

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/09/2021 9:47:32 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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



Dated: 24/09/2021 9:47:36 AM AEST

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

Registrar

Important Information

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

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.



Supplementary Statement of Agreed Facts

No VID183 of 2020

Federal Court of Australia
District Registry: Victoria
Division: General

Australian Securities and Investments Commission
Plaintiff

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

A INTRODUCTION

1. This Supplementary Statement of Agreed Facts (**SSAF**) is made for the purposes of s 191 of the *Evidence Act 1995* (Cth) jointly by the plaintiff (**ASIC**) and the defendant (**CFSIL**). The SSAF relates to proceeding number VID183 of 2020 commenced by ASIC on 17 March 2020 (**Proceeding**).
2. On 6 September 2021, the Court made declarations as to contraventions by CFSIL of sections 12DB(1)(h), 12DB(1)(i) and 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and sections 1041H, 949A and 912A(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) (**Declarations**). The Court fixed the Proceeding for hearing as to penalty and other relief on 12 October 2021 (**Relief Hearing**).
3. This document sets out the facts agreed by the parties solely for the purposes of the Relief Hearing in this Proceeding and do not constitute any agreement or admission outside of this Proceeding.
4. On 2 September 2021, the parties filed a Statement of Agreed Facts and Admissions (**SOAF**). In addition to the facts set out in this document, the parties intend to rely upon the agreed facts and admissions contained in the SOAF.

B ADDITIONAL AGREED FACTS

B.1 Approval of the April 2014 Letters and Call Documents

B.1.1 April 2014 Letters

5. The most senior people within CFSIL who approved the content of the Letters (as defined in paragraph 1 of the Declarations) were Sam Wall, Acting General Manager, Product and Investments, CFSIL; and Peter Sutherland, General Manager Colonial First State and Wealth Management Advice, Wealth Risk Management, CFSIL.
6. At the time that Mr Wall approved the Letters, on 31 March 2014,¹ he reported to Peter Chun, General Manager, Product and Investments.
7. At the time that Mr Sutherland approved the Letters, on 15 April 2014,² he reported to Peter Taylor, Chief Risk Officer, Wealth Management. Mr Taylor at that time reported to Alden Toevis, Group Chief Risk Officer.
8. The Letters, or drafts of the Letters, were also approved by the following persons (who held the following positions within CFSIL):

Name	Position	Date of approval	Document ID
John Anderson	Head of Corporate Superannuation	26 March 2014	CBA.5700.0004.0030
Amanda Ortlepp	Senior Marketing Manager, FirstChoice, Colonial First State	27 March 2014	CBA.5700.0004.0031
Carlene Hing	Manager, Wealth Risk Management – Colonial First State & Advice	31 March 2014	CBA.5700.0004.0035
Rebecca Warneford	Platform Development Manager, Distribution, Colonial First State	1 April 2014	CBA.5700.0004.0041
Lisa Rava	Senior Legal Counsel, Superannuation, Wealth Management Legal, Group Corporate Affairs (CBA)	1 April 2014	CBA.5970.0050.0174
		15 April 2014	CBA.5700.0004.0111

¹ CBA.5700.0004.0036

² CBA.5970.0238.1284

B.1.2 Call documents

9. ASIC has requested the name and title of the most senior person within CFSIL who approved the content of:
 - (a) the email from Ben Delorie, Customer Guidance Manager Client Operations, to First State Client Services Customer Guidance dated 18 March 2014 (being the email referred to in paragraph 64(a) of the SOAF)³ (**18 March email**);
 - (b) the script attached to the 18 March email (being the document referred to in paragraph 64(a) of the SOAF);⁴ and
 - (c) the document titled “APRA Callout Training Document” (being the document referred to in paragraph 64(b) of the SOAF),⁵

but CFSIL has been unable to provide that information in the time available but understands that the approval of those documents would have been provided by the same people, or people in equivalent roles to those outlined at paragraphs [5] to [8] above.

B.1.3 Communications with APRA in relation to Letters and call documents

10. On 26 March 2014, CFSIL provided APRA with:
 - (a) a copy of a draft of the Letters which was in a similar form to the final version of the Letters;⁶ and
 - (b) a document titled “Outbound script for contribution directions”.⁷
11. APRA did not propose any changes to those documents at that time.
12. On 14 April 2014, CFSIL provided APRA with a further version of the Letters.⁸ APRA provided some comments on the sentence in the Letters which discussed the issue of costs and insurance for members. After some modification to that sentence and the one that followed, the Letters were finalised.

³ CB D.12. 1342-44.

⁴ CB D.13.1344.

⁵ CB D.16 1351.

⁶ CB D.22 1373-1376.

⁷ CB D.22 1373-1376.

⁸ CBA.5970.0238.1284

B.2 Comparison of member fees and adviser trail commissions applicable to FirstChoice Personal Super and CES Fund's MySuper Product

B.2.1 Difference in amount of fees payable to CFSIL by members of FirstChoice Personal Super and members of CES Fund's MySuper Product

13. Between 2014 and 2016, the fees paid by members in FirstChoice Personal Super to CFSIL (excluding buy/sell spreads) were:
- (a) in the 2014 calendar year, \$7,050,000 higher than the fees that would have been payable by those members to CFSIL if all of those members were instead invested in CES Fund's MySuper Product (as defined in paragraph 8(e) of the SOAF). This equates on average to additional fees of \$587 per member with an open FirstChoice Personal Super account in that year;
 - (b) in the 2015 calendar year, \$6,718,000 higher than the fees that would have been payable by those members to CFSIL if all of those members were instead invested in CES Fund's MySuper Product. This equates on average to additional fees of \$709.10 per member with an open FirstChoice Personal Super account in that year; and
 - (c) in the 2016 calendar year, \$6,645,000 higher than the fees that would have been payable by those members to CFSIL if all of those members were instead invested in CES Fund's MySuper Product. This equates on average to additional fees of \$721.73 per member with an open FirstChoice Personal Super account in that year.

B.2.2 Difference in Net Revenue (including adviser trail commissions) obtained from members of FirstChoice Personal Super and members of CES Fund's MySuper Product

14. In paragraphs 15 to 17 below, the expression:
- (a) "CFSIL's Net Revenue Without Deduction of Adviser Trail Commissions" means the amount of fees paid to CFSIL by members less (i) CFSIL's investment management expenses and (ii) any service rebates, without any deduction of the amount of adviser trail commissions paid by CFSIL to advisers; and
 - (b) "CFSIL's Net Revenue After Deduction of Adviser Trail Commissions" means the amount of fees paid to CFSIL by members less (i) CFSIL's investment management expenses, (i) service rebates and (iii) the amount of adviser trail commissions paid by CFSIL to advisers.

15. Between 2014 and 2016, CFSIL's Net Revenue Without Deduction of Adviser Trail Commissions in respect of FirstChoice Personal Super members was:
 - (a) in the 2014 calendar year, \$5,302,000 higher than it would have been if all of those members were instead invested in CES Fund's MySuper Product. This equates on average to \$441.21 more per member with an open FirstChoice Personal Super account in that year;
 - (b) in the 2015 calendar year, \$5,015,000 higher than it would have been if all of those members were instead invested in CES Fund's MySuper Product. This equates on average to \$529.34 more per member with an open FirstChoice Personal Super account in that year; and
 - (c) in the 2016 calendar year, \$4,919,000 higher than it would have been if all of those members were instead invested in CES Fund's MySuper Product. This equates on average to \$534.27 more per member with an open FirstChoice Personal Super account in that year.
16. Between 2014 and 2016, CFSIL's Net Revenue After Deduction of Adviser Trail Commissions in respect of FirstChoice Personal Super members was:
 - (a) in the 2014 calendar year, \$1,795,000 higher than it would have been if all of those members were instead invested in CES Fund's MySuper Product. This equates on average to \$149 more per member with an open FirstChoice Personal Super account in that year;
 - (b) in the 2015 calendar year, \$1,792,000 higher than it would have been if all of those members were instead invested in CES Fund's MySuper Product. This equates on average to \$189 more per member with an open FirstChoice Personal Super account in that year; and
 - (c) in the 2016 calendar year, \$1,705,000 higher than it would have been if all of those members were instead invested in CES Fund's MySuper Product. This equates on average to \$185 more per member with an open FirstChoice Personal Super account in that year.
17. At all material times between March 2014 (being the date of the first of the contravening calls) and July 2016 (being the date of the last of the contravening calls), CFSIL was aware, as was in fact the case, that the Net Revenue Without Deduction of Adviser Trail

Commissions and the Net Revenue After Deduction of Adviser Trail Commissions it would obtain from members in FirstChoice Personal Super was likely to be greater than the Net Revenue Without Deduction of Adviser Trail Commission and the Net Revenue After Deduction of Adviser Trail Commissions it would obtain from those members if they were invested instead in CES Fund's MySuper Product because, inter alia, the applicable member fees in FirstChoice Personal Super were higher than the applicable member fees in CES Fund's MySuper Product.

B.2.3 Difference in amount of adviser trail commissions

18. Between 2014 and 2016, the total amount of adviser trail commissions paid by CFSIL to financial advisers in respect of FirstChoice Personal Super members was:
 - (a) in the 2014 calendar year, \$3,507,000. This equates on average to \$291.84 in adviser trail commissions per member with an open FirstChoice Personal Super account in that year;
 - (b) in the 2015 calendar year, \$3,223,000. This equates on average to \$340.19 in adviser trail commissions per member with an open FirstChoice Personal Super account in that year; and
 - (c) in the 2016 calendar year, \$3,214,000. This equates on average to \$349.08 in adviser trail commissions per member with an open FirstChoice Personal Super account in that year.
19. No adviser trail commissions would have been payable in respect of those members had they instead been invested in CES Fund's MySuper Product.
20. At all material times since at least 1 January 2014, CFSIL was aware that transferring members from FirstChoice Personal Super to CES Fund's MySuper Product would adversely impact financial planners who received adviser trail commissions because it would reduce the amount of revenue they would receive in the form of adviser trail commissions.

B.3 Member loss and CFSIL revenue in relation to Calls and Letters

B.3.1 Calls

21. On the remediation methodology adopted by CFSIL (which it refers to as the Project Carlisle methodology), it has paid in total \$77,079,209.72 in relation to 7,695 member accounts.⁹
22. In relation to the calls referred to in paragraphs 2 to 5 of the Declarations (**Calls**):
 - (a) on the assumption that the members would not have provided CFSIL with an investment direction had the conduct which has been declared in this proceeding to constitute contraventions of section 12DB of the ASIC Act (**relevant call contravening conduct**) not occurred, the total loss the members suffered as a result of the relevant call contravening conduct, is approximately \$424,808; and
 - (b) after these proceedings were commenced, CFSIL compensated those members who received the Calls for the amount of loss referred to in subparagraph (a) above;
 - (c) the total amount of additional profit CFSIL obtained from those members as a result of CFSIL:
 - (i) not having paid into a MySuper product their contributions received after 1 January 2014 was, up until 29 June 2021, approximately \$84,500 (after deduction of any adviser trail commissions paid by CFSIL to financial advisers) and approximately \$232,300 (before deduction of any adviser trail commissions paid by CFSIL to financial advisers); and
 - (ii) not having paid into a MySuper product their contributions received after the date of the relevant call to the member was, up until 29 June 2021, approximately \$78,800 (after deduction of any adviser trail commissions paid by CFSIL to financial advisers) and approximately \$214,000 (before deduction of any adviser trail commissions paid by CFSIL to financial advisers).

⁹ These were members who: (a) made a contribution after 1 January 2014 and therefore are part of the s29WA cohort (as distinct from members who had an ADA transfer only); and (b) were members of FirstChoice Personal Super.

B.4 CFSIL's Call Campaign

23. Since March 2014, CFSIL made at least 12,209 calls to members affected by its section 29WA breach (that is, members from whom CFSIL had accepted a superannuation contribution after 1 January 2014 into FirstChoice Personal Super without an investment direction) in which CFSIL sought an investment direction, which was then either provided on the call or provided following the call.
24. On 17 September 2019, CFSIL lodged a breach report with ASIC in relation to instances of breaches of financial services laws in respect of certain calls, and commenced work on a remediation program in respect of those calls.
25. In approximately 5,745 of the calls referred to in paragraph 23 above, the CFSIL representative:
 - (a) made statements to the member to the effect that:
 - (i) legislative changes, the legislator or the regulator required CFSIL to contact the member; and
 - (ii) the member needed to take action by providing an investment direction; and
 - (b) did not inform the member that they had the option of doing nothing and defaulting to MySuper.
26. In relation to the calls referred to in paragraph 25 above:
 - (a) on the assumption that the members would not have provided CFSIL with an investment direction had the conduct referred to in paragraph 25 above not occurred, the total loss the members suffered as a result of the conduct referred to in paragraph 25, is approximately \$67,028,633.42; and
 - (b) after these proceedings were commenced, CFSIL compensated those members for the amount of loss referred to in subparagraph (a) above.
27. As at the date of this SSAF, ASIC has requested, but CFSIL has been unable to provide in the time available, information regarding the total amount of additional revenue CFSIL obtained from those members as a result of CFSIL not having paid into a MySuper product their contributions received after 1 January 2014. CFSIL has not been able to provide the information referred to above because it has not undertaken the analyses necessary to produce that information.

28. In addition to the to the amount identified in paragraph 26(a) above, CFSIL has paid \$9,564,950.76 in remediation to members using “Straight Through Processing” (STP) in respect of 2,136 member accounts.

B.4.1 Letters

29. Of the 12,911 members who received the Letters, 8,668 members provided CFSIL with an investment direction (although some of those members may have provided that investment direction after receiving one of the 12,209 calls referred to in paragraph 23 above. CFSIL has not been able to provide information as to the number of members in this category because it has not been able to undertake the analyses necessary to produce that information in the time available).
30. As at the date of this SSAF, in respect of the Letters, ASIC has requested the following information, but CFSIL has been unable to provide information in the time available:
- (a) how many of these members had, between the time of receiving the Letters and providing the investment direction, received either a call or further correspondence from CFSIL;
 - (b) the amount of loss the members suffered as a result the conduct which has been declared in this proceeding to constitute a contravention of section 12DB of the ASIC Act; or
 - (c) whether (and if so, how much) CFSIL has paid any compensation to those members in respect of any such loss.
31. CFSIL has not been able to provide the information referred to above because it has not been able to undertake the analyses necessary to produce that information in the time available.
32. CFSIL has confirmed to ASIC that it will have a remediation program for members who received the Letters and provided CFSIL with an investment direction and who have not already been remediated.

B.5 Financial position of CFSIL and CBA

33. CFSIL’s total funds under management was:
- (a) as at 30 June 2014, \$62,508,326 (which represented a 4% share of the total industry superannuation funds under management);

- (b) as at 30 June 2015, \$68,941,985 (which represented a 3% share of the total industry superannuation funds under management);
 - (c) as at 30 June 2016, \$70,793,059 (which represented a 3% share of the total industry superannuation funds under management); and
 - (d) as at 30 June 2021, \$96,300,000 (which represented a 3% share of the total industry superannuation funds under management).
34. During each of the 2014, 2015, 2016 and 2020 financial years, CFSIL's total revenue, operating income before expenses, gross profit and net profit were as follows.

	Total Revenue	Gross Profit	Net profit after tax
2014	\$1,000,976,000	\$554,558,000	\$224,887,000
2015	\$1,154,671,000	\$654,937,000	\$276,109,000
2016	\$1,142,904,000	\$671,632,000	\$286,891,000
2020	\$1,161,153,000	\$711,102,000	\$174,246,000

35. At all material times, CFSIL was a wholly owned subsidiary of the Commonwealth Bank of Australia (CBA).¹⁰ CBA is one of Australia's largest companies. It is listed on the Australian Stock Exchange. Its current market capitalisation as at 30 June 2021 was \$177.18bn. During each of the 2014, 2015, 2016 and 2021 financial years, Commonwealth Bank of Australia's revenue, operating income before expenses, gross profit and net profit were as follows:

	Total Revenue	Gross profit	Net profit after tax
2014	\$22,488,000,000	\$21,570,000,000	\$8,650,000,000
2015	\$23,668,000,000	\$22,680,000,000	\$9,084,000,000
2016	\$24,578,000,000	\$23,322,000,000	\$9,247,000,000
2021	\$24,414,000,000	\$23,860,000,000	\$10,181,000,000

¹⁰ SOAF [6(g)].



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