 38 During the Relevant Period, Aware did not provide at least one Annual Review Service to approximately 9,000 Unbundled Advice Clients (of approximately 17,000 such clients in that period) who had not, in a relevant annual period, declined it, by failing to conduct at least one annual review of those client's investments over a 12 month period.
- 39 This was a failure to provide approximately 11,700 Annual Review Services in that period to those Unbundled Advice Clients.
- 40 At least 7,800 of those Unbundled Advice Clients became an Unbundled Advice Client on or after 21 August 2013, and all failures to provide an Annual Review Service to them in the Relevant Period occurred in the Penalty Period.

*Systems, procedures and controls*

- 41 During the Relevant Period, Aware maintained systems, procedures and controls that contributed to the non-delivery of Annual Review Services to its Advice Clients in that it:
- (a) applied a 14 month, not annual, cycle to provision of Annual Review Services;
  - (b) maintained service standards, procedures and financial incentives that did not require that all Advice Clients, irrespective of the amount of funds under management, be invited to receive (prior to 1 July 2017), and (prior to 1 July 2018) be provided with (or to have declined) an Annual Review Service annually.
  - (c) provided financial planner incentives for new business (new advice revenue) that, having regard to (b), once the financial planner had provided annual reviews to the requisite percentage (where applicable) of Advice Clients, incentivised its financial planners to prioritise new clients over providing Annual Review Services to all Advice Clients;
  - (d) maintained internal prospect appointment targets or ratios that, if met, left insufficient remaining financial planner capacity across Aware's financial planning network to conduct Annual Review Service appointments with all Advice Clients;
  - (e) did not conduct financial planner serviceability and capacity planning requiring provision of an Annual Review Service to all Advice Clients until early 2018;
  - (f) had operational practices for the allocation of clients to and retention of clients by Aware's financial planners that permitted clients not to be allocated to financial planners for the provision of Annual Review Services; and
  - (g) failed to identify, until early 2017, that Annual Review Representations had been made on and from 1 April 2013, and failed to incorporate required provision of Annual Review Services into Aware's systems, procedures and policies.
- 42 Aware progressively identified each of these matters on and from around June 2017 and took steps identified at paragraphs 116 and 118 to address them.

*Review cycle - application of a 14 month review period to an Annual Review Service*

- 43 Aware applied a 14 month review period to provision of Annual Review Services by its financial planners, not 12 months, by use of such a period in service standards (in respect of Bundled Clients) and in internal reporting (in respect of both Bundled Clients and Unbundled Advice Clients).
- 44 Since at least July 2012, Aware maintained service standards, agreed to by its management and board. These service standards were disseminated to financial



planners and were included within Aware’s financial planner incentive scheme terms and conditions as a gateway to eligibility for incentive payment.

45 A schedule of those service standards applying throughout the Relevant Period, as set out in Aware’s financial planner incentive scheme terms and conditions, is at **Schedule B**.

46 **Bundled Clients.** For Bundled Clients, the 14-month cycle was contained in service standards in place prior to 1 July 2017 required to be met by Aware’s employed financial planners, which, when requiring specified percentages of clients within funds under management cohorts to have received an Annual Review Service, did so by reference to a 14 month period.

47 By way of example, the service standards included within Aware’s financial planner incentive scheme operating as at 1 July 2013 to 30 June 2015 provided the following service standards in respect of Bundled Clients:<sup>6</sup>

| Relationship FUA (including partner) | Service standards   |
|--------------------------------------|---|
| > \$250K                             | 85% of clients to be reviewed within the last 14 months     |
| \$50K to \$250K                      | All clients to be invited annually                          |
| < \$50K                              | Review appointment available on request                     |
| All Clients                          | 65% of all clients to be reviewed within the last 14 months |

48 Until around June 2018, Aware prepared and used “Client Analysis Reports” for each regional office that measured the performance of planners, in respect of clients allocated to them.

49 The 14 month review cycle for Bundled Clients was embedded in those reports throughout the Relevant Period (including after 1 July 2017). A Bundled Client’s Annual Review Service was marked in them as “overdue” only after 14 months had passed. An individual planner’s percentage of allocated Bundled Clients reviewed – for example for the purposes of satisfaction of the service standard KPI within Aware’s planner incentive scheme (see paragraph 53(a)) – was measured using this report, by reference to a 14 month period.

50 **Unbundled Advice Clients.** For Unbundled Advice Clients, Aware’s service standards from 1 July 2014 were expressed to encourage, and then from 1 July 2015 require, financial planners to carry out an Annual Review Service annually, rather than on a 14 month basis.

51 Despite this, Aware’s Client Analysis Reports throughout the Relevant Period also expressed an Unbundled Advice Client’s Annual Review Service as “overdue” only

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<sup>6</sup> STS.9518.0001.0080 at .0085; STS.9518.0001.0117 at .0123.

after 14 months had passed. A planner could be recorded in the report by Aware as having no “overdue” Unbundled Advice Client reviews (and could be paid a financial incentive), even though he/she had Unbundled Advice Clients allocated who had not received an Annual Review Service for more than 12 months.

*Aware’s financial planner incentive scheme*

- 52 Throughout the Relevant Period, Aware maintained an incentive scheme for its financial planners. Planners could become eligible for incentives and bonuses, payable half-yearly, and could earn more than 50% of their total remuneration in incentive payments.
- 53 Aware’s service standards in place from time to time were an eligibility gateway for incentive payments under incentive scheme terms and conditions. The service standards were one of several key performance indicators (**KPIs**) that were required to be met in order for a planner to be eligible for incentive payments. The KPIs included:
- (a) a service standards gateway;
  - (b) file quality; and
  - (c) client satisfaction.
- 54 Throughout the Relevant Period, Aware’s financial planner incentive scheme did not require all Advice Clients allocated to a financial planner to have received (or declined to receive) an Annual Review Service in order for that planner to be eligible for an incentive payment. Instead, as noted above, that scheme required that certain percentages of some cohorts (determined by funds under management) of Advice Clients receive reviews within specified time frames.
- 55 For the years ending 30 June 2013 to 30 June 2018 Aware’s financial planner incentive scheme terms and conditions required new advice revenue targets to be met in order for a planner to be eligible for an incentive. It also applied a factor that increased an incentive depending on the amount of new advice revenue gained for Aware by a planner in the incentive period that was over the minimum threshold.
- 56 “New advice revenue” consisted of new funds under Aware’s management on which a fee for advice services was charged. As such, it included both additional funds contributed by existing Advice Clients, as well as funds contributed by new Advice Clients. Gaining new advice revenue usually required financial planners to conduct appointments with “prospects”: people who were not Advice Clients, although new investment in products by existing clients (for example: by directing inheritance into superannuation) could result in ‘new advice revenue’. Throughout the Relevant Period, between around 15-20% of planner appointments with prospective clients resulted in new advice revenue for Aware.

- 57 Aware’s financial planner incentive scheme encouraged planners to spend a portion of their time on seeking new advice revenue to be eligible for, and to increase the size of, financial incentives. This encouraged meeting prospective clients instead of servicing 100% of their allocated Advice Clients.<sup>7</sup>
- 58 In each year of the Relevant Period, between approximately 85% and approximately 100% of Aware’s financial planners were found by Aware to have met the service standard eligibility gateway for an incentive.
- 59 During the Relevant Period Aware could and did from time to time override the service standards gateway KPI to pay incentives that would not have otherwise been payable. Exemptions permitted financial planners to receive incentive payments despite Advice Clients not being provided with or being offered an Annual Review Service.<sup>8</sup>

*Financial planner capacity and capacity planning and monitoring*

- 60 Aware had between approximately 137 to 166 employed financial planners in offices located across Australia during the Relevant Period. Offices were grouped into regions, and a corporate head office was located in Sydney.
- 61 In around March 2015, Aware established a direct advice hub, also known as a “Client Hub”, in Wollongong NSW to provide some telephone-based advice services.
- 62 Average individual planner total appointment capacity at Aware varied from time to time. That appointment capacity was used to undertake appointments with existing clients, including Annual Review Services, and “prospect” appointments. Average individual planner total appointment capacity at Aware varied from time to time from between 6 and 10 appointments conducted per week (based on a 44 week year).<sup>9</sup>
- 63 Prior to around April 2018, capacity of Aware’s financial planners was forecast and determined at a regional level by regional managers and individual planners, using means such as Client Analysis Reports, and based upon service standards then existing, which did not include mandatory delivery of an Annual Review Service to all Advice Clients annually.
- 64 Client Analysis Reports summarised the client book of each financial planner in each regional office and measured the performance of each planner against the applicable service standards in place at the time, categorised by member funds under management.

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<sup>8</sup> Service Review & Enhancements Project Update December 2017 - **STS.8000.0003.3166, 3256-3273** at **3257** [2.3].

<sup>9</sup> StatePlus’s 912C response dated 29 April 2020 **RSF.1003.0001.0002**, Question 11 response.

- 65 These reports for individual Aware offices throughout the Relevant Period indicated that there were clients allocated to those offices who had not received an Annual Review Service within the previous 12 or 14 month period.
- 66 Serviceability and planner capacity planning in connection with the required delivery of Annual Review Services to all Advice Clients who did not decline the review commenced on 23 February 2018.<sup>10</sup>
- 67 In around May 2018 Aware developed internal business rules – “Service Delivery Principles” – that required that all Advice Clients must both be invited to an Annual Review Service and must either attend or positively decline the same in each 12 month period. These were implemented as a service standard KPI within Aware’s financial planner incentive scheme only as of 1 July 2018.
- 68 From around June 2018, Aware forecasted, reported and managed planner capacity around an obligation to provide an Annual Review Service to all Advice Clients who did not decline one. It did this using its “Capability and Serviceability Model”, “Capability and Serviceability Planning Manual” and “Ongoing Advice Service Delivery Operating Manual” (incorporating the “Service Delivery Principles” described above) operating together with internal tracking, service delivery and auditing reports.
- 69 Prior to around June 2018, Aware did not have an internal monitoring system permitting its management to track, across Aware’s business, at a given time, the % of Annual Review Services that were required to be provided and that were planned, and any shortfall in the Annual Review Services that could be provided, by reference to a service standard requiring all Advice Clients to have received an Annual Review Service (or decline one) within a 12 month period.

*Prospects appointments: allocation of capacity to meeting non-Advice Clients*

- 70 During the Relevant Period, Aware management reporting tracked and recorded the average number of appointments that financial planners held, “prospects” appointments targets and prospects appointment to review appointment ratios and targets. This was done in Performance Management Reports and CEO or Managing Director Reports and provided to Aware's Board.
- 71 In the Relevant Period, Aware’s target prospect to review appointment ratio was either 60:40 or 50:50 (at all times prior to 31 July 2016) and approximately 35:65 thereafter. At all times in the Relevant Period Aware’s financial planner incentive scheme incentivised its financial planners to conduct prospect appointments.

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<sup>10</sup> STS.8000.0003.0791, 0862-0876 at 0864, [6.3].

72 Aware maintained the following budgeted overall prospects appointments targets for its financial planning network:

- (a) Aware's Performance Management Report for the period ending 31 August 2015 reported planners had a target of 518 appointments per year with a prospect to review appointment ratio of 60:40;<sup>11</sup>
- (b) Planners continued to have a target of 518 appointments per year with a prospect to review appointment ratio of 60:40 until April 2016;<sup>12</sup>
- (c) In Aware's Performance Management Report for the period ending 31 March 2016 the targeted number of planner appointments per year was adjusted to 495 and the prospect to review appointment ratio amended to 50:50;<sup>13</sup>
- (d) Aware's Performance Management Report for the period ending 30 September 2016 reported planners had a target of 11 planner appointments per week with each planner being responsible for 431 clients on average. At that time, Aware's target prospects to review appointment ratio was 34:66;<sup>14</sup>
- (e) The target of 11 planner appointments per week continued until at least May 2017 and, during that period, Aware's target prospects to review appointment ratio was 35:65;<sup>15</sup>
- (f) Aware's year-to-date planner appointments budget for the period ending January 2018 was 30,415 (9,088 prospects: 21,327 review), however Aware's planners were 5,892 appointments short of their budget (3,578 prospect: 2,314 review). At that time, Aware's target prospects to review appointment ratio was 35:65;<sup>16</sup>
- (g) Aware's planner "Appointments Analysis" for the full 2018 financial year reported a budget of 66,550 appointments (23,217 prospects: 43,333 review), however Aware's planners were 9,837 short of their budget (7,706 prospects: 2,131 review). At that time, Aware's target prospects to review appointment ratio was 35:65.<sup>17</sup>

73 During due diligence for Aware Super Pty Ltd's acquisition of Aware which occurred in June 2016, Aware management then in place stated that Aware:<sup>18</sup>

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<sup>11</sup> STS.8000.0002.2785, 2816-2845 at 2818.

<sup>12</sup> STS.8000.0002.2785, 2816-2845 at 2818; STS.8000.0002.3059, 3109-3123 at 3111; STS.8000.0002.3565, 3635-3649 at 3637; STS.8000.0002.3979, 4030-4043 at 4032; STS.8000.0002.4880, 4907-4920 at 4909.

<sup>13</sup> STS.8000.0002.6060, 6083-6096 at 6085.

<sup>14</sup> STS.8000.0003.1505, 1546-1558 at 1550.

<sup>15</sup> STS.8000.0003.2818, 2847-2858 at 2849; STS.8000.0002.8451, 8491-8504 at 8493; STS.8000.0003.1736, 1808-1822 at 1812; STS.8000.0002.7780, 7870-7875 at 7871.

<sup>16</sup> STS.8000.0003.0527, 0584-0602 at 0587.

<sup>17</sup> STS.9508.0001.4351, 4633-4653 at 4638.

<sup>18</sup> Project Mango DD STS.9005.0003.8121 at 8133 and 8135.

- (a) had an operational target to limit servicing of “life advice” to 50% of collective adviser capacity;
- (b) was unwilling to reduce new business to ensure that review appointments for current clients occurred.

74 Throughout the Relevant Period, Aware maintained overall targets or ratios of “prospect” appointments to review appointments for its financial planners (at least 50:50 prior to 31 July 2016; approximately 35:65 thereafter). If met, these targets left insufficient remaining financial planner appointment capacity across Aware’s planning network to conduct review appointments with all Advice Clients.

#### *Client hub*

75 In October 2017, Aware management identified that expansion of Aware’s telephone advice capability, at its “client hub”, may assist to provide Annual Review Services to Advice Clients. In October 2017, the client hub completed around 70 Annual Review Services for Bundled Clients.<sup>19</sup>

76 In around December 2017, Aware anticipated increasing the number of financial planners at the client hub, in order to provide Annual Review Services to Advice Clients who were to be re-allocated from other Aware offices to the client hub.<sup>20</sup> This increase in planners occurred over the course of 2018.

77 In March 2018, Aware’s board was informed by management that 5 further financial planners were to be recruited to the client hub and 10,000 Advice Clients were to be re-allocated to it to be contacted for appointments.<sup>21</sup>

78 The client hub had limited planner appointment capacity to provide Annual Review Services to Advice Clients that were not able to be serviced in Aware’s other office locations at the end of the Relevant Period. Around 193 Annual Review Services of Bundled Clients were completed in the client hub in June 2018, of which 154 had been removed from other Aware offices.<sup>22</sup>

#### *Client allocation and limits*

79 Before around April 2015, clients were initially allocated to financial planners manually at an individual office level. For example, Aware’s Newcastle office used a “flip chart” with each page bearing the name of a planner in that office. If a planner did not have capacity they could remove themselves from the flip chart. New planners could have their name included on the flip chart twice. Each time a new Aware client booked a financial advice appointment, the client would be allocated to the planner

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<sup>19</sup> Financial Planning Report 24 May 2018, Table **STS.7000.0003.0921, 1061-1068** at **1065**.

<sup>20</sup> Financial Planning Report 7 December 2017 **STS.8000.0003.3166, 3295-3298** at **3298**.

<sup>21</sup> Service Review and Enhancement Project Update report 22 March 2018 **STS.8000.0003.0791, 0862-0876** at **0864**, [6.3].

<sup>22</sup> Financial Planning Report 25 October 2018 **STS.9508.0001.3924, 4153-4162** at **4160**.

whose name was on the flip chart. Once the appointment was booked, the page was flipped so that the next new client would be allocated to a different planner.

- 80 On and from April 2015, Aware introduced new “customer relationship management” software that applied an algorithm, considering metrics including the number of prospective and annual review appointments that could be booked with each planner, to allocate a new client to a planner.
- 81 Before 2018, if an existing Aware client had to be reallocated to another planner because, for example, the planner ceased employment, or was on leave for several months, a regional manager would be required to re-allocate that client. Approximate attrition rate for loss of financial planners was 15%-20% per year.
- 82 Throughout the Relevant Period Aware did not ensure that all Advice Clients were reallocated to a planner following an Aware financial planner leaving the organisation; or where an Aware financial planner was unavailable for an extended period; or for other operational reasons, such as promotions and transfers of roles.<sup>23</sup> Advice Clients could become orphaned (ie without any allocation to a financial planner).
- 83 The processes by which Aware clients were allocated and reallocated to financial planners throughout the Relevant Period were in some cases ineffective and, in many cases, undocumented.<sup>24</sup> This contributed to Advice Clients not being serviced within an annual period, particularly where capacity constraints existed with remaining planners in an office location or if hiring of replacement planners was delayed.<sup>25</sup>
- 84 Before implementation of its centralised serviceability and planning model from around April 2018 (see paragraph 118(g)), Aware did not have limits in place to ensure that Aware’s financial planners were only allocated at any one time the number of clients that they could reasonably be expected to provide Annual Review Services to. Aware agrees that from time to time prior to April 2018 individual planners were, as a result, allocated more Advice Clients than they could reasonably be expected to provide Annual Review Services to.

*Other*

- 85 Aware’s risk and compliance procedures did not ensure that provision of Annual Review Services to all Advice Clients was required annually by both service standards and financial planner incentives until 1 July 2018.
- 86 No internal Aware document recorded operative, business-wide policies or procedures to identify all Bundled Clients entitled by reference to Annual Review Representations

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<sup>23</sup> Mark Lennon FSRC Witness Statement **FSS.0001.0001.0157** at [534(c)].

<sup>24</sup> Aware’s 912C response dated 18 February 2020 **RSF.0019.0002.0002** – response to Question 4(d)-(e).

<sup>25</sup> Service Review and Enhancement Report – December 2017 – **STS.8000.0003.3166, 3256-3273** at **3257** and **3260**; Financial Planning Report – December 2017- **STS.8000.0003.3166, 3295-3298** at **3297**.

to receive an Annual Review Service on or after 1 April 2013, before Aware's client remediation methodology in February 2018.

**D. ADMISSIONS**

87 An Annual Review Service was a financial service within the meaning of s 12BAB(1)(a) and/or (g) of the ASIC Act and s 766A(1)(a) of the Corporations Act during the Relevant Period.

88 Each Annual Review Representation made to a Bundled Client in a statement of advice or record of advice on or after 1 April 2013 was a statement and a representation made in a "disclosure document or statement" within the meaning of that term in s 953A of the Corporations Act.

89 By each Accepted Payment, Aware in trade or commerce accepted payment or other consideration for the provision of Annual Review Services as financial services within the meaning of s 12DI(3)(a) of the ASIC Act.

90 At the time of each Accepted Payment during the Penalty Period there were reasonable grounds to believe that Aware would not be able to provide Annual Review Services to all such Advice Clients within the period specified by it (a period of 0-12 months aligning to the applicable anniversary of the date of a Bundled Client's Annual Review Representation or an Unbundled Advice Client's opt-in to receiving ongoing advice).

91 By accepting each Accepted Payment referred to in paragraph 90, Aware contravened s 12DI(3) of the ASIC Act.

92 By its conduct in each of:

- (a) contravening s 12DI(3) of the ASIC Act as referred to above;
- (b) failing to provide Annual Review Services at least once to not less than 25,300 Advice Clients in the Penalty Period; and
- (c) continuing and maintaining throughout the Penalty Period systems, procedures and controls and operational and compliance systems that did not ensure compliance with representations made and obligations to all Advice Clients in respect of the Annual Review Services,

Aware breached its obligation to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

93 By each occasion that Aware contravened s12DI(3) of the ASIC Act, Aware breached its general obligation to comply with the financial services laws in contravention of s 912A(1)(c) of the Corporations Act.



94 At all times during the Relevant Period, Aware’s AFSL required that Aware establish and maintain compliance measures that ensured, as far as is reasonably practicable, that it complied with the provisions of the financial services laws.

95 By its conduct referred to in paragraph 92(c) Aware contravened s 912A(1)(b) of the Corporations Act by failing to establish and maintain compliance measures that ensured, as far as is reasonably practicable, that it complied with the provisions of the financial services laws.

## **E. OTHER RELEVANT MATTERS**

96 During the Relevant Period, approximately 36,000 Advice Clients paid Aware fees for ongoing advice service and did not receive at least one Annual Review Service.

97 During the Penalty Period, at least 25,300 Advice Clients (made up of at least 17,500 Affected Bundled Clients; and 7,800 Unbundled Advice Clients) paid Aware fees for ongoing advice service and did not receive at least one Annual Review Service.

98 Aware has remediated approximately \$104.8 million to Advice Clients who were not provided with Annual Review Services since 1 April 2013.

### ***Aware’s identification and investigation of fee for no service conduct***

99 Aware’s directors discussed an ASIC announcement on the topic of fees for no service in respect of ANZ in a board meeting on around 24 April 2015. Aware’s FY16 Business Plan dated 21 May 2015 contained an initiative entitled, “Reviewing ongoing advice clients”.<sup>26</sup>

100 Aware Super Pty Limited's acquisition due diligence prior to effecting its acquisition of Aware in June 2016 identified that Annual Review Services may not have been provided to certain Bundled Clients.

101 After the acquisition by Aware Super of Aware in June 2016, the Aware board was replaced. Aware management, after the release in October 2016 of ASIC Report 499 *Financial advice: Fees for no service*, commenced an investigation of potential fee for no service conduct, including a review of business practices and service provision to clients.

102 An initial assessment by management was reported to the Aware board on 6 December 2016.<sup>27</sup> That review found, and the board of Aware Super Pty Ltd was aware, that:

- (a) in the year to November 2016, Annual Review Services had not been provided to about 15,800 members, of whom 14,597 were Bundled Clients with total funds under management of more than \$1.5bn, and who, at 0.75% of funds under management, paid \$15.4m for advice services;

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<sup>26</sup> STS.5003.0001.1031.

<sup>27</sup> STS.8000.0003.2818, 2927-2940 at 2927.

- (b) the majority of Bundled Clients with more than \$150,000 invested received an Annual Review Service, consistent with Aware’s financial planner incentives, but more than 3,800 Bundled Clients with less than \$50,000 funds under management and more than 5,000 Bundled Clients with between \$50,000 and \$150,000 funds under management had not received an Annual Review Service;
  - (c) Aware would require an extra 21 financial planners across its network to provide an Annual Review Service to Bundled Clients who had not received one.
- 103 The Aware risk and compliance team, aided by personnel from Aware Super Pty Ltd’s compliance team, then undertook an initial review of historic representations made to clients and identified that:
- (a) some Bundled Clients who received a written advice document provided by Aware were told in the advice document that the member would be invited to receive an Annual Review Service with an Aware financial planner; and
  - (b) some members referred to in (a) had not been subsequently invited to receive an Annual Review Service.
- 104 By around 27 April 2017, Aware had identified the Annual Review Representation referred to in paragraph 26 above and a Contact Representation referred to in paragraph 29 as having been made to Bundled Clients, and that Aware had committed to provide an Annual Review Service when making the Annual Review Representation.
- 105 At around this time Aware created a “Service Enhancement Project” (later styled the “Service Review and Enhancements Project”) initially tasked with designing and then building a commercially sustainable ongoing service model that effectively controlled the risk of fee for no service failures, and with identifying matters that may have contributed to clients not receiving reviews on a regular basis. The Service Review and Enhancements Project met fortnightly and reported monthly to Aware’s board.
- 106 On 12 May 2017, Aware provided a breach report to ASIC (**First Breach Report**) in relation to fee for no service conduct and Bundled Clients.<sup>28</sup>
- 107 In its updates to the Aware board from April 2017, the Service Review and Enhancements Project noted matters contributing to not all Bundled Clients being reviewed as including:
- (a) lower net worth Bundled Clients were not required to be proactively contacted to arrange regular reviews and some Bundled Clients may not have received invitations for Annual Review Services;

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<sup>28</sup> StatePlus notification to ASIC dated 12 May 2017 (First Breach Report) **STS.9000.0012.1647**.

- (b) a 14 month review period;
- (c) exited financial planners - that there had been no documented or consistent process in the financial planning network to appropriately transfer a financial planner's clients to another financial planner when they left Aware.

- 108 Aware, on and from around May 2017, recognised that there would be Advice Clients who would not thereafter be provided Annual Review Services while Aware took steps to evaluate and improve its processes and systems, including service standards, internal reporting and information technology systems. Aware decided it would remediate those Advice Clients when Annual Review Services were not provided.
- 109 In this period, Aware, through its Service Review and Enhancements Project team, developed a client remediation methodology for Bundled Clients, engaging KPMG to assist it and provide independent assurance.
- 110 From July 2017 to February 2019, Aware provided ASIC with reports in relation to remediation provided to Advice Clients in respect of Advice Services that were not provided to them. The first report included, amongst other things, an update regarding Aware's client remediation methodology and a review of the circumstances for each potentially affected client.<sup>29</sup>
- 111 On 7 December 2017, the Aware Board approved the establishment of the Remediation Review team as part of the Service Review and Enhancements Project, to commence detailed, manual review of client data related to the provision of annual reviews to Bundled Clients. From around late January 2018, that review commenced.
- 112 Reviewers used a "Service Review and Enhancements Reviewer Handbook" prepared by Aware to carry out manual reviews of Bundled Client files to determine whether an Annual Review Representation had been made, and whether the Bundled Client had received or declined an Annual Review Service in each year thereafter.
- 113 On 23 August 2018, Aware provided a breach report to ASIC (**Second Breach Report**) in relation to fee for no service conduct and Unbundled Advice Clients.<sup>30</sup>
- 114 Aware, through its Service Review and Enhancements Project team, developed a client remediation methodology for Unbundled Advice Clients, engaging KPMG to assist it and provide independent assurance.<sup>31</sup>
- 115 Reviews of Unbundled Advice Client files were conducted from around September 2018.

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<sup>29</sup> STS.5003.0001.1276.

<sup>30</sup> StatePlus notification to ASIC dated 23 August 2018 (Second Breach Report) RSF.0003.0001.0497.

<sup>31</sup> Client Remediation Methodology Annual Review For Ongoing Advice Clients Invested in Unbundled Products (May 2019) RSF.1000.0001.0074.

*Development of systems, processes and control improvements*

116 From early 2017, Aware:

- (a) introduced a Financial Advice Monitoring and Supervision Handbook setting out its methodology for the monitoring and supervision of its financial planners; and
- (b) began implementing the StatePlus File Review Program. That program monitored compliance with legislative and licensee requirements regarding the core advice-related services provided by its financial planners. It covered enquiries and complaints handling; incidents and breach management; event-based advice fee management and the investigation of fee for no service matters

117 From around June 2017, Aware progressively took steps to evaluate and improve its processes and systems, including service standards, internal reporting and IT systems, to control the risk of fee for no service conduct. Non-provision of Annual Review Services to Advice Clients occurred thereafter (including those referred to at Concise Statement [14]) including, in smaller numbers, after the Relevant Period.

118 Measures undertaken by Aware included:

- (a) changing the service standards applying to financial planners to require:
  - (i) as of 1 July 2017, all Advice Clients to be invited annually to an Annual Review Service regardless of funds under management; and
  - (ii) as of 1 July 2018, all Advice Clients to have received or declined an Annual Review Service;
- (b) establishing, in December 2017, a fixed annual review anniversary date for each Bundled Client in Aware's information technology systems and standardising the capture of client annual review invitations and responses to permit clearer establishment of provision or decline of an Annual Review Service;
- (c) from December 2017, the provision of data spreadsheets to the financial planning network to allow it to more effectively manage the timing of client appointments—servicing busier regional offices by either redeploying financial planners or servicing clients by telephone. These spreadsheets contained data filtered by office, the data having been extracted from the CAR and the Service Review and Enhancement Project. This was an interim measure while automated reporting was being developed, and was a precursor to the Service Delivery Reports;
- (d) also from around April 2018, the circulation of Annual Review Business Rules to the financial planner network through monthly dashboards, which includes requirements that, among other things:

- (i) all clients paying an ongoing advice fee must be invited for an annual review;
  - (ii) the due date of an annual review was to be a fixed date for the duration of the client relationship, with all reviews having to be held in the 12 months prior to the due date; and
  - (iii) where a client was invited for a review but declined, that decline must clearly be documented in CRM prior to the due date, including any reason provided for the decline;
- (e) amending, from 1 July 2018, Aware’s financial planner incentive scheme terms and conditions to remove new advice revenue targets for incentive eligibility;
  - (f) from early 2018, documenting business practices and processes in the financial planning network to transfer a planner’s clients when they left Aware, and, in around October 2018, implementing attestation of allocation of clients to a financial planner;
  - (g) from around February 2018, preparation of centralised serviceability and capacity planning models for delivery of an Annual Review Service to all Advice Clients, introduced in around April 2018;
  - (h) establishing and increasing financial planner capacity in “direct advice (telephone) / client hubs” to conduct Annual Review Services and allocating Advice Clients to those hubs, which allocation commenced on and from around May 2018;
  - (i) introducing, on 29 June 2018, an “Ongoing Advice Service Delivery Operating Manual” for planners that took into consideration updated “Service Delivery Principles” that required delivery of Annual Review Services to all Advice Clients;
  - (j) around June 2018, when Aware’s “Capability and Serviceability Model”, “Capability and Serviceability Planning Manual”, and “Ongoing Advice Service Delivery Operating Manual” were operating together, the development and use of “Service Delivery Reports” (Service Delivery Scheduling, Service Delivery Audit, Service Delivery Tracking) which reported to Aware management:
    - (i) the number of Advice Clients due for an Annual Review Service;
    - (ii) review status;
    - (iii) due dates;
    - (iv) invitation status,

at corporate, regional office and individual planner levels, that allowed Aware management to monitor whether action needed to be taken to prevent failure to

deliver Annual Review Services in a then current annual period. The Capacity and Serviceability Model made it clear to Regional Managers that they were to supervise, monitor and coach financial planners to constantly assess their ability to deliver quality advice to ongoing advice clients as well as their capacity for meeting with new clients. It aimed to identify peak periods in review appointments and to manage any support capacity required to ensure that service delivery was uninterrupted;

- (k) In August 2018, Aware amended the Ongoing Advice Service Delivery Operating Manual to introduce an investigative process, with a spreadsheet issued to each regional office on a monthly basis. That monthly spreadsheet highlighted clients who received services that appeared to fail Service Standards and that required investigation. It provided instructions on how to exhaust all avenues to contact that office's non-responsive clients so as to carry out a review;
- (l) In November 2018, Aware commenced the 'Unbundling Project'. The Unbundling Project restructured the Bundled Products so that advice fees and management fees were charged separately; the total cost of the Bundled Product, including advice fees, would not change; Bundled Clients could opt-out of receiving advice services and could 'switch off' advice fees; and a Fee Disclosure Statement and an opt-in renewal was required. The Unbundling Project was implemented in November 2019;<sup>32</sup>
- (m) In June 2019, Aware introduced the Practice Management Tool (eventually launched in December 2019). The Practice Management Tool incorporated CRM data and management information system reports, and set out at regional, office and planner levels: the number of clients to receive an annual review; appointments booked; clients not yet booked or requiring an annual review (for example, because the annual review had been completed before the due date); network and planner available work days; CRM generated appointment limits; fixed appointment capacity to complete service delivery; and remaining appointment capacity. The Practice Management Tool was used to understand service delivery, model planner leave, set appointment limits and improve visibility of capacity for appointment bookings, as well as manage the percentage of prospective and annual review appointments.

119 Aware made a number of changes to its compliance and regulatory function more broadly during the Relevant Period, including:

- (a) from May 2015, the introduction of a series of policies, practice notes and procedures dealing with complaints, including how to respond to, acknowledge, resolve and investigate complaints and how complaints should be internally reported;

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<sup>32</sup> StatePlus's 912C response dated 29 April 2020 **RSF.1003.0001.0002**.

- (b) from December 2016:
- (i) when it established a working group to control the emerging risk of fee for no service failures by increasing proactive services to pre-FOFA clients; and
  - (ii) the introduction of a Compliance Monitoring Practice Note, which outlined the methodology for monitoring the effectiveness of controls designed to mitigate and minimise compliance risk across all capacities of the business, including financial advice; and
- (c) from February 2018, the introduction of a new Learning and Development Policy, which outlined internal and external training for employees, who were required to complete modules on various topics every 12 or 24 months.

*Aware's remediation program*

- 120 After the date of Aware's First Breach Report, Aware representatives attended meetings with ASIC approximately 12 times. These meetings were often conducted by telephone. At these meetings, Aware provided general updates to ASIC on the progress of the development of its service review and plans for review and remediation of clients. These meetings continued from 4 July 2017 until 29 March 2019.
- 121 In November 2017, Aware engaged KPMG to provide independent assurance as to the performance of Aware's client remediation methodology in respect of Bundled Clients. In 2018, KPMG was similarly engaged in respect of Unbundled Advice Clients. In each case, the scope of the engagement included assurance as to:<sup>33</sup>
- (a) identification of potentially affected clients;
  - (b) identification of all clients eligible for remediation;
  - (c) the making of remediation payments and communication to clients.
- 122 KPMG issued 4 reports – 2 in relation to Bundled Client remediation, one of which was reissued, and 2 in relation to Unbundled Advice Client remediation – together with a number of status update reports for particular tranches.
- 123 From March 2018, Aware commenced making remediation payments to Bundled Clients, in 9 tranches, for the period from 1 April 2013 to 31 August 2018 (one tranche being for the period to 31 August 2018). Aware informed Bundled Clients by letter of the repayments made, informing them that:

*As a StatePlus client who has invested in at least one of the following products: Allocated Pension Fund, Term Allocated Pension Fund, Investment Funds – Class A, Fixed Term Pension Plan, and/or Personal*

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<sup>33</sup> Client Remediation Methodology – Annual Review for Ongoing Advice Clients **RSF.1000.0001.0022** at **0029**.

*Retirement Plan (Products), you were charged a Product fee which entitled you to receive a range of StatePlus services including an annual review of your investments.*

*A review of our records has shown that, for at least one year, you did not meet with your financial planner for an annual review of your investments. This was an oversight on our part for which we sincerely apologise.*

*To make this up to you, we're providing you with a repayment of \$[ ]. The way in which we have calculated this is set out in the attachment to this letter.*

- 124 Aware has made remediation payments of \$79,641,558 to 27,567 Bundled Clients. Aware has also made remediation payments to 1,187 Bundled Clients who did not receive an Annual Review Service in a single annual period ending between early 2018 and August 2018.
- 125 From around June 2019 Aware commenced making remediation payments to Unbundled Advice Clients.
- 126 Aware made remediation payments of \$23,855,805 to 9,026 Unbundled Advice Clients.
- 127 In total, Aware has made remediation payments of \$104.8m to Advice Clients in respect of Annual Review Services that were not provided by it on or after commencement of the Relevant Period.
- 128 Remediation was not paid to Bundled Clients or Unbundled Advice Clients:
- (a) for years in which the relevant Bundled Client declined the offer of an Annual Review Service and there was evidence of the declinature;
  - (b) who had previously received compensation for the year they did not receive an Annual Review Service. Where the client had received a portion of advice fees, the historical compensation was netted off against the calculated remediation amount;
  - (c) at the time of paying the remediation no longer had an account with Aware and the total remediation payable was less than \$20;
  - (d) for some years in which no Annual Review Service occurred, where Aware attributed an Annual Review Service to these years, for clients:
    - (i) who had two or more Annual Review Service appointments which occurred within one year, with one of those appointments being within 31 days of the last or first date of a year in which there was no annual review. In this circumstance, the Annual Review Service which occurred within 31 days of the year in which the client would



otherwise not have received an Annual Review Service would be attributed to the year in which there was no Annual Review Service;

- (ii) who had two or more Annual Review Service appointments which occurred within one year and the subsequent year(s) each had an annual review appointment occurring within 31 days of the subsequent year, leading to a final year where there was no annual review. In this circumstance, the Annual Review appointments occurring within 31 days of the subsequent year would be applied to each subsequent year resulting in the last-most annual review being deemed to have applied to the first year in which the client would otherwise not have received an Annual Review; and
- (iii) one or more Annual Review Services occurred within 31 days after the previous year for the client where there was no annual review. In this circumstance, the Annual Review Service which occurred within 31 days of the previous year could be attributed to the previous year.

129 Aware funded payments to Advice Clients pursuant to its remediation program:

- (a) as to approximately \$60m, by the issuance of additional share capital to its then sole shareholder FSSSP Financial Services Pty Ltd (ABN 99 612 452 598), a wholly owned subsidiary of Aware Super Pty Ltd. FSSSP funded that purchase through issuing share capital to its parent, Aware Super Pty Ltd; and
- (b) as to approximately \$45m, from retained earnings which would otherwise have been available to declare as dividends to FSSSP Financial Services Pty Ltd.

## **F. OTHER FACTS RELEVANT TO RELIEF**

### *Aware's financial position*

130 During each of the 2013 to 2018 and 2021 financial years Aware's total revenue, operating income before expenses, gross profit and net profit were as follows.

|      | <b>Revenue</b> | <b>Expenses</b> | <b>Profit before tax</b> | <b>Net profit</b> |
|------|----------------|-----------------|--------------------------|-------------------|
| 2013 | 123,847        | (78,844)        | 45,003                   | 31,420            |
| 2014 | 143,137        | (89,285)        | 53,852                   | 37,638            |
| 2015 | 165,040        | (100,756)       | 64,284                   | 47,009            |
| 2016 | 175,861        | (118,069)       | 57,792                   | 40,672            |

|      |         |           |          |          |
|------|---------|-----------|----------|----------|
| 2017 | 191,090 | (129,364) | 61,726   | 43,176   |
| 2018 | 197,058 | (234,875) | (37,817) | (26,477) |
| 2021 | 136,908 | (173,441) | (36,533) | (36,533) |

131 Aware Super Pty Limited's (formerly FTC) revenue was:

- (a) for the year ending 30 June 2013, \$1,153,283;
- (b) for the year ending 30 June 2014, \$1,460,798;
- (c) for the year ending 30 June 2015, \$1,501,643;
- (d) for the year ending 30 June 2016, \$1,745,220;
- (e) for the year ending 30 June 2017, \$2,085,696;
- (f) for the year ending 30 June 2018, \$2,218,411; and
- (g) for the year ending 30 June 2021, \$1,722,039.

***Transfer of the StatePlus Retirement Fund and winding up of the Fixed Term Pension Plan***

132 Further:

- (a) on 30 June 2019, members and assets of the StatePlus Retirement Fund were transferred by way of a successor fund transfer to Aware's ultimate parent, Aware Super Pty Ltd (ACN 003 742 756), in its capacity as trustee of Aware Super;
- (b) in May 2020, the StatePlus Fixed Term Pension Plan was wound up;
- (c) on 26 August 2020, Aware applied to the Australian Prudential Regulation Authority to cancel its registrable superannuation entity licence as it was no longer the trustee of a superannuation entity and did not then hold superannuation assets; and
- (d) from around May 2020, Aware has conducted a financial planning business only.

***Co-operation***

133 Throughout the course of ASIC's investigation and these Proceedings, Aware has responded to all requests for information and all notices seeking information, books or records. The admissions made by Aware give rise to a more efficient resolution of the Proceeding than a contested trial.

***Contribution***

134 Aware provided remediation to Advice Clients prior to commencement of these Proceedings, has made admissions in this SOAF prior to a contested trial and has consented to the relief set out in the proposed orders.

***No prior contraventions***

135 Aware has not previously been found by the Court to have contravened a provision of the ASIC Act or Chapter 7 of the Corporations Act.

Date: 2 December 2021

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



.....

Andrew Maher  
Partner, Allens  
Lawyer for the Defendant

## SCHEDULE A

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| 2.  | 26 and 28(b)    | Template Statement of Advice  | STS.9521.0009.0001 |
| 3.  | 26 and 28(b)    | Template Record of Advice   | STS.9521.0005.4533 |
| 4.  | 28(a) and 28(b) | Annexure K StatePlus supplementary response dated 23 December 2019  | RSF.1000.0002.0003 |
| 5.  | 28(a)           | FSS Board Paper entitled 'Compliance Monitoring Review Report - Provision of Ongoing Fee Offering' Period of review 1 July 2015 – 30 September 2016 | STS.5003.0001.1018 |
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| 27. | 28(b)    | Template Statement of Advice | STS.9521.0008.3005 |
| 28. | 28(b)    | Template Statement of Advice | STS.9521.0008.3507 |
| 29. | 28(b)    | Template Statement of Advice | STS.9521.0008.4009 |
| 30. | 28(b)    | Template Statement of Advice | STS.9521.0008.4510 |
| 31. | 28(b)    | Template Statement of Advice | STS.9521.0008.5011 |
| 32. | 28(b)    | Template Statement of Advice | STS.9521.0008.5512 |
| 33. | 28(b)    | Template Statement of Advice | STS.9521.0008.6013 |
| 34. | 28(b)    | Template Statement of Advice | STS.9521.0008.7007 |
| 35. | 28(b)    | Template Statement of Advice | STS.9521.0008.7509 |
| 36. | 28(b)    | Template Statement of Advice | STS.9521.0008.8011 |
| 37. | 28(b)    | Template Statement of Advice | STS.9521.0011.1437 |
| 38. | 28(b)    | Template Statement of Advice | STS.9521.0011.3873 |
| 39. | 28(b)    | Template Statement of Advice | STS.9521.0011.4292 |
| 40. | 28(b)    | Template Statement of Advice | STS.9521.0011.4728 |
| 41. | 28(b)    | Template Statement of Advice | STS.9521.0011.5165 |

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| 42. | 28(b)    | Template Statement of Advice | STS.9521.0011.5584 |
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| 67. | 28(b)    | Template Record of Advice    | STS.9521.0005.4183 |

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| 68. | 28(b)    | Template Record of Advice | STS.9521.0005.4295 |
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| 90. | 28(b)    | Template Record of Advice | STS.9521.0005.6904 |
| 91. | 28(b)    | Template Record of Advice | STS.9521.0005.7012 |
| 92. | 28(b)    | Template Record of Advice | STS.9521.0005.7198 |
| 93. | 28(b)    | Template Record of Advice | STS.9521.0005.7296 |

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| 94.  | 28(b)    | Template Record of Advice | STS.9521.0005.7394 |
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| 98.  | 28(b)    | Template Record of Advice | STS.9521.0004.0858 |
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| 106. | 28(b)    | Template Record of Advice | STS.9521.0004.0001 |
| 107. | 28(b)    | Template Record of Advice | STS.9521.0004.0105 |
| 108. | 28(b)    | Template Record of Advice | STS.9521.0004.0209 |
| 109. | 28(b)    | Template Record of Advice | STS.9521.0004.0313 |
| 110. | 28(b)    | Template Record of Advice | STS.9521.0004.0417 |
| 111. | 28(b)    | Template Record of Advice | STS.9521.0004.0521 |
| 112. | 28(b)    | Template Record of Advice | STS.9521.0004.0636 |
| 113. | 28(b)    | Template Record of Advice | STS.9521.0004.0745 |
| 114. | 28(b)    | Template Record of Advice | STS.9521.0004.0964 |
| 115. | 28(b)    | Template Record of Advice | STS.9521.0004.1478 |
| 116. | 28(b)    | Template Record of Advice | STS.9521.0004.1991 |
| 117. | 28(b)    | Template Record of Advice | STS.9521.0004.2505 |
| 118. | 28(b)    | Template Record of Advice | STS.9521.0004.2822 |



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| 119. | 47           | Financial Planner Incentive Scheme for the period commencing 1 July 2013   | STS.9518.0001.0080                   |
| 120. | 47           | Financial Planner Incentive Scheme for the period commencing 1 July 2014   | STS.9518.0001.0117                   |
| 121. | 59, 83       | Board Paper entitled 'Service Review and Enhancements Project Update' from SSFS board meeting pack dated 7 December 2017   | STS.8000.0003.3166,<br>.3256-.3273   |
| 122. | 62, 118(l)   | StatePlus response dated 29 April 2020 to a notice issued to by ASIC dated 17 April 2020 (NTC2002909) pursuant to s 912C of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) | RSF.1003.0001.0002                   |
| 123. | 66, 77       | Board Paper entitled 'Service Review and Enhancements Project Update' from SSFS board meeting pack dated 22 March 2018   | STS.8000.0003.0791,<br>.0862-.0876   |
| 124. | 72(a), 72(b) | Performance Management Report enclosed with the SSFS board meeting pack dated 16 September 2015  | STS.8000.0002.2785,<br>.2816-.2843   |
| 125. | 72(b)        | Performance Management Report enclosed with the SSFS board meeting pack dated 22 October 2015  | STS.8000.0002.3059,<br>.3109-.3123   |
| 126. | 72(b)        | Performance Management Report enclosed with the SSFS board meeting pack dated 10 December 2015   | STS.8000.0002.3565,<br>.3635-.3649   |
| 127. | 72(b)        | Performance Management Report enclosed with the SSFS board meeting pack dated 25 February 2016   | STS.8000.0002.3979,<br>.4030-.4043   |
| 128. | 72(b)        | Performance Management Report enclosed with the SSFS board meeting pack dated 22 March 2016  | STS.8000.0002.4880,<br>.4907-.4920   |
| 129. | 72(c)        | Performance Management Report enclosed with the SSFS board meeting pack dated 22 April 2016  | STS.8000.0002.6060,<br>.6083-.6096   |
| 130. | 72(d)        | Performance Management Report enclosed with the SSFS board meeting pack dated 25 October 2016  | STS.8000.0003.1505,<br>.1546-.1558   |
| 131. | 72(e)        | Performance Management Report enclosed with the SSFS board meeting pack dated 6 December 2016  | STS.8000.0003.2818,<br>.2847 - .2858 |
| 132. | 72(e)        | Performance Management Report enclosed with the SSFS board meeting pack dated 16 February 2017   | STS.8000.0002.8451,<br>.8491-.8504   |

| #    | Para Ref | Document Title  | DocID                           |
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| 133. | 72(e)    | Performance Management Report enclosed with the SSFS board meeting pack dated 27 April 2017   | STS.8000.0003.1736, 1808-1822   |
| 134. | 72(e)    | Performance Management Report enclosed with the SSFS board meeting pack dated 15 June 2017  | STS.8000.0002.7780, .7870-.7875 |
| 135. | 72(f)    | Performance Management Report enclosed with the SSFS board meeting pack dated 22 February 2018  | STS.8000.0003.0527, .0584-.0602 |
| 136. | 72(g)    | Performance Management Report enclosed with the SSFS board meeting pack dated 19 July 2018  | STS.9508.0001.4351, .4633-.4653 |
| 137. | 73       | FSS Memo on the 'Project Mango Due Diligence – Advice Workstream' dated 27 April 2016   | STS.9005.0003.8121              |
| 138. | 75       | Board Paper entitled, 'Proposed changes to Financial Planning Incentive Scheme Design' from SSFS board meeting pack dated 24 May 2018   | STS.8000.0003.0921, .1061-.1067 |
| 139. | 76, 83   | Board Paper entitled 'Financial Planning Report' dated from SSFS board meeting pack dated 7 December 2017   | STS.8000.0003.3166, .3295-.3298 |
| 140. | 78       | Board paper entitled 'Financial Planning Report' from SSFS board meeting pack dated 25 October 2018   | STS.9508.0001.3924, .4153-.4162 |
| 141. | 82       | Witness Statement of Mark Lennon dated 17 August 2018   | FSS.0001.0001.0157              |
| 142. | 83       | StatePlus response dated 18 February 2020 to a notice issued to by ASIC dated 24 January 2020 (NTC2001976) pursuant to s 912C of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) | RSF.0019.0002.0002              |
| 143. | 99       | Board Paper entitled 'SSFS 2016 Financial Year Business Plan' dated 21 May 2015 from SSFS board meeting pack dated 21 May 2015  | STS.5003.0001.1031              |
| 144. | 102      | Board Paper entitled 'ASIC Report 499 – Implications for StatePlus' from SSFS board meeting pack dated 6 December 2016  | STS.8000.0003.2818, .2927-.2940 |
| 145. | 106      | First Breach Notice 12 May 2017   | STS.9000.0012.1647              |

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| 146. | 110      | Letter from SSFS to ASIC with subject 'RE: Breach notification 120517_Annual Review of Clients Receiving Ongoing Advice' dated 4 July 2017   | STS.5003.0001.1276 |
| 147. | 113      | Second Breach Notice 23 August 2018  | RSF.0003.0001.0497 |
| 148. | 114      | Client Remediation Methodology Annual Review For Ongoing Advice Clients Invested in Unbundled Products (May 2019)<br><br>Annexure I to the StatePlus response dated 18 December 2019 to a notice issued to by ASIC dated 4 December 2019 (SC02308438) pursuant to s 912C of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) | RSF.1000.0001.0074 |
| 149. | 121      | Client Remediation Methodology – Annual Review for Ongoing Advice Clients<br><br>Annexure G to the StatePlus response dated 18 December 2019 to a notice issued to by ASIC dated 4 December 2019 (SC02308438) pursuant to s 912C of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth)   | RSF.1000.0001.0022 |