

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	VID415/2020
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124) & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 22/06/2020 4:53:28 PM AEST

Registrar

### Important Information

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

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



No. of 2020

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

**Australian Securities and Investments Commission**  
Plaintiff

and

**Commonwealth Bank of Australia (ACN 123 123 124)**  
First Defendant

and

**Colonial First State Investments Ltd (ACN 002 348 352) as trustee for Commonwealth Essential Super (ABN 56 601 925 435)**

Second Defendant

### **STATEMENT OF CLAIM**

The period from 1 July 2013 to 30 June 2019 is referred to as the **Relevant Period** in this statement of claim.

#### **A. Parties**

1. The Plaintiff is a body corporate:

- (a) established by s 7 of the Australian Securities Commission Act 1989 (Cth);
- (b) continued by s 261 of the Australian Securities and Investments Commission Act 2001 (Cth) (**ASIC Act**); and
- (c) able to sue in its corporate name by reason of s 8 of the ASIC Act.

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2. The First Defendant is and was at all material times:
  - (a) a corporation duly incorporated;
  - (b) liable to be sued in its corporate name;
  - (c) the holder of an Australian Financial Services Licence numbered 234945.
3. The Second Defendant is and was at all material times:
  - (a) a corporation duly incorporated;
  - (b) liable to be sued in its corporate name;
  - (c) the trustee of the superannuation fund known as Commonwealth Essential Super (ABN 56 601 925 435); and
  - (d) a wholly-owned subsidiary of the First Defendant.

**B. Commonwealth Essential Super**

4. At all times on and from 17 May 2013, “Commonwealth Essential Super”, also referred to in this statement of claim as “Essential Super”, is and has been a superannuation product within the meaning of s 761A of the *Corporations Act 2001* (Cth) (**Corporations Act**).

**C. Development of Essential Super**

5. On or about 4 May 2012, the First Defendant and the Second Defendant presented a joint business case (**Business Case**) to the First Defendant’s Executive Committee for the purpose of jointly developing a simple superannuation product (**Simple Super**).

**Particulars**

A copy of the Business Case may be inspected by appointment with the office of the Plaintiff’s solicitors.

6. On or about 4 May 2012, the First Defendant’s Executive Committee:
  - (a) approved in principle the Simple Super project and the Business Case and the estimated expenditure set out in the Business Case of \$33.4 million;
  - (b) approved the funding release of \$8.6 million from the Group investment pool; and

- (c) noted that the project team would seek approval for the final funding release of \$24.8 million by October 2012.

#### **Particulars**

These matters are recorded in the minutes of the meeting, a copy of which may be inspected by appointment with the office of the Plaintiff's solicitors.

#### 7. The Business Case endorsed by the First Defendant's Executive Committee:

- (a) assumed a 50% sharing of costs and benefits between the First Defendant's Retail Banking Services Business Unit (**RBS**) and the Second Defendant's business units (**CFS**);
- (b) stated that the RBS and CFS finance teams would be engaged to agree to an allocation methodology following Business Case approval.

#### **Particulars**

This is set out in paragraph 6.2.4 of the Business Case.

- (c) proposed that the Simple Super product to be jointly developed by the First Defendant and the Second Defendant:
  - (i) would be a MySuper product compliant with the then proposed MySuper, Superstream and Future of Financial Advice reforms;
  - (ii) would primarily be distributed via the First Defendant's retail branch network under a General Advice model and that online origination via NetBank would also be available;
  - (iii) would be offered to the First Defendant's business banking customers as a solution to meet their Superannuation Guarantee obligations; and
  - (iv) would have telephone support provided by the Second Defendant's call centre with Commonwealth Simple Super branding.

#### **Particulars**

These statements can be found at pages 6, 7, 10 and 11 of the Business Case, a copy of which may be inspected by appointment with the office of the Plaintiff's solicitors.



8. Between approval of the Business Case on or about 4 May 2012 and 1 July 2013, the First Defendant and the Second Defendant jointly developed the Simple Super product.
9. The joint development of the Simple Super product:
  - (a) was undertaken by RBS and the Second Defendant's Wealth Management Business Unit (**WM**);
  - (b) occurred substantially in accordance with the Business Case.
10. In or about October 2012, the First Defendant and the Second Defendant chose "Essential Super" to be the name of the jointly developed Simple Super product.
11. In or around November 2012, the First Defendant and the Second Defendant reached a consensus (or an accommodation) as to the approach to be taken to the issue of attribution of revenue and costs in respect of Essential Super (**Attribution Arrangement**), the elements of which included that:
  - (a) for the 2014 financial year:
    - (i) operational expenditure within RBS and WM per the Business case would be split 44:56 respectively;
    - (ii) costs would not be transferred between RBS and WM;
    - (iii) revenue would be recorded by WM and then 50% will be transferred to RBS;
    - (iv) the WM finance team would prepare the full profit and loss of the product;
    - (v) the RBS finance team would provide the costs they have incurred each month;
  - (b) during planning for the 2015 financial year, the actual performance of Essential Super would be reviewed and a decision made as to the relevant split, to be managed by adjusting the attribution of the revenue not costs;
  - (c) there would be an underlying principle providing for an equitable distribution of the benefits of the Essential Super product;

- (d) there would be constant monitoring of the result through the 2014 financial year in order to determine whether there had been a material deviation from the principle referred to in (c), with scope to review the allocation of revenue;
- (e) the arrangement would be reviewed after the 2014 financial year.

### **Particulars**

The Attribution Arrangement is partly written and partly oral.

Insofar as the Attribution Arrangement is in writing, the Plaintiff refers to:

- (i) an email sent at 4.05pm on 13 November 2012 by Keith Wylie, then Executive Manager, Reporting and Planning for the Second Defendant to Linda Stamford then General Manager Product Finance for the First Defendant, copying in Mark Steinberg then General Manager CFS & WM Advice for the Second Defendant;
- (ii) an email sent at 4.46pm on 13 November 2012 by Linda Stamford to Keith Wylie, copying in Mark Steinberg, Daphne Ling, then Manager, RBS Finance for the First Defendant, and Heather Stokes, then Senior Manager, Retail Product Finance for the First Defendant;
- (iii) an email sent at 10.13am on 20 November 2012 by Heather Stokes to Lee Strachov, then Executive Manager Product Channel and Support for the First Defendant;
- (iv) an email sent at 6.06pm on 21 November 2012 by Lee Strachov to Melinda Livingstone, then Head of Channel Development for the Second Defendant, Richard Whitfield, then Simple Super Program Director for the First Defendant, and David Lee, then Senior Business Analyst for the First Defendant;
- (v) an email sent at 5.24pm on 30 November 2012 by Melinda Livingstone, to Peter Chun, then General Manager, Product and Channel Development for the Second Defendant; and
- (vi) an email sent at 3.11pm on 3 December 2012 by Melinda Livingstone to Sarah Gumley, then Simple Super Product Manager for the Second Defendant, David Lee and Mauricio Alferez.

Insofar as the Attribution Arrangement is oral, the Plaintiff refers to and relies upon the reference to "our discussion" in the email sent at 4.46pm on 13 November 2012 by Linda Stamford to Keith Wylie, copying in Mark Steinberg, Daphne Ling and Heather Stokes.

12. Essential Super:

- (a) was first offered on 17 May 2013;
- (b) was launched for sale to individuals and employers through the First Defendant's retail branch network and online channels on 1 July 2013;
- (c) was, at all material times, the only superannuation product that the First Defendant trained its staff to sell; and
- (d) contained four investment options with the MySuper product being the Lifestage investment option, where the level of risk of investments was tailored according to the age of the member.

**D. Distribution Agreements between the First Defendant and Second Defendant with respect to Essential Super**

13. On or about 27 June 2013, the First Defendant and the Second Defendant entered into a Distribution and Administration Services Agreement (**2013 Distribution Agreement**), the terms of which included that:

- (a) it would commence on 27 June 2013 and continue for a period of 5 years unless terminated earlier (clause 2);
- (b) the First Defendant would provide certain specified services to the Second Defendant in relation to Essential Super, including (clause 6 and Schedules 1 and 2):
  - (i) Distribution & Resourcing Services:
    - (A) Allocation of trained and compliant resources to distribute and service Essential Super;
    - (B) Access to the First Defendant's customer channel for distribution of Essential Super;
    - (C) Use of the First Defendant's branches to distribute Essential Super;
    - (D) Identification and verification of customers, collection of Tax File Numbers;

- (E) Development and maintenance of marketing materials and services including web content to support the distribution of Essential Super via the branch and online network;
  - (F) Compliance review of materials distributed to Essential Super members and prospective members;
- (ii) IT services:
  - (A) Maintaining product information, application forms and associated material in CommSee and NetBank;
  - (B) Daily data feeds from these systems to the Second Defendant's systems;
- (iii) NetBank:
  - (A) Access to Essential Super online functionality into NetBank;
  - (B) Delivery of product messages to members via NetBank inbox;
  - (C) Account servicing functions such as online contributions in NetBank;
  - (D) Link to the online servicing capabilities in the Second Defendant's FirstNet system via NetBank;
- (c) the Second Defendant would pay the First Defendant a fee for the services being an annual fee of 30% of total net revenue earned by the Second Defendant from Essential Super in the relevant financial year (clause 8 and Schedule 1) (**2013 Fee Term**);
- (d) the Second Defendant would determine the total net revenue for Essential Super at the end of each financial year for that financial year and advise the First Defendant of the fee payable based on that total net revenue (Schedule 1);
- (e) the First Defendant, after receiving the advice from the Second Defendant as to the amount due and payable, would issue an invoice for the fees (Schedule 1).



### Particulars

The 2013 Distribution Agreement is a written agreement dated 27 June 2013, a copy of which may be inspected by appointment with the office of the Plaintiff's solicitors.

14. On or about 2 June 2015, the First Defendant and the Second Defendant entered into a Distribution and Administration Services Agreement (**2015 Distribution Agreement**) the terms of which included that:
  - (a) it would commence on 2 June 2015 and continue for a period of 5 years unless terminated earlier (clause 2);
  - (b) the First Defendant would provide certain specified services to the Second Defendant in relation to Essential Super, including (clause 6 and Schedules 1 and 2):
    - (i) Distribution & Resourcing Services:
      - (A) Allocation of trained and compliant resources to distribute and service Essential Super;
      - (B) Access to the First Defendant's customer channel for distribution of Essential Super;
      - (C) Use of the First Defendant's branches to distribute Essential Super;
      - (D) Identification and verification of customers, collection of Tax File Numbers;
      - (E) Development and maintenance of marketing materials and services including web content to support the distribution of Essential Super via the branch and online network;
      - (F) Compliance review of materials distributed to Essential Super members and prospective members;
    - (ii) IT services:
      - (A) Maintaining product information, application forms and associated material in CommSee and NetBank;

- (B) Daily data feeds from these systems to the Second Defendant's systems;
- (iii) NetBank:
  - (A) Access to Essential Super online functionality into NetBank;
  - (B) Delivery of product messages to members via NetBank inbox;
  - (C) Account servicing functions such as online contributions in NetBank;
  - (D) Link to the online servicing capabilities in the Second Defendant's FirstNet system via NetBank;
- (c) the Second Defendant would pay the First Defendant a fee for the services being an annual fee of 30% of total net revenue earned by the Second Defendant from Essential Super in the relevant financial year (clause 8 and Schedule 1) (**2015 Fee Term**);
- (d) the Second Defendant would determine the total net revenue for Essential Super at the end of each financial year for that financial year and advise the First Defendant of the fee payable based on that total net revenue (Schedule 1);
- (e) the First Defendant, after receiving the advice from the Second Defendant as to the amount due and payable, would issue an invoice for the fees (Schedule 1).

#### **Particulars**

The 2015 Distribution Agreement is a written agreement dated 2 June 2015, a copy of which may be inspected by appointment with the office of the Plaintiff's solicitors.

15. On or about 26 February 2018, the First Defendant and the Second Defendant entered into a Distribution and Administration Services Agreement (**2018 Distribution Agreement**) the terms of which included that:
  - (a) it would commence on 26 February 2018 and continue for a period of 5 years unless terminated earlier (clause 2);
  - (b) the First Defendant would provide certain specified services to the Second Defendant in relation to Essential Super, including (clause 6 and Schedule 2):



CBA Retail Sales Support

- (i) Account origination:
  - (A) Provide access to Essential Super application through CommSee;
  - (B) Send completed and eligible application details to the Second Defendant's systems (FMS);
  - (C) Ensure that current sales processes include a step to issue current produce disclosure statement (PDS) pack to members upon application;
- (ii) Customer servicing:
  - (A) Send customer alterations details from CommSee to the Second Defendant's systems (FMS) including adding or removing employee details for employer arrangements;
  - (B) Provide members with general account information and customer service in relation to this product;
  - (C) Ensure branch systems are available to add and remove employees for employers;
- (iii) Complaints about Sales process:
  - (A) Acknowledgement and resolution of complaints about the branch network relevant to Essential Super;
- (iv) Branch staff training:
  - (A) Ensure that branch staff are appropriately qualified, trained and accredited to assist customers with Essential Super (including but not limited to RG146 accreditation where required);
- (v) Distribution training procedures:
  - (A) Updating procedures for Branch staff in relevant systems after direction from the product management in both CFS and RBS;

- (B) Provide to the Second Defendant's CFS Product division for approval (on behalf of the Second Defendant), any new or amendments to branch staff training procedures which relate to product features or design;

#### Digital Wealth

##### (vi) Online (NetBank/ CommBank App):

- (A) provide customers access to online application for new applications (also known as originations), ability to make contributions, view account balances and access to SimpleNet via the First Defendant's digital assets (including but not limited to NetBank);
- (B) Send completed and eligible application details to the Second Defendant's systems (FMS);
- (C) Send customer alternations details to the Second Defendant's systems (FMS);
- (D) Enable business customers to make superannuation contributions for their employees using Essential Super by providing access to employer-sponsor application for Essential Super and a SuperStream compliant facility including payment function for contributions via the First Defendant's digital assets (including but not limited to NetBank);

##### (vii) Digital content:

- (A) Publication of all digital content approved by the Second Defendant, including updating or amending content as requested by the Second Defendant's CFS Product division;

##### (viii) SuperMatch:

- (A) Access to SuperMatch functionality and results of SuperMatch search via the First Defendant's digital assets (including but not limited to NetBank);

- (B) Send completed and eligible rollover requests to the Second Defendant's systems;

Consumer Wealth Marketing

(ix) Acquisition marketing:

- (A) Producing and distributing marketing material to support the distribution of Essential Super including but not limited to:

- Campaigns (acquisition/cross-sell);
- Campaign landing pages;
- Collateral;
- Paid advertising;
- Digital owned assets including CommBank NetBank and the App;

All material needs to be produced in accordance with the agreed Standard Operating Procedures and RACI framework; and approved in accordance with Group Standards and as required by relevant law before being issued.

(x) Portfolio marketing:

- (A) Producing and distributing marketing material to engage and retain existing Essential Super members:

- Campaigns (portfolio/retention);
- Campaign landing pages;
- Collateral;
- ENewsletter;

All material needs to be produced in accordance with the agreed Standard Operating Procedures and RACI framework; and approved in accordance with Group Standards and as required by relevant law before being issued.

## (xi) Product communications:

## (A) Producing or reviewing product related communications including:

- On-boarding (mandatory communications);
- PDS;
- Fund Fact sheets;
- Product change communications including but not limited to creation of Key Changes flyers for PDS rolls and customer remediation communications;
- Bi-annual statements;
- Annual reports;

## (xii) Amendments to marketing material:

## (A) Provide to the Second Defendant's CFS Product division for approval (on behalf of the Second Defendant), any new or amendments to existing marketing material or disclosures\*;

\* Does not include any content or materials required in order to correct any previous errors or address or remediate any previous breaches of applicable law of the Service Level Agreement set out in Schedule 2. In such cases, the First Defendant must develop the relevant materials as soon as is reasonably practical and in any event within a timeframe that is reasonably requested by the Second Defendant.

## (xiii) Disclosure services:

## (A) Notify members of their SuperMatch results (via email or post);

(c) the Second Defendant would pay the First Defendant a fee for the services, being an annual fee of 30% of total net revenue earned by the Second Defendant from Essential Super in the relevant financial year (clause 8 and Schedule 1) (**2018 Fee Term**);



- (d) the Second Defendant would determine the total net revenue for Essential Super at the end of each financial year for that financial year and advise the First Defendant of the fee payable based on that total net revenue (Schedule 1); and
- (e) that the First Defendant, after receiving the advice from the Second Defendant as to the amount due and payable, would issue an invoice for the fees (Schedule 1).

### **Particulars**

The 2018 Distribution Agreement is a written agreement dated 26 February 2018, a copy of which may be inspected by appointment with the office of the Plaintiff's solicitors.

(The 2013 Distribution Agreement, the 2015 Distribution Agreement and the 2018 Distribution Agreement are hereafter referred to collectively as the **Distribution Agreements**.)

The 2013 Fee Term, 2015 Fee Term and 2018 Fee Term are hereafter referred to collectively as the **Fee Terms**).

### **E. Supplemental Fee Arrangements between the First Defendant and Second Defendant with respect to Essential Super**

16. In or around October 2013, the First Defendant and the Second Defendant reached a consensus (or an accommodation) (**2013 Profit Arrangement**), the elements of which included that the Second Defendant would give effect to a two-part 50:50 profit share arrangement as to Essential Super by:
  - (a) first, applying the 2013 Fee Term; and
  - (b) second, transferring both revenue and expenses between the First Defendant and the Second Defendant, such that the First Defendant and the Second Defendant would have equal shares of:
    - (i) revenue; and
    - (ii) expenses.

### Particulars

The 2013 Profit Arrangement is in writing. The Plaintiff refers to an email dated 23 October 2013, from Sam Wall of the Second Defendant to Peter Chun of the Second Defendant, copying in Lisa Rava of the First Defendant, and the example set out within the email.

17. On or around 29 April 2016, the First Defendant and the Second Defendant reached a consensus (or an accommodation) (**2016 Profit Arrangement**), the elements of which included that the Second Defendant would give effect to a 50:50 profit share arrangement as to Essential Super by transfer of revenue only.

### Particulars

The 2016 Profit Arrangement is in writing. The Plaintiff refers to

- (i) the email sent at 9:58am on 29 April 2016 from Deirdre Langan, then Executive Manager, Liability Products Finance for the First Defendant to Keith Wylie, then Executive Manager Reporting and Planning, for the Second Defendant, and copied to Liem Huynh, then Executive Manager Financial Reporting Control for the Second Defendant and Ben Sciberras, then Manager CFS Corporate Reporting for the Second Defendant;
- (ii) the reply by Keith Wylie at 10:36am on that date;
- (iii) the reply by Deirdre Langan at 11:19am on that day; and
- (iv) the reply by Ben Sciberras at 12:03pm on that day to Deirdre Langan, Keith Wylie and Liem Huynh and copied to Mandy Zhong, then Senior Financial Accountant for the Second Defendant;
- (v) an email sent at 1:38pm on 29 April 2016 from Deirdre Langan, to Keith Wylie;
- (vi) the reply by Keith Wylie at 1:53pm on that date, copied to Ben Sciberras; and
- (vii) the reply by Ben Sciberras at 4:23pm that day to Keith Wylie and Deirdre Langan and copied to Mandy Zhong.

18. On or around 2 November 2017, the First Defendant and/or the Second Defendant abandoned and/or ceased to apply the Attribution Arrangement, the 2013 Profit Arrangement and the 2016 Profit Arrangement, effective from the end of October 2017.



### Particulars

The Plaintiff refers to:

- (i) an email sent at 11.54am on 21 September 2017 by Elizabeth Bennett, then Senior Manager, Business Partnering for the Second Defendant to Deirdre Langan, then Executive Manager Forecast and Decision Support for the First Defendant;
- (ii) an email sent at 11.33am on 18 October 2017 by Elizabeth Bennett to Deirdre Langan;
- (iii) an email sent at 9.16am on 30 October 2017 by Elizabeth Bennett to Deirdre Langan; and
- (iv) an email sent in reply at 1.57pm on 2 November 2017 by Deirdre Langan to Elizabeth Bennett.

(The Attribution Arrangement, the 2013 Profit Arrangement and the 2016 Profit Arrangement are hereafter referred to collectively as the **Profit Share Arrangements**).

#### F. Distribution of Essential Super

- 19. The First Defendant has, and during the Relevant Period had at all material times, over 1000 Commonwealth Bank branches (**Branches**) throughout Australia that together form its retail branch network (**Branch Network**).
- 20. The First Defendant has, and during the Relevant Period had at various times, digital assets including NetBank and CommBank and, from May 2016, the CommBank App, accessible online by the general public (**Digital Channels**).
- 21. Subject only to the matters set out at paragraphs 24 and 25 (below), at all times during the Relevant Period the First Defendant provided distribution and administrative services in respect of Essential Super.
- 22. On and from 1 July 2013:
  - (a) until on or about 8 October 2017, the First Defendant sold Essential Super to individuals through its Branch Network (**Branch Sales**).
  - (b) until on or about 3 July 2018, the First Defendant sold Essential Super to individuals through its Digital Channels (**Digital Sales**).
  - (c) until on or about 3 July 2018, the First Defendant sold Essential Super to employers as a default fund for employees who did not make a choice of superannuation fund (**Employer Sales**).

23. As a result of Employer Sales, individuals who:
- (a) both became employed by employers with Essential Super as their employer's default fund (whether before or after 3 July 2018); and
  - (b) did not make a choice of superannuation fund for superannuation contributions by that employer;
- became members of Essential Super (**Employee Sales**).
24. On or about 8 October 2017, the First Defendant ceased selling Essential Super in its Branches.
25. On or about 3 July 2018, the First Defendant ceased providing customers access to the online application for membership of Essential Super via its Digital Channels.
26. The Second Defendant has previously represented, and it is the fact, that during the Relevant Period 390,400 individuals became members of the Commonwealth Essential Super fund (excluding those members who never had funds in their Essential Super account), broken down by financial year as follows:
- (a) 1 July 2013 to 30 June 2014: approximately 69,607;
  - (b) 1 July 2014 to 30 June 2015: approximately 70,141;
  - (c) 1 July 2015 to 30 June 2016: approximately 66,714;
  - (d) 1 July 2016 to 30 June 2017: approximately 112,617;
  - (e) 1 July 2017 to 30 June 2018: approximately 68,807;
  - (f) 1 July 2018 to 30 June 2019: approximately 2,514.
27. The Second Defendant has previously represented, and it is the fact, that of the 390,400 individuals who became members of Essential Super during the Relevant Period:
- (a) 191,364 became members pursuant to Branch Sales;
  - (b) 135,499 became members pursuant to Digital Sales;
  - (c) approximately 22,872 became members pursuant to Employee Sales; and
  - (d) approximately 40,665 became members because they were members of the Colonial First State First Choice Superannuation Trust, had accrued default

amounts in that fund and those accrued default amounts were transferred to the Commonwealth Essential Super fund between September 2014 and August 2016 (**ADA Transfers**).

**G. Financial Product Advice and Branch Sales**

28. As to Branch Sales, during the Relevant Period:

- (a) a small number of Branch Sales occurred in which a customer became a member of Essential Super as a result of a member (or members) of the First Defendant's staff interactively completing a paper application for the opening of an Essential Super account with the customer;
- (b) otherwise, a Branch Sale involved a customer becoming a member of Essential Super as a result of:
  - (i) initiation of the Essential Super account opening process by a member (or members) of the First Defendant's staff in the First Defendant's "CommSee" system within a Branch; and
  - (ii) interactive completion of the application with the customer.

**Only Authorised Staff could sell Essential Super**

29. During the Relevant Period:

- (a) subject to sub-paragraph (b), only staff who had completed the prescribed training and testing (**Authorised Staff**) were permitted to initiate and assist a customer to complete the Essential Super account opening process, whether in "CommSee" or by means of a paper application form;
- (b) Non-Authorised Staff were permitted to assist a customer to become a member of Essential Super only when the staff member called the Essential Super call centre and an Authorised Staff member in the call centre assisted the customer with the Essential Super account opening process in "CommSee" or by means of a paper application form.

**Training**

30. At all times from 1 July 2013 to 8 October 2017, staff involved in customer interactions in Branches were trained by the First Defendant:



- (a) to create customer interest in Essential Super; and
  - (b) if the staff were not Authorised Staff, to perform a “warm transfer” of customers interested in Essential Super to Authorised Staff or the Essential Super call centre.
31. The training referred to in paragraph 30 included:
- (a) training to use a “Financial Health Check” interview and sales process to:
    - (i) establish rapport with the customer;
    - (ii) gain an understanding of the customer’s objectives, financial situation and needs; and
    - (iii) introduce them to financial products offered by the First Defendant, including Essential Super;
  - (b) skillBUILDER eLearning: Creating an interest in Essential Super without providing advice (non-Tier 1 accredited staff).

#### **Approved Scripts for non-Authorised Staff**

32. At all material times, in respect of Branch Sales, the First Defendant provided staff who were not Authorised Staff with approved scripts:
- (a) to use when discussing Essential Super with a customer or potential customer; and

#### **Particulars**

The scripts were in writing and headed “Essential Super: Factual Information: Approved Scripts”, copies of which may be inspected by appointment with the office of the Plaintiff’s solicitors.

The scripts were available to staff via hyperlinks on the Defendant’s “standard operating procedure” document for Essential Super account opening. Approved scripts were also available to staff via the Defendant’s electronically available Essential Super intranet or “iSource” pages.

- (b) to assist them in implementing a “warm transfer” of customers to an Authorised Staff member or the Essential Super call centre.

### Particulars

The scripts were in writing and differentiated between a warm transfer performed after a Financial Health Check and one where no Financial Health Check had occurred and were headed "CSS for personal product after FHC", "CSS for personal product opened tran account NO FHC" and "CSS for personal product NO FHC", copies of which may be inspected by appointment with the office of the Plaintiff's solicitors.

### Standard Operating Procedure

33. At all material times, in respect of Branch Sales, the First Defendant had in place a "standard operating procedure" (**SOP**) for all branch staff to follow for Branch Sales.

### Particulars

The standard operating procedure was in writing and was contained in a document headed "Standard Operating Procedure – Essential Super Account Opening – Personal Customer". Copies of each SOP referred to below may be inspected by appointment with the office of the Plaintiff's solicitor.

34. The First SOP was in effect from 1 July 2013 to 22 October 2013 and contained the following:
- (a) Column 1 set out the actions required as follows:
    - (i) Authorised Staff to provide a short, oral general advice warning to the customer before starting the Essential Super application;
    - (ii) provision of an Essential Super pack to the customer, containing a Financial Services Guide, Product Disclosure Statement and a general advice flyer, and an opportunity to read the Product Disclosure Statement before opening the account;
    - (iii) discussion on product benefits and features, including fees;
    - (iv) identification of the customer and updating/creation of customer profile in CommSee. Confirmation of NetBank registration;
    - (v) initiation of the Essential Super account opening process in the First Defendant's "CommSee" system and interactive completion of the

application with the customer using the screen instructions and scripts and directing the customer's attention to important information text;

- (vi) selection of the customer's tax file number (**TFN**) from another account or entry of TFN if the customer provides it. Discussion with the customer of implications if TFN is not provided and explanation of how to add it in NetBank;
  - (vii) allow the customer to select investment and insurance options;
  - (viii) explain and offer fast track employer email service to direct employer superannuation contributions to an Essential Super account;
  - (ix) provision of all forms as required, including account summary, choice of fund (to direct employer superannuation contributions to an Essential Super account) and bring together superannuation forms (to consolidate the customer's superannuation interests into an Essential Super account); and
  - (x) directing the customer to the on-screen declaration and obtaining of the customer's signature on a signature pad or paper form if signature pad is unavailable;
- (b) Column 2 directed staff to the forms/screens to use, with links to the approved scripts for Authorised Staff and non-Authorised Staff. It also provided handy hints regarding:
- (i) "fast track" employer email service to direct employer superannuation contributions to an Essential Super account;
  - (ii) the insurance offered to customers based on their age and the ability for customers to halve, or double or opt-out of their pre-approved insurance;
  - (iii) that customers can choose their own investment mix, or select the default Lifestage investment option which will be managed for them;
- (c) Column 3 contained helpful tips to assist staff drive "quality" accounts, being accounts with funds in them, by having customers complete the "choice of fund" and "bring together my super" forms.



35. The Second SOP was in effect from 23 October 2013 to 27 March 2015 and contained the same three columns as itemised in paragraph 34 with respect to the First SOP except that Column 1 contained an additional direction to staff to ask the customer if they would like to search for lost or inactive superannuation “now” using the Supersorter Tool with a view to consolidation.
36. The Third SOP was in effect from 28 March 2015 to 24 July 2015 and was in the same terms as described in paragraph 35 with respect to the Second SOP except that:
- (a) customers were no longer able to select investment and insurance options on opening an Essential Super account; and instead
  - (b) Column 1 directed staff to guide customers through investment and insurance screens allowing them the opportunity to understand the default selections and Column 2 provided staff with handy hints concerning the default investment and insurance options and the fact that Essential Super members could change the default settings at any time in NetBank.
37. The Fourth SOP was in effect from 25 July 2015 until 8 October 2017 and was in the same terms as described in paragraph 36 with respect to the Third SOP except that Column 1 directed staff to advise customers that they could change investment and insurance options in NetBank after the account is open.

#### **Training: Authorised Staff**

38. At all times from 1 July 2013 to 8 October 2017, Authorised Staff were trained by the First Defendant to sell Essential Super under a “general advice model”.

#### **Particulars**

The Business Case for Essential Super contemplated an operating model using the First Defendant’s Branch Network as the primary (but not exclusive) distribution channel, under a general advice model.

In internal publications available to Authorised Staff on the First Defendant’s internal computer system, including “How to discuss Insurance or Essential Super with a customer” the First Defendant referred to Authorised Staff being accredited only to provide general advice and not personal advice.

Copies of these documents may be inspected by appointment with the office of the Plaintiff’s solicitors.

39. The training completed by Authorised Staff comprised:

- (a) completion of the following 12 online training modules described by the Defendant as “Tier 1 General Advice in Superannuation Accreditation eLearning”:
- (i) Module 1 – Superannuation Fundamentals;
- (ii) Module 2 – Super Regulators and Legislation;
- (iii) Module 3 – Super Investments;
- (iv) Module 4 – Employer Contributions;
- (v) Module 5 – Personal Contributions;
- (vi) Module 6 – Contributions, Taxation and Splitting;
- (vii) Module 7 – Taxation and Fees;
- (viii) Module 8 – Insurance in Super;
- (ix) Module 9 – Accessing Super Benefits;
- (x) Module 10 – Payment of Benefits;
- (xi) Module 11 – Income Streams;
- (xii) Module 12 – Providing Financial Advice;

and

- (b) completion of the following additional online and manager-led training sessions:
- (i) Manager Led Session: Why is Superannuation Important;
- (ii) Manager Led Session 2: Why is Superannuation Important;
- (iii) Manager Led Session 3: Essential Super Conversations;
- (iv) Essential Super eLearning: Essential Super Overview;
- (v) Essential Super eLearning: Essential Super for Personal Customers;
- (vi) Essential Super eLearning: Essential Super for Employers;

- (vii) skillBUILDER eLearning: Creating an Interest in Essential Super with Personal Customers providing General Advice;
- (viii) skillBUILDER eLearning: Creating an Interest in Essential Super with Employer Customers providing General Advice;

and

- (c) completion of annual refresher modules as prescribed.

### **Particulars**

The first update comprised two re-accreditation eLearning modules Tier 1 Refresh Module 1 – Regulators and Legislation and Tier 1 Refresh Module 2 – Product and Advice that all Authorised Staff were required to complete by April 2014 in order to be able to continue selling Essential Super.

The second update comprised two product eLearning modules introduced 17 March 2015 (Regulators and Legislation 2015 and Product and Advice) that all Authorised Staff were required to complete in order to be able to continue selling Essential Super.

Copies of the training modules may be inspected by appointment with the office of the Plaintiff's solicitors.

### **Approved Scripts: Authorised Staff**

- 40. At all material times during the Relevant Period, in respect of Branch Sales, the First Defendant provided Authorised Staff with approved scripts, a General Advice Warning (**GAW**) script and sales guides to use when introducing Essential Super to a customer or potential customer.

### **Particulars**

The approved scripts were in writing and headed "Essential Super: General Advice: Approved Scripts".

The GAW script was in writing and headed "General Advice Warning (GAW) script".

The sales guides were in writing and headed:

- "Start a Super Conversation";
- "Essential Super QRG";
- "How to discuss insurance or Essential Super with a customer"; and



- “Essential Super Insurance: Common questions and suggested responses”.

These materials were available to Authorised Staff via hyperlinks on the Defendant’s “standard operating procedure” document for Essential Super account opening and via the Defendant’s electronically available Essential Super intranet or “iSource” pages.

Copies of these documents may be inspected by appointment with the office of the Plaintiff’s solicitors.

### **Summary of Processes: Branch Sales**

41. In the light of:

- (a) the Standard Operating Procedure in place for staff to follow for Branch Sales as described in paragraphs 33 to 37; and
- (b) the training and approved scripts given to Authorised Staff as described in paragraphs 38 to 40;

the First Defendant set in place processes so that Authorised Staff would provide a recommendation or a statement of opinion to customers during Branch Sales that was intended to influence the customer, or that could reasonably be regarded as being intended to have such an influence on the customer, in making one or more of the following decisions:

- (a) whether to open an Essential Super account;
- (b) for Branch Sales up until 28 March 2015:
  - (i) a choice between four different investment options within Essential Super;
  - (ii) whether to take out life insurance within Essential Super and, if so, a choice between the default level, half of the default level or twice the default level and a choice between life insurance only and life insurance plus total and permanent disability insurance;
- (c) whether to direct employer contributions to the Essential Super account; and
- (d) whether to rollover amounts held in other superannuation funds to the Essential Super account.

### **Conclusion: Financial product advice and Branch Sales**

42. In circumstances where:

- (a) as set out in paragraph 28, Branch Sales involved a member (or members) of the First Defendant's staff interactively completing an application for the opening of an Essential Super account with the customer;
- (b) as set out in paragraph 29, only Authorised Staff members were permitted to assist customers to open an Essential Super account in the way described in paragraph 28;
- (c) as set out in paragraphs 30 to 32, non-Authorised Staff members were trained to create an interest in Essential Super and perform a warm transfer of the customer to an Authorised Staff member; and
- (d) as set out in paragraph 41, the First Defendant set in place processes so that Authorised Staff would provide a recommendation or a statement of opinion to customers during Branch Sales as set out in that paragraph;

the First Defendant, via its Authorised Staff, provided a recommendation or a statement of opinion to customers at all times that Branch Sales were occurring that was intended to influence the customer, or that could reasonably be regarded as being intended to have such an influence on the customer, in making one or more of the following decisions:

- (a) whether to open an Essential Super account;
- (b) for Branch Sales up until 28 March 2015:
  - (i) a choice between four different investment options within Essential Super;
  - (ii) whether to take out life insurance within Essential Super and, if so, a choice between the default level, half of the default level or twice the default level and a choice between life insurance only and life insurance plus total and permanent disability insurance;
- (c) whether to direct employer contributions to the Essential Super account; and
- (d) whether to rollover amounts held in other superannuation funds to the Essential Super account.

43. In these premises, financial product advice (within the meaning of s 766B of the Corporations Act) was provided by the First Defendant on and from 1 July 2013 until on or about 8 October 2017 to every (or alternatively, almost every) customer who became a member of Essential Super pursuant to a Branch Sale.

#### **H. Financial Product Advice and Employer Sales**

44. As to Employer Sales:

- (a) some Employer Sales occurred in Branches and to that extent an Employer Sale involved an employer being set up as a “sponsor” with respect to Essential Super in the First Defendant’s “CommSee” system by:
  - (i) initiation of an application by a member (or members) of the First Defendant’s staff in the First Defendant’s “CommSee” system; and
  - (ii) interactive completion of the application with the employer customer;
- (b) some Employer Sales occurred digitally and to that extent an Employer Sale involved an employer setting themselves up as a “sponsor” with respect to Essential Super by means of an online application via a Digital Channel.

45. Once an employer was set up as an Essential Super sponsor, that employer was able to add employees as members of Essential Super:

- (a) in a Branch; or
- (b) by calling the Essential Super call centre; or
- (c) via a Digital Channel.

46. With respect to Employer Sales in Branches:

- (a) only Authorised Staff members were permitted to assist employer customers to be set up as a “sponsor” with respect to Essential Super in the First Defendant’s “CommSee” system;
- (b) the First Defendant trained its Branch staff to create an interest in Essential Super with business customers and, if those staff were not themselves Authorised Staff, to do a warm transfer of such customers to an Authorised Staff member;



- (c) the First Defendant trained its business banking staff in the First Defendant's local business banking (**LBB**) division to create an interest in Essential Super with their business customers and create a referral to an Authorised Staff member to follow up those customers and set them up as "sponsors" in CommSee;
  - (d) the First Defendant set in place processes so that Authorised Staff would provide a recommendation or a statement of opinion to employer customers during Employer Sales in Branches that was intended (or that could reasonably be regarded as being intended) to influence the employer customer in deciding whether or not to nominate Essential Super to be the default fund for employees who did not make a choice of superannuation fund.
- 47. At all times during the Relevant Period, in respect of Employer Sales in Branches, the First Defendant had in place a "standard operating procedure – business customer" (**Employer SOP**) for all staff to follow.
- 48. The First Employer SOP was in effect from 1 July to 31 October 2013 and contained the following:
  - (a) Column 1 set out the actions required as follows:
    - (i) Product introduction/discussion and creating interest:
      - (A) staff to identify a clue that the customer may be interested in Essential Super;
      - (B) Authorised Staff only to use an Essential Super tag on that incorporates a General Advice Warning;
      - (C) staff to provide Financial Services Guide and PDS to customer to read;
      - (D) staff to discuss the product benefits and features;
      - (E) staff to explain what information will be needed about employees to open the accounts today;
    - (ii) Setting up an employer arrangement:
      - (A) staff to correctly identify business and update/create profile in CommSee. Confirm NetBank registration;

- (B) staff to initiate employer arrangement by selecting: “New Product>Superannuation”;
    - (C) staff to follow on screen instructions to complete “Employer Acknowledgement”;
  - (iii) Capture new employees:
    - (A) staff to select “Add” to capture employees and follow on screen instructions;
    - (B) if no employees added at account opening, staff to follow up with business owner;
    - (C) staff to explain that the employer can add employees by visiting the branch; or by calling Essential Super Services on 13 40 74.
  - (b) Column 2 directed staff to the forms/screens to use including handy hints on adding employees;
  - (c) Column 3 contained helpful tips to assist staff drive “quality” accounts, being accounts with funds in them, with links to relevant training, including the eLearning modules “Essential Super Overview” and “Essential Super for Employers” and SkillBUILDER training “Creating an interest in Essential Super with Employers providing General advice only (Tier 1 accredited staff)” and “Creating an interest in Essential Super without providing advice (non Tier 1 accredited staff)”.
49. Subsequent Employer SOPs had the content set out in the First Employer SOP plus:
- (a) additional material in Column 1 as follows:
    - (i) the product features and benefits were stated to be:
      - (A) saves time;
      - (B) can easily add, remove, and pay employees in NetBank;
    - (ii) staff were directed to provide the Essential Super for Business starter kit to the customer which included the PDS/FSG/GAW box set; and

- (iii) staff were directed to walk customers through the “ES for Business NetBank Guide”, “How to use the Employee leaflets” and “ATO Choice” forms;
  - (b) additional material in Column 2 as follows:
    - (i) directing staff to “use the Approved factual information and approved scripts” with this phrase hyperlinked to the relevant approved documents;
    - (ii) warning staff that they may not offer an incentive and/or offer discounted banking products as a condition of taking up an Essential Super arrangement.
50. With respect to digital Employer Sales, at all times while Employer Sales were occurring the online application form for employers contained a recommendation or a statement of opinion that was intended (or that could reasonably be regarded as being intended) to influence employer customers to become an Essential Super “sponsor”.

#### **Particulars**

The online application process for employers on NetBank as at September 2013 contained the following text:

“Reasons for applying:

- To have a central depository for all your employees super details
- The ability to create a superannuation account for your employees.”

A copy of this document may be inspected by appointment with the office of the Plaintiff’s solicitors.

51. Further or in the alternative to paragraph 50:

- (a) employer customers commenced an online application as a result of direct or indirect marketing by the First Defendant;

#### **Particulars**

The marketing included the following:

- (i) “In Branch” marketing, including posters, fliers, booklets and brochures directed to employer customers;
- (ii) Representations by Branch staff, particularly those with existing relationships with small business customers,

including staff within the First Defendant's LBB division, and staff in the role of a small business specialist, business banking specialist or relationship manager;

- (iii) Prospecting emails sent to existing employer customers of the First Defendant;
  - (iv) Digital marketing including search engine marketing and marketing on LinkedIn and other social media; and
  - (v) Marketing on NetBank and CommBank.
- (b) the marketing material was designed to influence employer customers to nominate Essential Super to be the default fund for employees who did not make a choice of superannuation fund.

### **Summary of processes: Employer Sales**

52. In the circumstances identified in:

- (a) paragraphs 46 to 49, financial product advice (within the meaning of s 766B of the Corporations Act) was provided by the First Defendant on and from 1 July 2013 until on or about 8 October 2017 to every (or alternatively, almost every) employer who became an Essential Super "sponsor" pursuant to an Employer Sale in a Branch; and
- (b) paragraphs 50 and 51, financial product advice (within the meaning of s 766B of the Corporations Act) was provided by the First Defendant on and from 1 July 2013 until on or about 3 July 2018 to every (or alternatively, almost every) employer who became an Essential Super "sponsor" pursuant to a digital Employer Sale.

### **I. Financial Product Advice and Digital Sales**

53. Digital Sales were completed by individuals becoming members of Essential Super by completing an online application to open an Essential Super account via a Digital Channel.
54. The online application on and from 1 July 2013 (**First Online Application**) contained screens as follows:



- (a) a "landing page" containing the following text:
 

"How to apply for Essential Super.

Applying for an Essential Super account is quick and easy.

1. Apply in a few easy steps. 2. [graphic indicating a 10 minute wait] 3. Your account is open in NetBank. 4. Set up your first contribution."
- (b) a screen requiring customers to confirm/update their contact details;
- (c) a screen requiring customers to confirm their personal details and TFN. Depending on the status of the customer, information was provided about how to obtain a TFN, or about how the First Defendant would use the TFN or the consequences of not providing a TFN to the First Defendant;
- (d) a screen where customers were required to select from four available investment options, or a mixture of them, with information provided regarding the different options;
- (e) a screen where customers were required to select whether to accept the default death and TPD insurance cover based on the customer's age or whether to halve, double or opt out of this insurance and information regarding the various options;
- (f) a screen summarising the application details and asking the customer to confirm them. This screen also asked customers whether they wish to "fast-track" employer contributions by having an email sent directly to their employer directing the employer to make superannuation contributions on their behalf to the Essential Super account;
- (g) a congratulatory screen stating "All you need to do is set up your first contribution: You can select one or more of the following +Transfer money from your other super funds +Notify your employer to pay super contributions into this account +Make contributions from your bank account. Important: Your life insurance cover commences once there are funds in your super account". For those who had already set up employer contributions this screen read "Here's some more ways to fast track your super: +Transfer money from your other super funds +Make contributions from your bank account"; and

- (h) a final screen with the heading "Thank You and Next Step".
55. The online application process on and from March 2015 (**Second Online Application**) was the same as described in paragraph 54 for the First Online Application except for the following:
- (a) customers were not able to select an investment option but instead were informed by a screen that the First Defendant had automatically selected the Lifestage Investment option for them based on their age but that the customer can change the investment option in NetBank immediately after opening the account; and
  - (b) customers were not able to choose an insurance option but instead were informed by a screen that they were pre-approved for life insurance cover as part of their super but that they could halve, double or cancel the insurance in NetBank immediately after opening the account.
56. The online application process on and from July 2015 (**Third Online Application**) was the same as described in paragraph 55 for the Second Online Application except for the following:
- (a) the visual design of the application form was modernised and tailored according to the age of the applicant;
  - (b) the screen regarding insurance contained text about "Things you should know", which included that "Your premiums will be paid from your super account, not your take-home pay, which can make it more tax-effective". A check box was provided at the bottom of this page allowing customers to opt out of the insurance;
  - (c) there was a SuperMatch screen asking whether the customer has any other super accounts and whether they would like to consolidate them and stating "Rolling all of your super into your Essential Super account will save you time, paperwork and potentially fees."
57. The online application process on and from February 2017 (**Fourth Online Application**) was the same as described in paragraph 56 for the Third Online Application except for the following:
- (a) the "Get Started Page" stated "You're about to open an Essential Super account. The information being provided to you is general advice only. This

information doesn't take into account your objectives, financial situation or needs.”;

- (b) the insurance opt out function was removed; and
- (c) the SuperMatch screen stated “You can use your TFN to find your other super. Here’s how:” and sought the customer’s consent to the use of their TFN to search the ATO’s SuperMatch program for super amounts held for the customer by the ATO or other superannuation funds.

58. Further changes were made to the online application process on and from September 2017 and again on and from March 2018 but the features of the online application process described in paragraph 57 did not change.

#### **Summary of processes: Digital Sales**

59. In the circumstances described in paragraphs 54 to 58, at all times on and from 1 July 2013 until on or about 3 July 2018, the online application contained a recommendation or a statement of opinion that was intended to influence (or could reasonably be regarded as being intended to influence) customers in making one or more of the following decisions:

- (a) whether to open an Essential Super account;
- (b) a choice between four different investment options within Essential Super;
- (c) whether to take out life insurance within Essential Super and, if so, a choice between the default level, half of the default level or twice the default level and a choice between life insurance only and life insurance plus total and permanent disability insurance;
- (d) whether to direct employer contributions to the Essential Super account;
- (e) whether to rollover amounts held in other superannuation funds to the Essential Super account; and
- (f) whether to make personal contributions to the Essential Super account.

60. In these premises, financial product advice (within the meaning of s 766B of the Corporations Act) was provided on and from 1 July 2013 until on or about 3 July 2018 by the First Defendant to every (or alternatively, almost every) customer who became a member of Essential Super pursuant to a Digital Sale.



**J. Financial produce advice and ADAs**

61. Individuals who became members of Essential Super as a result of ADA Transfers (as described in paragraph 27(d) above) received a welcome pack from the First Defendant shortly after the transfer was effected.
62. The welcome pack contained:
- (a) a covering letter encouraging the new members to:
    - (i) bring all their super together into their Essential Super account;
    - (ii) make personal contributions to their Essential Super account;
    - (iii) complete their beneficiary nomination;
    - (iv) maintain sufficient funds in the account to ensure continuation of the insurance coverage.
  - (b) an "Investment Confirmation" summarising the Essential Super account;
  - (c) a PDS for Essential Super;
  - (d) a "Super Choice" form to instruct the member's employer to pay future contributions to Essential Super;
  - (e) a non-lapsing death benefit nomination form; and
  - (f) a booklet with information regarding NetBank and superannuation.
63. In these premises, financial product advice (within the meaning of s 766B of the Corporations Act) was provided by the First Defendant to every (or alternatively, almost every) customer who became a member of Essential Super pursuant to an ADA Transfer.

**K. Financial Product Advice to persons as retail clients**

64. Any financial product advice provided in the course of a Branch Sale, Digital Sale, Employer Sale, Employee Sale or to a member of Essential Super was provided to the relevant person as a retail client for the purposes of s 761G of the Corporations Act.



**L. The Second Defendant gave, and the First Defendant accepted, a monetary or non-monetary benefit**

65. During the Relevant Period, the Second Defendant made payments to the First Defendant in respect of Essential Super as follows:

- (a) \$2,253,537.82 on or about 31 July 2014 for the 2014 financial year;
- (b) \$12,303,856 on or about 25 July 2018 for the 2018 financial year;
- (c) \$1,141,468.82 on or about 22 August 2018 for July 2018;
- (d) \$1,156,272.89 on or about 26 September 2018 for August 2018;
- (e) \$1,131,283.60 on or about 30 October 2018 for September 2018;
- (f) \$1,183,778.29 on or about 27 November 2018 for October 2018;
- (g) \$1,159,280.84 on or about 19 December 2018 for November 2018;
- (h) \$1,211,837.17 on or about 30 January 2019 for December 2018; and
- (i) \$1,226,166.87 on or about 29 March 2019 for January 2019;

**(Cash Payment Benefits).**

66. Each Cash Payment Benefit was referable to:

- (a) one or more Fee Terms;

or otherwise

- (b) one or more Profit Share Arrangements.

67. Further or in the alternative, during the Relevant Period, the Second Defendant made payments to the First Defendant in respect of Essential Super by the following journal entries, each of which was posted pursuant to anterior agreements between the finance teams for the First Defendant and the Second Defendant, respectively, as to the mode of payment:

- (a) \$2,253,537.82 on 30 June 2014 by journal entry #0002884878 for the 2014 financial year;

### Particulars

The agreement as to the posting of this journal entry was reached in the email sent 4 July 2014 by Andrew Strong, then Executive Manager, Liability Products Finance for the First Defendant, to Deirdre Langan then Executive Manager Financial Reporting for the Second Defendant and copied to Keith Wylie, then Executive Manager Reporting and Planning, for the Second Defendant and Omar Tlais, Finance Manager, Wealth Management for the Second Defendant and the reply by Deirdre Langan on the same day.

- (b) \$1,496,618.28 on 31 December 2014 by journal entry #0003107342 for the period from 1 July 2014 to 31 December 2014;

### Particulars

The agreement as to the posting of this journal entry was reached in the email sent 6 January 2015 by Andrew Strong then Executive Manager, Liability Products Finance for the First Defendant, to Liem Huynh then Executive Manager Financial Reporting for the Second Defendant and Liem Huynh's reply on the same day to Andrew Strong, copied to Ben Sciberras, then Manager CFS Corporate Reporting for the Second Defendant.

- (c) \$6,900,000 on 30 April 2016 by journal entry #0003717255 for the period from 1 July 2015 to 30 April 2016;

### Particulars

The agreement as to the posting of this journal entry was reached in the following emails:

- (i) email sent at 9:58am on 29 April 2016 from Deirdre Langan, then Executive Manager, Liability Products Finance for the First Defendant to Keith Wylie, then Executive Manager Reporting and Planning, for the Second Defendant, and copied to Liem Huynh, then Executive Manager Financial Reporting Control for the Second Defendant and Ben Sciberras, then Manager CFS Corporate Reporting for the Second Defendant;
- (ii) the reply by Keith Wylie at 10:36am on that date;
- (iii) the reply by Deirdre Langan at 11:19am on that day; and
- (iv) the reply by Ben Sciberras at 12:03pm on that day to Deirdre Langan, Keith Wylie and Liem Huynh and copied to Mandy Zhong, then Senior Financial Accountant for the Second Defendant;

- (v) a separate reply to Deirdre Langan's email particularised in (iii) and sent by Liem Huynh on 30 April 2016 at 8:56pm to Dierdre Langan, Keith Wylie and Ben Sciberras;
  - (vi) a reply to the email particularised in (v) and sent by Ben Sciberras on 2 May 2016 to Liem Huynh, Dierdre Langan and Keith Wylie;
  - (vii) an email sent at 1:38pm on 29 April 2016 from Deirdre Langan, to Keith Wylie;
  - (viii) the reply by Keith Wylie at 1:53pm on that date, copied to Ben Sciberras; and
  - (ix) the reply by Ben Sciberras at 4:23pm that day to Keith Wylie and Deirdre Langan and copied to Mandy Zhong.
- (d) \$1,600,000 on 30 June 2016 by journal entry #0003806790 for the period 1 May to 30 June 2016;

#### **Particulars**

The agreement as to the posting of this journal entry was reached in the following emails:

- (i) an email sent at 11:02am on 5 July 2016 from Deirdre Langan, then Executive Manager, Liability Products Finance for the First Defendant to Keith Wylie, then Executive Manager Reporting and Planning, for the Second Defendant, Ben Sciberras, then Manager CFS Corporate Reporting for the Second Defendant, and Sarah Bingham, then Manager Financial Reporting for the First Defendant;
  - (ii) the reply by Ben Sciberras at 11:13am on that date, copied to Mandy Zhong, then Senior Financial Accountant for the Second Defendant; and
  - (iii) the further reply by Ben Sciberras at 3:44pm on that day confirming posting of the journal entry.
- (e) \$841,981.57 on 31 July 2016 by journal entry #0003841311 for July 2016;
- (f) \$869,365.00 on 29 August 2016 by journal entry #0003874804 for August 2016;
- (g) \$1,026,926.59 on 30 September 2016 by journal entry #0003906361 for September 2016;
- (h) \$1,087,656.27 on 31 October 2016 by journal entry #0003958823 for October 2016;



- (i) \$1,096,550.90 on 30 November 2016 by journal entry #0003999590 for November 2016;
- (j) \$1,144,403.13 on 20 December 2016 by journal entry #0004027104 for December 2016;
- (k) \$879,960.58 on 31 January 2017 by journal entry #0004082645 for January 2017;
- (l) \$1,139,963.16 on 27 February 2017 by journal entry #0004112368 for February 2017;
- (m) \$1,295,850.01 on 30 March 2017 by journal entry #0004153297 for March 2017;
- (n) \$1,411,357.17 on 30 April 2017 by journal entry #0004185380 for April 2017;
- (o) \$1,468,285.55 on 19 May 2017 by journal entry #0004219522 for May 2017;
- (p) \$1,472,448.34 on 30 June 2017 by journal entry #0004274612 for June 2017;

#### **Particulars**

The agreement as to the posting of journal entries (e) to (p) was reached as follows:

- (i) an email sent at 3:53pm on 29 July 2016 from Ben Sciberras, then Manager CFS Corporate Reporting for the Second Defendant, to Deirdre Langan, then Executive Manager, Liability Products Finance for the First Defendant, Keith Wylie, then Executive Manager Reporting and Planning, for the Second Defendant, and Mandy Zhong then Senior Financial Accountant for the Second Defendant;
- (ii) the attachment to the email setting out the figures to be posted each month for the 2017 financial year;
- (iii) the reply by Deirdre Langan at 4:30pm on that date, also copied to Sarah Bingham, then Manager Financial Reporting for the First Defendant; and
- (iv) the “true-up” for January 2017 was agreed during a meeting between Elizabeth Bennett, then Senior Manager Business Partnering for the Second Defendant and Deirdre Langan, then Executive Manager, Forecast and Decision Support for the First Defendant in or about February 2017 referred to in the email sent from Elizabeth Bennett to Deirdre Langan on 1 February 2017.



- (q) \$1,472,448.34 on 31 July 2017 by journal entry #0004320320 for July 2017;
- (r) \$923,764.00 on 30 August 2017 by journal entry #0004400361 for August 2017;
- (s) \$1,028,352.00 on 22 September 2017 by journal entry #0004386160 for September 2017;
- (t) \$518,086.84 on 31 October 2017 by journal entry #0004437140 for October 2017;

#### **Particulars**

The agreement as to the posting of journal entries (q) to (t) was set out in an email sent on 31 August 2017 from Elizabeth Bennett, then Senior Manager, Business Partnering for the Second Defendant to Deirdre Langan, then Executive Manager Forecast and Decision Support for the First Defendant and the attachment to the email setting out the figures to be posted each month.

- (u) \$1,047,901.63 on 30 November 2017 by journal entry #0004479319 for November 2017;
- (v) \$1,083,057.20 on 31 December 2017 by journal entry #0004517708 for December 2017;
- (w) \$1,116,922.93 on 31 January 2018 by journal entry #0004556462 for January 2018;
- (x) \$1,146,244.40 on 28 February 2018 by journal entry #0004592076 for February 2018;
- (y) \$1,184,953.45 on 31 March 2018 by journal entry #0004633395 for March 2018;
- (z) \$1,217,464.09 on 30 April 2018 by journal entry #0004669440 for April 2018;
- (aa) \$1,253,385.22 on 31 May 2018 by journal entry #0004709237 for May 2018;
- (bb) \$311,275.69 on 29 June 2018 by journal entry #0004745194 for June 2018;

#### **Particulars**

The agreement as to the posting of journal entries (u) to (bb) was reached in the following emails:

- (i) the email sent on 31 August 2017 from Elizabeth Bennett, then Senior Manager, Business Partnering for the

Second Defendant to Deirdre Langan, then Executive Manager Forecast and Decision Support for the First Defendant and the attachment to the email setting out the figures to be posted each month;

- (ii) the email sent from Elizabeth Bennett to Deirdre Langan on 30 October 2017 and Deirdre Langan's reply on 2 November 2017 to the effect that, from 1 November 2017 payments from the Second Defendant to the First Defendant for Essential Super would be 30% of net revenue; and
- (iii) the email sent from Elizabeth Bennett to Deirdre Langan and copied to Maria Ghali on 14 June 2018 regarding the Essential Super "true up for FY18" and the figure to be posted for June 2018.

A copy of the emails and journal entries referred to may be inspected by appointment with the office of the Plaintiff's solicitors.

- (cc) \$1,141,468.82 on 31 July 2018 by journal entry #0004799262 for July 2018;
- (dd) \$1,156,272.89 on 31 August 2018 by journal entry #0004834363 for August 2018;
- (ee) \$1,131,283.60 on 30 September 2018 by journal entry #0004873473 for September 2018;
- (ff) \$1,183,778.29 on 31 October 2018 by journal entry #0004913015 for October 2018;
- (gg) \$1,159,280.84 on 30 November 2018 by journal entry #0004955518 for November 2018;
- (hh) \$1,211,837.17 on 31 December 2018 by journal entry #0004995168 for December 2018; and
- (ii) \$1,226,166.87 on 11 February 2019 by journal entry #0005042639 for January 2019.

### Particulars

The agreement as to the posting of journal entries (cc) to (ii) was reached in the following emails:

- (i) An email sent 7 August 2018 by Jihee Kang to Maria Ghali and copied to Milad Mousavi with the subject "Essential Super Forecast";

- (ii) the reply to that email by Maria Ghali, copied to Milan Mousavi and Ben Dale; and
- (iii) the reply by Jihee Kang to Maria Ghali, copied to Malid Mousavi, Ben Dale and Elizabeth Bennett.

A copy of the emails and journal entries referred to may be inspected by appointment with the office of the Plaintiff's solicitors.

68. On or about 29 June 2018 the journal entries specified in paragraphs 67(q) to (aa) were:
- (a) reversed by journal entry #0254745194; and
  - (b) reposted by journal entry #0004745194, which also included the amount specified in paragraph 67(bb).

(The journal entries referred to in paragraphs 67 and 68(b) are referred to as the **Journal Entry Payment Benefits**)

69. Each Journal Entry Payment Benefit was referable to:

- (a) one or more Fee Terms;
- or otherwise
- (b) one or more Profit Share Arrangements.

70. Further or in the alternative, during the Relevant Period, the First Defendant had a contractual entitlement to be paid, and the Second Defendant had a commensurate contractual obligation to pay, an annual fee of 30% of the total net revenue earned by the Second Defendant in relation to Essential Super in the relevant financial year (**Chose in Action Benefits**).

### Particulars

The contractual entitlement and obligation arose under the Fee Terms of the Distribution Agreements.

71. On or around 21 February 2019, the First Defendant and the Second Defendant agreed that payments from the Second Defendant to the First Defendant under the 2018 Distribution Agreement would be suspended from (and inclusive of) the payment calculated on the basis of net revenue for February 2019.

### Particulars

The resolution by the Second Defendant's Board to suspend payments to the First Defendant is referred to in the Minutes of the CFSIL Board meeting on 25 February 2019, a copy of which may be inspected by appointment with the office of the Plaintiff's solicitors.

#### M. Nature of the benefits given to the First Defendant

72. With respect to Essential Super, the Second Defendant only earned revenue from accounts that had been opened and into which funds had been placed (**Funded Essential Super Accounts**).
73. At all times during the Relevant Period, the net revenue earned by the Second Defendant from Funded Essential Super Accounts included:
  - (a) the "Member Fee" of \$5 per month (\$60 per annum) per Funded Essential Super Account; plus
  - (b) the "Management Fee" of 0.80% per annum of funds under administration; plus
  - (c) the "Insurance Administration Fee" of 7.5% of premiums for insurances held by members through Essential Super.
74. One or more components of the Second Defendant's net revenue from Essential Super increased if any one or more of the following occurred:
  - (a) the number of Funded Essential Super Accounts increased;
  - (b) the funds under administration within Essential Super increased;
  - (c) more Funded Essential Super Account holders took insurance through their Essential Super account.
75. As a result of the Fee Terms, during the Relevant Period:
  - (a) Chose in Action Benefits;
  - (b) Cash Payment Benefits; and/or
  - (c) Journal Entry Payment Benefits,

increased in any one or more of the circumstances set out in paragraph 74.



76. Further or alternatively, as a result of the Profit Share Arrangements, from in or around 1 July 2013 to on or around 31 October 2017, the:

- (a) Cash Payment Benefits; and/or
- (b) Journal Entry Payment Benefits,

increased in any one of the circumstances set out in paragraph 74, other things being equal.

**N. Corporations Act, s 963A**

77. Each of:

- (a) the Chose in Action Benefits;
- (b) the Cash Payments Benefits;
- (c) the Journal Entry Benefits,

comprise benefits (the **Impugned Benefits**, and each an **Impugned Benefit**) given to the First Defendant who provided financial product advice to persons as retail clients (as referred to in paragraphs 43, 52, 60, 63 and 64).

78. By reason of:

- (a) the nature of each Impugned Benefit; and
- (b) the circumstances in which each Impugned Benefit was given, as described in paragraphs 5 to 18 and 65 to 71, the Impugned Benefits, and each Impugned Benefit, could reasonably be expected to influence the choice of financial product recommended by the First Defendant to retail clients (viz., the Impugned Benefits, and each Impugned Benefit, could reasonably be expected to influence the First Defendant to recommend Essential Super, and not another superannuation product, to its customers).

79. Further to paragraph 78, by reason of:

- (a) the nature of each Impugned Benefit; and
- (b) the circumstances in which each Impugned Benefit was given, as described in paragraphs 5 to 18 and 65 to 71, the Impugned Benefits, and each Impugned Benefit, could reasonably be expected to influence:

- (i) the financial product advice given to retail clients by the First Defendant in that the Impugned Benefits, and each Impugned Benefit, could reasonably be expected to influence the First Defendant to, thereafter, recommend:
  - (A) that Essential Super members increase the funds in their Essential Super accounts;
  - (B) that Essential Super members take and maintain insurance with their Essential Super accounts.

80. Accordingly, within the meaning of s 963A of the Corporations Act:

- (a) each Cash Payment Benefit comprised conflicted remuneration;
- (b) each Journal Entry Payment Benefit comprised conflicted remuneration;
- (c) each Chose in Action Benefit comprised conflicted remuneration.

81. Further or in the alternative to paragraph 80, the Impugned Benefits, and each Impugned Benefit, comprised conflicted remuneration by reference to each Funded Essential Super Account, in circumstances where:

- (a) each Funded Essential Super Account gave rise to one or more Impugned Benefits;
- (b) the First Defendant provided financial product advice to persons each as a retail client in respect of every, or almost every, Funded Essential Super Account; and
- (c) the Impugned Benefits, and each of them, could reasonably be expected to influence:
  - (i) the choice of financial product recommended by the First Defendant to retail clients; and/or
  - (ii) financial product advice given to retail clients by the First Defendant.

**O. Corporations Act, s 963L**

82. Further, in the circumstances described in paragraphs 72 to 76, the Impugned Benefits, and each of them, comprised a benefit, the value of which was wholly or partly dependent on the total value and/or the number of Essential Super products:

- (a) acquired by retail clients, or a class of retail clients, as referred to in paragraphs 26 and 27;
- (b) to whom the First Defendant provided financial product advice as referred to in paragraphs 43, 52, 60, 63 and 64.

83. Accordingly, the Plaintiff is entitled to rely on the presumption in s 963L of the Corporations Act.

**P. Contraventions: Corporations Act**

84. In the premises, by accepting each:

- (a) Cash Payment Benefit;
- (b) Journal Entry Payment Benefit; and/or
- (c) Chose in Action Benefit,

the First Defendant contravened s 963E(1) of the Corporations Act.

85. Further, by giving each:

- (a) Cash Payment Benefit;
- (b) Journal Entry Payment Benefit; and/or
- (c) Chose in Action Benefit,

the Second Defendant contravened s 963K of the Corporations Act.

**AND THE PLAINTIFF SEEKS**

(A) The relief set out in the Originating Process.

Date: 22 June 2020

*Johnson Winter & Skiffington*

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Signed by Tom Jarvis  
Lawyer for the Plaintiff

This pleading was prepared by counsel, Philip H Solomon, Dean Luxton and Anna R Wilson.

**Certificate of lawyer**

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

Date: 22 June 2020



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Signed by Tom Jarvis  
Lawyer for the Plaintiff