# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Commonwealth Bank of Australia [2023] FCAFC 135

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| Appeal from: | *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1149 |
| File number: | VID 630 of 2022 |
| Judgment of: | **MOSHINSKY, O'BRYAN AND JACKMAN JJ** |
| Date of judgment: | 17 August 2023 |
| Catchwords: | **CORPORATIONS** – conflicted remuneration – Div 4 of Pt 7.7A of the *Corporations Act 2001* (Cth) (**Act**) – where the first respondent (**CBA**) and the second respondent (**CFSIL**) entered into arrangements whereby CFSIL would develop and manage, and CBA would distribute, a superannuation product – where CFSIL agreed to pay a proportion of net annual revenue earned from the superannuation product to CBA and where cash transfers were effected between the entities in connection with the promise to pay – where CBA and CFSIL are related entities – whether the contractual promise to pay and the cash transfers constituted a "benefit" for the purpose of s 963A – whether the presumption in s 963L was applicable – whether, because of the nature of the impugned benefits and the circumstances in which they were given, the impugned benefits were capable of influencing and could reasonably have been expected to influence the choice of financial product recommended, or the financial product advice given, by CBA to retail clients – whether the appellant, the Australian Securities and Investments Commission, was required, and failed, to establish that CBA provided financial product recommendations and/or financial product advice to retail clients – whether the impugned benefits came within reg 7.7A.16 of the *Corporations Regulations 2001* (Cth) with the result that the prohibition on conflicted remuneration did not apply – Div 4 of Pt 7.7A of the Act did not apply to the impugned benefits – appeal dismissed<br><br>**STATUTORY INTERPRETATION** – proper construction of s 963A of the Act – meaning of the word "benefit" – whether s 963A capable of application where a financial service licensee recommends a single financial product – whether s 963A capable of application where a |

benefit is given by one legal entity to another within a wholly-owned group of companies

Legislation:

*Acts Interpretation Act 1901* (Cth), ss 15AA, 15AB

*Corporations Act 2001* (Cth), ss 9, 623, 657A, Pt 7.1 Div 3, ss 760A, 761A, 761G, 761GA, 762A, 764A, 766B, 766H, Pt 7.7A Div 4, ss 963AA, 963A, 963D, 963E, 963L, 963K, 1012IA, Pt 10.18, ss 1526, 1528

*Corporations Amendment (Financial Advice Measures) Act 2016* (Cth)

*Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth)

*Corporations Law*, s 698

*Superannuation Industry (Supervision) Act* 1993 (Cth), ss 34C(1), 58(2)

*Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019* (Cth)

*Corporations Amendment (Further Future Of Financial Advice Measures) Bill 2012* (Cth)

*Corporations Amendment Regulation 2013 (No. 5)* (Cth)

*Corporations Regulations 2001* (Cth), regs 7.1.08(1), 7.7A.16, 7.7A.16A, 7.7A.16B

Cases cited:

*Aberfoyle Ltd v Western Metals Ltd* (1998) 84 FCR 113

*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27

*Australian Building & Construction Commissioner v Construction Forestry, Mining & Energy Union* (2018) 262 FCR 473

*Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* (2017) 254 FCR 311

*Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449

*Australian Securities and Investment Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170

*Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1149

*Australian Securities and Investments Commission v Forex Capital Trading Pty Limited, in the matter of Forex Capital Trading Pty Limited* [2021] FCA 570

*Australian Securities and Investments Commission v Lewski* (2018) 266 CLR 174

*Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527

*Australian Securities and Investments Commission v Select*

*AFSL Pty Ltd (No 2)* [2022] FCA 786; 162 ACSR 1

*Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515; 407 ALR 1

*Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 171 CLR 88

*Balanced Securities Limited v Dumayne Property Group Pty Ltd* (2017) 53 VR 14

*Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 43 NSWLR 638

*Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249

*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384

*Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629

*Commonwealth v Baume* (1905) 2 CLR 405

*Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)* (2020) 275 FCR 342

*Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Limited* (1934) 52 CLR 85

*Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471

*Federal Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573

*Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444 (Gibbs and Mason JJ)

*Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520

*Guinn v United States*, 238 US 347 (1915)

*Hillam v Iacullo* (2015) 90 NSWLR 422

*Hunter Douglas Australia Pty Ltd v Perma Blinds* (1969) 122 CLR 49

*Lane v Wilson*, 307 US 268 (1939)

*McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633

*Mersey Docks and Harbour Board v Henderson Bros* (1888) 13 App Cas 595

*Newton v Federal Commissioner of Taxation* (Cth) (1958) 98 CLR 1

*Norcast S.ár.L* v *Bradken Ltd (No. 2)* [2013] FCA 235; (2013) 219 FCR 14

*O'Connell v Nixon* (2007) 16 VR 440

*Pileggi v Australian Sports Drug Agency* (2004) 138 FCR 107

*Primac Holdings Ltd v IAMA Ltd* (1996) 22 ACSR 454

*Project Blue Sky v Australian Broadcasting Authority*

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| | (1998) 194 CLR 355<br>*Re Powertel (No 3)* [2003] ATP 28<br>*Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611<br>*Robert Bosch (Australia) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research* (2011) 197 FCR 374<br>*Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd* (1993) 177 CLR 508<br>*Savage Resources Ltd v Pasminco Investments Pty Ltd* (1998) 159 ALR 304<br>*Sea Shepherd Australia Ltd v Commissioner of Taxation* (2013) 212 FCR 252<br>*SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362<br>*The King v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23<br>*Thirteenth Beach Coast Watch Inc v Environment Protection Authority* (2009) 29 VR 1<br>*Unity APA Ltd v Humes Ltd (No 2)* [1987] VR 474<br>*Vines v Djordjevitch* (1955) 91 CLR 512<br>*Westpac Securities Administration Ltd v Australian Securities and Investments Commission* 270 CLR 118<br>*Workpac Pty Ltd v Skene* (2018) 264 FCR 536 |
| Division: | General Division |
| Registry: | Victoria |
| National Practice Area: | Commercial and Corporations |
| Sub-area: | Regulator and Consumer Protection |
| Number of paragraphs: | 336 |
| Date of hearing: | 22-23 February 2023 |
| Counsel for the Appellant: | Mr P Solomon KC with Mr D Luxton and Ms A Wilson |
| Solicitor for the Appellant: | Johnson Winter Slattery |
| Counsel for the First Respondent: | Mr N J Young KC with Mr P Kulevski and Ms L Coleman |
| Solicitor for the First Respondent: | Clayton Utz |
| Counsel for the Second | Mr N P De Young KC with Mr K Loxley |

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| Respondent: | |
| Solicitor for the Second Respondent: | King & Wood Mallesons |

# ORDERS

**VID 630 of 2022**

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| **BETWEEN:** | **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**<br>Appellant |
| **AND:** | **COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)**<br>First Respondent |
| | **COLONIAL FIRST STATE INVESTMENTS PTY LTD (ACN 002 348 352) AS TRUSTEE FOR COMMONWEALTH ESSENTIAL SUPER (ABN 56 601 925 435)**<br>Second Respondent |
| **ORDER MADE BY:** | **MOSHINSKY, O'BRYAN AND JACKMAN JJ** |
| **DATE OF ORDER:** | **17 AUGUST 2023** |

**THE COURT ORDERS THAT:**

1. The appeal be dismissed.

2. The Appellant pay the costs of the appeal of the First and Second Respondents.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

## MOSHINSKY J:

1 I have had the considerable benefit of reading in draft the reasons for judgment of O'Bryan J and the reasons for judgment of Jackman J. I agree with O'Bryan J that the appeal should be dismissed with costs. Subject to one issue, I agree with the reasons of O'Bryan J. The one issue is: whether the primary judge erred in concluding that ASIC had failed to establish that CBA provided financial product advice (appeal grounds 9 and 10). In my opinion, the primary judge erred in concluding that it was not established that CBA provided financial product advice. I would therefore uphold ground 10. However, this does not affect the overall outcome of the appeal.

2 I gratefully adopt the summary of the facts, issues and the parties' submissions set out in the reasons of O'Bryan J. I will also adopt the abbreviations used in his Honour's reasons.

3 I agree with O'Bryan J that: a benefit given to a financial services licensee cannot constitute conflicted remuneration if the licensee does not provide financial product advice to persons as retail clients in respect of the financial product in question; in the circumstances of the present case, ASIC was required to prove that CBA provided financial product advice in relation to Essential Super to retail clients; that does not require proof that CBA provided financial product advice on every occasion on which it distributed Essential Super, but there must be evidence from which the Court can conclude that financial product advice was given on at least some occasions.

4 I also agree with O'Bryan J that: in order to prove that CBA gave financial product advice to retail clients in respect of Essential Super, it was necessary to establish (on the balance of probabilities) that statements of a particular kind were made to retail clients, and that the content of those statements satisfied the definition of financial product advice; proof of that fact did not necessarily require evidence from individual staff members or individual customers; the fact could be proved to the requisite standard by a combination of documentary evidence and inference.

5 Further, I agree that: the evidence established that CBA developed and implemented comprehensive processes and procedures for the distribution of Essential Super by branch staff across a network of more than 1,000 branches; CBA trained its staff with respect to the types of statements that were permitted to be made to customers or potential customers in relation to

Essential Super, and staff were provided with scripts and guides for that purpose; in the circumstances as described by O'Bryan J, the Court will readily infer that statements of the kind contained in training and other materials provided to branch staff are likely to have been communicated to customers who acquired Essential Super on many occasions.

6 The point of difference is whether, assuming that bank staff said words to the effect of the approved scripts, this conduct constituted the provision of financial product advice within the meaning of s 766B of the *Corporations Act 2001* (Cth). The relevant parts of that provision are set out in the judgment of O'Bryan J. It suffices for present purposes to set out subsection (1):

> (1) For the purposes of this Chapter, ***financial product advice*** means a recommendation or a statement of opinion, or a report of either of those things, that:
>
> (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
>
> (b) could reasonably be regarded as being intended to have such an influence.

7 A distinction is drawn in s 766B between "personal advice" and "general advice", but that distinction is not relevant for present purposes. It is not contended by ASIC that CBA gave "personal advice". Therefore, if CBA gave financial product advice, any such advice was "general advice": see s 766B(4).

8 The definition of "financial product advice" is to be construed in the context of Ch 7 of the *Corporations Act* as a whole. Ch 7 contains important protections for consumers in relation to the provision of financial product advice. Among other things, there are disclosure requirements that apply to the provision of financial product advice. The extent of these obligations differs depending on whether the advice is personal advice or general advice, with the requirements more onerous in the case of personal advice.

9 Section 766B(1) refers to "a recommendation or a statement of opinion". The meaning of these words was considered by the Full Court of this Court in *Australian Securities and Investment Commission v Westpac Securities Administration Ltd* [2019] FCAFC 187; 272 FCR 170 ***(Westpac Securities)***. All members of the Full Court (Allsop CJ, Jagot and O'Bryan JJ) held that the conduct of Westpac constituted the provision of *financial product advice*, and that such advice was *personal advice*. On appeal to the High Court, Westpac accepted that it had given

financial product advice and the issue was whether that advice was personal advice or general advice: see *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3; 270 CLR 118 at [6], [46].

10 In *Westpac Securities*, Allsop CJ considered the meaning of the words "a recommendation or a statement of opinion" in s 766B(1) at [16]-[23], including:

> 16 The primary judge, correctly in my view, at [83]-[93] of the reasons, considered it appropriate to give a broad interpretation to "recommendation" and "statement of opinion", as words used in a provision intended to be, to a significant degree, protective. In particular, I agree with the approach of Sackville AJA in *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [365]-[366], referred to by the primary judge at [85]:
>
> > 365 The construction of s 766B(1) must take into account that the language encompasses a recommendation or statement of opinion that is intended to influence a person in making a decision relating to a financial product or could reasonably be regarded as having such an influence. A person wishing to influence another person (the client) to make a decision relating to a financial product … may do so in ways other than by express recommendations or explicit statements of opinion. Information or other material may be presented to the client in a form implying that the presenter favours or commends a particular course of action without saying so explicitly. Similarly information or other material may be presented in a form that implies that the presenter's view is that the contemplated course of action is likely to be beneficial to the client.
> >
> > 366 The authorities have accepted that the statutory language should be given a broad interpretation. Specifically, they support the proposition that a person may provide information or present material in a way that implicitly makes a recommendation or states an opinion in relation to a financial product.
>
> 17 The protection of people from potentially selfishly motivated advice is not advanced by making fine logical distinctions based on overly precise linguistic choices about words of a general kind employed by Parliament in furtherance of the protective purpose. Protection from assiduous, clever and subtle advancement of another's personal interest may require a generous breadth of meaning of words that are taken from, and are intended to relate to, human relational experience, and a giving of practical flexibility in the application of those words to the reality of human experience.
>
> 18 The question is one of the practical application of the statute to the context in question to see whether an express or implied "recommendation" (that is, a commending something by favourable representation or presentation as worthy of confidence or acceptance or as advisable or expedient) or "statement of opinion" (that is, a judgment or belief or view or estimation) was made. The two concepts are, of course, related. The opinion may be the basis of the

> recommendation; and the recommendation may carry with it an implied opinion.

11 The meaning of the "a recommendation or a statement of opinion" in s 766B(1) was also considered by Jagot J at [216]-[218], [236]-[240] and by O'Bryan J at [330]-[339].

12 In the present case, the agreed facts in relation to branch sales included (capitalised terms having the meanings set out in the SAFID):

(a) A Branch Sale generally 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 CBA's staff in its "CommSee" system, within a Branch; and (ii) interactive completion of the application with the customer: SAFID, [48(a)].

(b) During the Relevant Period, CBA staff who had completed the prescribed training and testing (referred to as "Authorised Staff" in the SAFID) were permitted to undertake the process described above: SAFID, [49].

(c) During the Relevant Period, CBA staff who had not completed the prescribed training and testing ("Non-Authorised Staff") could either perform a "warm transfer" to Authorised Staff to assist a customer with opening an Essential Super account or could call the Essential Super call centre and assist a customer to become a member of Essential Super together with an Authorised Staff member in the call centre: SAFID, [50].

(d) Between 1 July 2013 and 8 October 2017, Branch staff were to follow Standard Operating Procedures for Branch Sales: SAFID, [54].

(e) From in or around June 2013 until 8 October 2017, Authorised Staff were trained by CBA to engage with a customer or potential customer, in respect of Essential Super, under a "general advice model": SAFID, [59].

(f) The training completed by Authorised Staff from in or around June 2013 until 8 October 2017 included (among other things) Module 12 – Providing Financial Advice: SAFID, [60(a)].

(g) Between 1 July 2013 and 8 October 2017, CBA provided Authorised Staff with: (i) a General Advice Warning approved script; and (ii) guides to use when introducing Essential Super to a customer or potential customer: SAFID, [61].

(h) The General Advice Warning approved script and guides referred to above could be accessed by Branch staff, including via: (i) hyperlinks in CBA's "standard operating

procedure" document for Essential Super account opening; and (ii) CBA's electronically available Essential Super intranet or "iSource" pages: SAFID, [62].

13 Different versions of the "Standard Operating Procedure: Essential Super Account Opening – Personal Customer" were in place during different periods of time during the relevant period (AB 2933-2936). The Standard Operating Procedures each contained four stages: (1) Product introduction / discussing and creating interest; (2) Product fulfilment; (3) Complete forms; and (4) Send forms. By way of example, the Standard Operating Procedure in place during the period 1 July 2013 to 22 October 2013 required Authorised Staff to take the following steps during the "Product introduction / discussing and creating interest" stage:

> 1.1 Provide a General Advice Warning (GAW) to the customer before starting application (accredited staff only)
>
> 1.2 Provide FSG [financial services guide] and PDS [product disclosure statement] to customer and provide them the opportunity to read the PDS before opening account
>
> 1.3 Discuss product benefits and features including fees

14 During the appeal hearing, we were taken to a one-page document containing approved scripts (AB 2893). It appeared to be common ground that this document was hyperlinked in the Standard Operating Procedures or, in any event, formed part of the instructions to Authorised Staff (T33, T35, T106). This document included the following approved script and instruction:

> **General Advice Warning:** "I can provide you general advice about Essential Super, however you will need to decide if it is a suitable product for you by reading the PDS."
>
> **Accredited staff providing general advice must preposition GAW at the start of interaction when discussing Essential Super**.
>
> (Emphasis in original.)

15 The document also set out the following five approved scripts:

| **Approved Scripts** | |
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| 1 | "Generally, customers find that Essential Super is a straightforward superannuation product with the convenience of on line access through Netbank. Would you be interested in taking out Essential Super?" |
| 2 | "I'm letting my customers know about an exciting product called Essential Super. Essential Super is an online superannuation account which helps people to manage their super through NetBank. It also has the convenience of accepting employer contributions." |
| 3 | "Many of our customers have found that selecting their own superannuation fund, rather than using the fund their employer provides, enables them to take greater control of their super. As Essential Super is accessible through NetBank, this makes it even easier as it provides flexibility for super and banking to be managed |

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| | in the one place." |
| 4 | "Thank you for giving me the opportunity to review your banking. There are a number of ways that I feel I may be able to assist you, but I would like to focus on 1 main area today. You mentioned that you goal is to purchase your first home; I would like to refer you to our lending Specialist Sam who will be able to talk to you about your lending needs and look at ways to get you into your home sooner. What time appointment would suit you?..... I am also letting all my customers know about Essential Super, a competitively priced superannuation account that allows customers to take more control of their super. Essential Super can be managed online in NetBank alongside a customer's day to day banking. Would you be interested in opening an Essential Super account?" |
| 5 | **Customer:** A friend of mine told me you have a new super account (Essential Super). Is it a good account?<br>**Staff:** "I am able to provide you general advice about Essential Super, however you will need to decide if it is right for you by reading the PDS. Customers have found that Essential Super has provided them greater control over their superannuation as it can be viewed and managed online through NetBank. It has a competitive fee structure and is easy to open. Would you be interested in opening an account?" |

16 The document also set out the following instructions:

| Do's | Don'ts |
|---|---|
| Must be clear about the advice you are providing by reading General Advice Warning (GAW) to the customer upfront | Must not use words such as 'you and your' or phrases such as 'meet your needs' or 'right for you' |
| Use scenarios when discussing Essential Super with a customer i.e. 'Many of my customers have found...' or 'Generally, customers who select their own super...' (the scenarios you are providing must be true) | Must not relate to the customer's individual circumstances including information located in CommSee or in discussions i.e. 'I can see that you don't have superannuation already. Based on this, Essential Super may be right for you' |

17 In light of the agreed facts and the Standard Operating Procedures, it can be inferred that Authorised Staff of CBA made statements to the effect of the approved scripts. The context includes the fact that the conversations were with existing customers and potential customers of the bank. Further, the scripts concerned the customer making a choice about a superannuation product, an important financial decision. In this context, in my opinion, several of the statements in the scripts constituted an implied "recommendation" (a commending of something by favourable representation or presentation as worthy of confidence or acceptance or as advisable or expedient) or a "statement of opinion" (a judgment or belief or view or estimation), picking up the meanings of those words adopted by Allsop CJ in *Westpac Securities* at [18]. In particular, the statements that Essential Super was "competitively priced" (script 4) or had a "competitive fee structure" (script 5) were statements of opinion about the pricing of Essential Super compared with other superannuation products: cf *Westpac Securities*

at [67]. The statement in script 3 that many customers had found that selecting their own superannuation product, rather than using the fund that their employer provided, "enable[d] them to take greater control of their super" was an expression of opinion about the practical advantages of Essential Super. The positive descriptions of Essential Super ("straightforward", "easy to open") were, in context, implied representations that choosing Essential Super would yield a positive outcome for the customer. Having regard to these matters, the scripts contained implied recommendations and statements of opinion that were intended, or could reasonably be regarded as intended, to influence a person in making a decision in relation to Essential Super.

18 This approach is consistent with, and furthers, the consumer protection purpose of the relevant legislation. It is not suggested that this conclusion would lead to any impractical or unduly onerous outcome. Indeed, it is apparent from the agreed facts and the Standard Operating Procedures that CBA's processes were designed on the basis that Authorised Staff would be giving "general advice" (being a form of financial product advice).

19 For these reasons, I consider that the primary judge erred in concluding that ASIC had failed to establish that CBA provided financial product advice. I would uphold ground 10.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

Dated: 17 August 2023

# REASONS FOR JUDGMENT

## O'BRYAN J:

### A. INTRODUCTION

20 This appeal concerns the application of the statutory prohibition on conflicted remuneration in Div 4 of Pt 7.7A of the *Corporations Act 2001* (Cth) (**Act**) to arrangements agreed between the first respondent, Commonwealth Bank of Australia (**CBA**), and the second respondent, Colonial First State Investments Limited (**CFSIL**), in relation to the distribution of a superannuation product called "Essential Super".

21 CBA is the parent entity of the Commonwealth Bank of Australia group of companies (**CBA Group**). CFSIL is a wholly owned subsidiary of CBA.

22 The appellant, the Australian Securities and Investments Commission (**ASIC**), instituted proceedings alleging that, between 1 July 2013 and 30 June 2019 (the **relevant period**), when CFSIL issued and CBA distributed Essential Super, CFSIL gave and CBA accepted benefits in relation to Essential Super which comprised conflicted remuneration contrary to ss 963E and 963K of the Act. The benefits were alleged to comprise:

(a) the contractual promise made by CFSIL to pay CBA an annual fee of 30% of the total net revenue earned by CFSIL in respect of Essential Super in return for distributing Essential Super through CBA's branch network and its digital distribution channels;

(b) payments by way of cash transfers from CFSIL to CBA in purported performance of the contractual promise; and

(c) journal entries posted in the general ledger of the CBA Group recording amounts payable from CFSIL to CBA in purported performance of the contractual promise.

23 The three categories of benefits were defined in the trial judge's reasons as the "**impugned benefits**". On the appeal, ASIC pressed its case only in respect of the contractual promise and the cash transfers, and not the journal entries. Reflecting ASIC's case on appeal, these reasons adopt the term "impugned benefits" to refer to the contractual promise and the cash transfers.

24 The key statutory provision at issue in this proceeding is s 963A of the Act. That section defines conflicted remuneration as follows:

> ***Conflicted remuneration*** means any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services

licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:

(a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or

(b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

25 On 29 September 2022, the trial judge delivered judgment: *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1149 (**primary judgment** or **PJ**). The trial judge dismissed the proceedings on four principal bases, which can be stated as follows:

(a) first, the impugned benefits did not constitute benefits within the meaning of s 963A of the Act;

(b) second, the impugned benefits, because of their nature and the circumstances in which they were given, could not reasonably have been expected to influence the choice of financial product recommended by CBA to customers who became members of Essential Super or the financial product advice given by CBA to those customers;

(c) third, ASIC was required, and failed, to establish that CBA gave financial product advice to retail clients who opened an account in the Essential Super fund; and

(d) fourth, even if the impugned benefits given by CFSIL to CBA constituted conflicted remuneration for the purpose of s 963A, those benefits were exempted by operation of transitional provisions in s 1528 of the Act and the regulations made under that provision, being (relevantly) regs 7.7A.16, 7.7A.16A and 7.7A.16B of the *Corporations Regulations 2001* (Cth) (**Regulations**).

26 By its notice of appeal, ASIC challenges the construction adopted by the trial judge of s 963A (ground 1). ASIC also challenges the findings of the trial judge that:

(a) the impugned benefits did not constitute a "benefit" within the meaning of s 963A (grounds 2 and 3);

(b) the presumption in s 963L did not operate in circumstances where the impugned benefits did not constitute a "benefit" within the meaning of s 963A (grounds 4 and 5);

(c) because of the nature of the impugned benefits and the circumstances in which they were given, the impugned benefits were not capable of influencing and could not reasonably have been expected to influence the choice of financial product

recommended by CBA to retail clients or the financial product advice given to retail clients by CBA (grounds 6 to 8);

(d) ASIC was required, and failed, to establish that CBA provided financial product recommendations to retail clients and/or financial product advice to retail clients (grounds 9 and 10); and

(e) the impugned benefits came within reg 7.7A.16 of the Regulations with the consequence that Div 4 of Pt 7.7A did not apply to the impugned benefits (grounds 11 and 12).

27 With a limited exception, there is no appeal against any of the findings of primary fact made by the trial judge. The grounds of appeal largely concern the proper construction of s 963A of the Act and its application to the facts as found. Grounds 9 and 10 also challenge the trial judge's conclusion that the evidence, and the primary facts as found, did not establish that CBA provided financial product advice to retail clients in connection with the distribution of Essential Super.

28 By a notice of contention, CBA contends that:

(a) if the trial judge erred in the construction of "benefit" within the meaning of s 963A, his Honour's conclusion that CBA did not receive benefits ought to be upheld on other grounds (contention 1);

(b) if the trial judge erred in finding that CBA did not receive "benefits" within the meaning of s 963A with the consequence that s 963L of the Act did not apply, the trial judge's finding as to s 963L ought to be upheld as that provision did not operate on other grounds (contention 2); and

(c) the trial judge ought to have found that ASIC carried the burden of proving that Div 4 of Pt 7.7A of the Act applied to the impugned benefits and ASIC failed to discharge that burden, including by reason of failing to establish that the impugned benefits were outside the transitional provisions (contention 3).

29 For the reasons that follow, I would dismiss the appeal. The trial judge was correct to conclude that the impugned benefits were not conflicted remuneration within the meaning of s 963A.

30 Whilst I agree with the trial judge as to the ultimate disposition of the proceeding, these reasons differ to those of the trial judge on a number of points. As discussed below, I would uphold certain of the grounds of appeal, but those grounds do not change the ultimate conclusion.

## B. FACTUAL BACKGROUND

31 As noted above, the findings of primary fact made by the trial judge are not contested on the appeal (save in a minor respect). Certain facts were the subject of agreement between the parties at trial, as recorded in the Statement of Agreed Facts and Issues in Dispute dated 29 October 2020 (**SAFID**).

32 The facts that are critical to the disposition of this appeal, and that are not the subject of controversy, are summarised below. During the course of the hearing, the parties' counsel took the Court to documents that were before the trial judge in order to highlight certain parts of those documents and to place the legal issues within their full factual context. No party submitted during the appeal that the contents of the documents were controversial. Where it is necessary to do so, those documents and their contents are referred to below.

### CBA Group structure

33 At all relevant times, CBA was the holder of an Australian Financial Services Licence (PJ [38]).

34 Throughout the relevant period, the CBA Group was divided into legal entities and business units, including (PJ [37]):

(a) Retail Banking Services (**RBS**), a business unit that provided home loan, consumer finance and retail deposit products and services to all retail bank customers; and

(b) Wealth Management, a business unit that provided superannuation, investment, retirement and insurance products and services including financial planning.

35 RBS sits within the CBA legal entity (PJ [216]).

36 CFSIL is, and was throughout the relevant period, a wholly-owned subsidiary of CBA. It sat within the Colonial First State (**CFS**) division of the Wealth Management business unit (PJ [170], [204]).

37 The parties, and the documents on which they relied before the trial judge, at times referred interchangeably to "RBS" and "CBA", "CFSIL" and "Wealth Management", and "CFS" and "Wealth Management". In applying the provisions of Div 4 of Pt 7.7A to the facts as found, these reasons usually refer to CBA and CFSIL as the statutory regime operates with respect to the legal entities.

38 At all relevant times, CBA had over 1,000 branches throughout Australia that together formed its retail branch network (PJ [55]). CBA also had digital channels including NetBank and CommBank, and after May 2016, CBA's digital channels included the CommBank App. The digital channels were accessible online by the general public (PJ [56]).

**MySuper**

39 In 2012, legislation was enacted by the Commonwealth Parliament providing for the creation of a simple, cost-effective, default superannuation product called "MySuper" (PJ [40] and SAFID [14]).

40 One of the purposes for the introduction of MySuper was to simplify and standardise the default superannuation product available to all Australians. A further purpose was to create default superannuation products that had common characteristics so that they could be compared based on a few key differences – cost, investment performance and the level of insurance coverage – and would charge fees that would be described in the same way so that those fees could also be directly compared. All MySuper products were, by force of legislation, required to meet prescribed core criteria (PJ [40] and SAFID [15]).

41 MySuper products are tightly regulated. They involve a requirement to obtain authorisation from APRA before a trustee of a superannuation fund can offer a MySuper product, restrictions on the types of fees that can be charged and investment options limited to either a single diversified option or a life cycle option. All MySuper products must contain life and total permanent disability insurance on an opt-out basis. No commission can be paid on MySuper products from funds in member accounts. Superannuation trustees are generally only permitted to offer one MySuper product in a fund (PJ [41]).

42 From 1 January 2014, employers' superannuation guarantee contributions for employees who had not made a choice of fund could only be directed to a fund that offered a MySuper product. Trustees of superannuation funds were required to transfer default amounts accrued prior to 1 January 2014 (**accrued default amounts** or **ADAs**) to a MySuper product before 30 June 2017 (PJ [42]).

**Development of Essential Super**

43 In or around April 2011, the CBA Group began to develop a superannuation product that would be compliant with the proposed MySuper reforms, would capture superannuation guarantee

contributions and would consolidate superannuation from other funds (PJ [36]). At that time, the proposed superannuation product was referred to as "Simple Super".

44 On or about 4 May 2012, a paper was presented to the CBA Group Executive Committee in relation to the Simple Super project (titled "Paper No 3 Simple Super"). A business case (**Business Case**) for the development of the Simple Super product was also presented (PJ [45]; SAFID [21]).

45 The Executive Committee paper recommended that the Executive Committee approve the Simple Super Project in principle, targeting a 1 July 2013 launch date of the product to coincide with the implementation date for MySuper. The paper stated the following rationale for the recommendation:

> **4. Rationale for recommendation**
>
> 4.1 The project will deliver a simple superannuation product that is accessible via NetBank alongside the customer's transaction account. It will also provide the ability to view balances and make additional contributions through NetBank, offer a small number of investment options, as well as simple death and disablement insurance cover.
>
> 4.2. Key reasons for approving the project include:
>
> 4.2.1. **Strong customer appeal**: There is compelling benefit for our customers who seek to consolidate their financial relationships with fewer providers, and to manage their finances in one place. Furthermore, integrating superannuation into a customer's banking relationship enhances the customer tenure overall.
>
> 4.2.2. **A mass market product**: Most Australians have simple superannuation needs. This product will allow the customer to take the same super and transaction accounts as they transfer from job to job.
>
> 4.2.3. **Supports retention of youth market**: Simple Super can support CBA's retention of young customers, particularly those burdened by multiple super funds due to casual work and job changes.
>
> 4.2.4. **Competitive defence**: In late 2007, Westpac gained a first-mover advantage by launching a Simple Super product, BT Super for Life, distributed through Westpac/St George branches and online. Westpac has highlighted BT Super for Life as a key growth strategy.
>
> 4.2.4.1. ANZ launched a similar product in December 2011, and NAB has scoped a simple super product which is on-hold pending funding. ING Direct's super product is due for launch this year.
>
> 4.2.5. **Regulatory environment**: The commencement of MySuper legislation on July 2013 will herald a new generation of MySuper-style funds. MySuper is the new mandated product design for default super contributions.
>
> 4.3 The high level financial summary is set out in the table below.
>
> [Table omitted]

4.3.1. RBS and WM will equally share the project costs and net benefits.

…

4.3.3. The project will yield financial benefits of $63.8m over a 5 year period. The additional revenue is generated from incremental branch and online sales, with the branch being the primary channel under a General Advice model.

…

46 The Executive Committee paper also recorded that the project was "jointly owned by the WM and RBS Group Executives" and that the Steering Committee was to comprise "impacted" Executive General Managers and General Managers from RBS and CFS.

47 The Business Case was a lengthy document. Relevantly to the issues raised in the proceeding, the Business Case recognised that a joint initiative between RBS and Wealth Management was a means to achieve the development and distribution of the Simple Super product. The Business Case contemplated a division of responsibilities between RBS and CFSIL, whereby CFSIL was to "manufacture and administer" the product and RBS was to distribute it. The document contemplated that the product would be distributed via CBA's retail branch network and online channels. The retail branch network was to be the primary distribution channel under a "general advice" model; however, online origination via NetBank would also be available. The Business Case assumed a 50:50 sharing of the costs and benefits between the RBS and CFSIL business units and proposed that, once the business case was approved, the finance teams of RBS and CFSIL would "agree to allocation methodology" (PJ [45]; SAFID [21]).

48 On 4 May 2012, the CBA Group Executive Committee approved (in principle) the Simple Super project and requested that a methodology be developed for the sharing of costs and earnings between the relevant entities (PJ [46]; SAFID [22]).

49 Between 4 May 2012 and 1 July 2013, RBS and Wealth Management jointly developed the Simple Super product. In October 2012, CBA and CFSIL chose "Essential Super" to be the name of the product (PJ [46]).

**The Essential Super fund**

50 Essential Super was first offered on 17 May 2013 with four investments options called Lifestage, Balanced, Australian Share and Cash Deposit. The Lifestage investment option was offered as a MySuper product from 16 November 2013 (SAFID [25]). At all relevant times, CFSIL was the trustee of the Essential Super superannuation fund (SAFID [8(c)]). Essential

Super was launched for sale to individuals and employers through CBA's retail branch network and online channels on 1 July 2013 (SAFID [27]).

51 At all relevant times, Essential Super has been a superannuation product within the meaning of s 761A of the Corporations Act (SAFID [17]).

52 The fees charged to members of the Essential Super fund were set out in the Product Disclosure Statement issued from time to time. CFSIL only earned revenue from "funded" Essential Super accounts; ie, those accounts that had been opened and into which funds had been placed (PJ [84]). Initially (from May 2013 until November 2013), there were three principal categories of fees charged to fund members: a member fee of $5 per month; a management fee of 0.8% per annum of funds under administration; and an insurance administration fee of 7.5% of the premiums paid for insurance held by members through the fund (PJ [85]). From November 2013, the management fee was divided into two fees, being an administration fee and an investment fee, each of which was calculated as 0.4% per annum of funds under administration (PJ [86]). From March 2015, the member fee was increased to $5.88 per month (PJ [87]). From November 2018, the administration fee was reduced to 0.35% per annum of funds under administration (PJ [88]).

**APRA Standard SPS 231 Outsourcing**

53 On 15 November 2012, the Australian Prudential Regulation Authority (**APRA**) published the Superannuation (prudential standard) determination No. 3 of 2012 under s 34C(1) of the *Superannuation Industry (Supervision) Act* 1993 (Cth) (**SIS Act**). The determination came into effect on 1 July 2013. By that determination, APRA Standard SPS 231 titled "Outsourcing" was made applicable to all "RSE licensees" (as defined in s 10 of the SIS Act). It is uncontroversial that CFSIL was an RSE licensee at all relevant times.

54 Paragraph 6 of APRA Standard SPS 231 stated that "outsourcing" involves an RSE licensee entering into an arrangement with any other party to perform, on a continuing basis, a business activity that currently is, or could be, undertaken by the RSE licensee itself. Paragraph 8 stated that the standard only applies to the outsourcing of a material business activity as defined in the standard. Paragraph 9 stated that a "material business activity" is one that has the potential, if disrupted, to have a significant impact on an RSE licensee's business operations, its ability to manage risks effectively, the interests, or reasonable expectations, of beneficiaries, or the financial position of the RSE licensee, any of its RSEs or its connected entities.

55 APRA Standard SPS 231 imposed a range of obligations on RSE licensees with respect to the outsourcing of material business activities. Those obligations were summarised in the Standard in the following terms:

> This Prudential Standard requires that all outsourcing arrangements involving material business activities entered into by an RSE licensee be subject to appropriate due diligence, approval and ongoing monitoring. All risks arising from outsourcing material business activities must be appropriately managed to ensure that the RSE licensee is able to meet its obligations to its beneficiaries.
>
> The ultimate responsibility for the outsourcing policy of an RSE licensee rests with its Board of directors.
>
> The key requirements of this Prudential Standard are that an RSE licensee must:
>
> - have a policy, approved by the Board, relating to outsourcing of material business activities;
> - have sufficient monitoring processes in place to manage the outsourcing of material business activities;
> - have a legally binding agreement in place for all outsourcing of material business activities;
> - consult with APRA prior to entering into agreements to outsource material business activities to service providers that conduct their activities outside Australia; and
> - notify APRA after entering into agreements to outsource material business activities.

56 Relevantly, paragraph 20 stipulated that each outsourcing arrangement must be contained in a documented legally binding agreement and the agreement must be signed by all parties to it before the outsourcing arrangement commences.

## Commercial arrangements between CBA and CFSIL in respect of Essential Super

### *Commercial terms*

57 In late 2012, representatives of CBA and CFSIL commenced talks in relation to the attribution of costs and revenue from Essential Super (PJ [47]). By emails exchanged in November and December 2012, the CBA and CFSIL finance teams agreed that, for the first financial year ending 30 June 2014, there would be a 50:50 share of revenue and a 44:56 share of operating expenditure (PJ [537] and SAFID [28(a)])). In the next financial year, it was proposed that the actual performance of the product would be reviewed and a decision would be made as to the relevant split between the businesses (SAFID [28(a)]).

58 In May 2013, representatives of CBA and CFSIL exchanged email correspondence concerning the development of a Distribution and Administration Services Agreement in respect of Essential Super.

59 A draft agreement was circulated by email on 9 May 2013 (SAFID [29]). The draft agreement specified the services to be provided by CBA to CFSIL in respect of the distribution of Essential Super, and the fees to be paid by CFSIL to CBA in connection with those services. A range of fees were payable for different services (SAFID [29(a)]). The draft did not refer to the proposed cost and revenue sharing arrangement. Also attached to the email was a document that summarised the "key features" of the draft agreement. Relevantly, that document stated that the agreement had been prepared "in compliance with APRA's prudential requirements for an outsourcing agreement as set out in its standard SPS 231".

60 An email sent on 16 May 2013 referred to a meeting that morning and the proposed action was to document the "CFS/RBS revenue sharing agreement for review and endorsement" (SAFID [29(b)]). A further draft agreement was circulated by email on 20 May 2013 in which the fees schedule had been updated to reflect the "revenue sharing arrangement" (SAFID [29(c)]). In that draft, the fees schedule (being schedule 1) stipulated, in respect of all services provided under the agreement, that "The Trustee will pay the Bank for the Services outlined in this Schedule 1 an annual fee of 30% of total net revenue earned by the Trustee in relation to the Fund in the relevant financial year".

61 On 27 June 2013, CBA and CFSIL entered into the Distribution and Administration Services Agreement (**2013 Distribution Agreement**) with respect to Essential Super for an initial 5-year term (PJ [47]). The recitals stated that CFSIL (as the trustee of Essential Super) wished to appoint CBA to provide the defined services to the Essential Super fund and CBA had agreed to do so. By clause 3, CBA agreed to perform the services set out in schedule 2 to the agreement in connection with the distribution of Essential Super, which included the allocation and deployment of trained staff to distribute the product through CBA's retail branch network, the development of marketing materials and services, maintaining product and application-related information in CBA's internal and customer-facing IT systems, and providing access to Essential Super in NetBank. The agreement contained detailed provisions governing the supply of those services. Clause 4 stipulated that the agreement was not intended to create a partnership, joint venture or agency between the parties. Clause 8 stipulated that CFSIL was required to pay CBA the fees specified in schedule 1 for the performance of the defined

services. Schedule 1 contained the same specification of fees as in the earlier draft, namely that "The Trustee will pay the Bank for the Services outlined in this Schedule 1 an annual fee of 30% of total net revenue earned by the Trustee in relation to the Fund in the relevant financial year" (PJ [538]). The term "net revenue" was not defined in the agreement. Schedule 1 to the agreement also stipulated that:

(a) at the end of each financial year, CFSIL (as the trustee) was to determine the total net revenue for the Essential Super fund for that financial year and advise CBA of the fee payable based on that total net revenue;

(b) after receiving the advice from CFSIL as to the amount due and payable, CBA was to issue an invoice for the fees set out in schedule 1; and

(c) the fee arrangements in relation to the outsourcing arrangement were to be reviewed by the parties after the end of each financial year,

(see PJ [54] and the terms of the agreement).

62 On 22 April 2015, the CFSIL Board was asked to approve the continuation of the outsourcing arrangement recorded in the 2013 Distribution Agreement. The Board paper noted that CFSIL's outsourcing policy required an annual review of material outsourcing arrangements and APRA Standard SPS 231 required the Board to have sufficient monitoring processes in place. The Board paper recommended amendments to the 2013 Distribution Agreement which the paper described as immaterial. The minutes of the meeting of the CFSIL Board on 22 April 2015 stated that the Board approved "the continuation of the outsourcing arrangement with CBA" and the proposed amendments. On 2 June 2015, a new version of the Distribution and Administration Services Agreement with those minor amendments was executed (the **2015 Distribution Agreement**) (PJ [48] and [541]). The fee schedule was unchanged.

63 On 23 February 2018, Linda Elkins, Executive General Manager at CFS, wrote a letter on behalf of CFSIL to Clive van Horen, Executive General Manager Retail Products, on behalf of CBA. That letter, titled "Letter of Variation", recorded the agreement between CBA and CFSIL to vary certain clauses of the 2015 Distribution Agreement (PJ [50]). The letter of variation was countersigned on behalf of CBA on 28 February 2018 (PJ [51]). The letter stated that CFSIL and CBA had agreed to suspend the distribution and administration services provided via CBA branches with effect from 8 October 2017 and that, for the duration of the suspension, CBA was not required to meet certain performance and marketing standards and reporting requirements.

64 On 26 February 2018, CBA and CFSIL executed a further version of the Distribution and Administration Services Agreement (**2018 Distribution Agreement**) (PJ [52]). Although the format of schedules 1 and 2 to that agreement were revised, the promise by CFSIL to pay CBA an annual fee equal to 30% of total net revenue earned by CFSIL in relation to Essential Super in the relevant financial year remained unchanged (PJ [53]).

65 The contractual obligations in the Distribution Agreements for CFSIL to pay CBA an annual fee equal to 30% of total net revenue earned by CFSIL in relation to Essential Super is one of the impugned benefits the subject of the proceeding.

***Cash transfers***

66 CFSIL made the following cash transfers to CBA in respect of Essential Super (PJ [81] and [82]):

(a) $2,253,537.82 on or about 31 July 2014 for the 2014 financial year;

(b) $12,303,855.79 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.

67 Those cash transfers are also impugned benefits the subject of the proceeding.

68 The trial judge found that the cash transfers were calculated in accordance with the methodology for calculating the fees in the 2018 Distribution Agreement (PJ [82]). I assume that the trial judge intended to refer to the cash transfers in paragraphs (b) to (i) above (consistently with SAFID [82], also reflected at PJ [496]), as the cash transfer in paragraph (a) was made under the 2013 Distribution Agreement. In relation to the cash transfer in paragraph (a), Deidre Langan of CBA gave evidence, which was accepted by the trial judge, that:

(a) Ms Langdon was informed that RBS and CFSIL had agreed a 50:50 profit share with respect to Essential Super (PJ [110]); and

(b) as Essential Super was loss-making in the 2014 financial year, the Cash Transfer that was made in respect of that financial year was in an amount that effected a 50:50 share of losses between RBS and CFS (PJ [117]).

69 Although it was not the subject of submissions, I note also that the Distribution Agreements contemplated an annual payment of the applicable fee at the end of each financial year. The monthly payments during the 2019 financial year were, to that extent, inconsistent with the contractual terms.

70 In addition to the cash transfers, during the relevant period journal entries totalling $55,723,946.65 in respect of Essential Super were made in the CBA Group General Ledger (PJ [83]). Although ASIC no longer presses its case in respect of the journal entries, it is contextually relevant to note the following evidence that was given by Ms Langdon on behalf of CBA and which was accepted by the trial judge:

(a) the General Ledger is the master set of accounts that captures all transactions (including assets, liabilities, revenue and expenses) across the CBA Group business units and legal entities (PJ [98]);

(b) every CBA Group legal entity has its own subordinate ledger that sits within the General Ledger, to which journal entries can be posted (PJ [103]);

(c) journal entries are primarily used by the CBA Group to attribute and track costs, revenue and expenses of different business units within the CBA Group (PJ [104]);

(d) within the CBA Group it is common for one business unit (or legal entity) to incur expenses on behalf of another business unit (or legal entity) upfront (PJ [106]);

(e) it was only by means of a special "sweep" process that a journal entry would create a payable in the balance sheet, and the general practice was that all payables identified in that sweep process were thereafter settled by a cash payment between the relevant entities (PJ [107]);

(f) in relation to Essential Super, CBA incurred expenses upfront on behalf of CFSIL and Ms Langan was involved in posting one journal entry in the 2014 financial year, which was set up in such a way to "sweep" Essential Super costs borne by CBA (on behalf of CFSIL) to CFSIL (PJ [108]);

(g) the journal entry in the 2014 financial year was picked up in the CBA Group's monthly sweep process as was intended, and on 31 July 2014 the cash transfer in respect of the 2014 financial year was transferred from CFSIL to the CBA (PJ [116]);

(h) no journal entries were posted to effect a profit share for the January to June 2015 portion of the 2015 financial year (PJ [123]); and

(i) a journal entry made on or around 29 April 2016 reflected a 50:50 split of profit earned on Essential Super in respect of the period July 2015 to April 2016 (PJ [124]-[125]).

71 The finance teams in CBA and CFSIL did not become aware of the 2013 and the 2015 Distribution Agreements until September 2017. Until then, they were working on the basis of a 50:50 profit share, as agreed in the exchange of emails between the finance teams in November and December 2012, not the 70:30 profit share agreed in the Distribution Agreements. Ms Langdon gave evidence that, from that point on, journal entries were posted in accordance with the 70:30 profit share arrangement as specified in the Distribution Agreements (PJ [131]). Further, the journal entry posted for October 2017 included an amount by way of "true-up" for the months of July, August and September 2017 so that the year to date for the 2018 financial year reflected the 70:30 profit share (PJ [132]). However, there was no attempt to rectify previous actions taken in the financial years preceding the 2018 financial year on the basis of the assumed 50:50 profit share (PJ [497], [506] and [509(b)]).

72 The finance teams in CBA and CFSIL also discovered after the end of the 2017 financial year that no journal entry since the July 2014 journal entry had in fact resulted in a cash transfer from CFSIL to CBA (PJ [135]). In the ensuing 2015, 2016 and 2017 financial years, only management account journal entries were made and there were no sweep entries in those years which created a cash payable entry and nor were any cash payments made (PJ [137]). Steps were taken to rectify the lack of cash payments in the 2018 financial year, but no steps were taken to rectify the absence of cash payments in the previous financial years (PJ [138], [140]).

73 On 21 February 2019, CBA and CFSIL agreed that payments from CFSIL to CBA under the 2018 Distribution Agreement would be suspended from and including the payment calculated on the basis of net revenue for February 2019 (SAFID [91]).

**Distribution of Essential Super**

74 Essential Super was distributed by CBA in the following ways (PJ [57]):

(a) from 1 July 2013 to about 8 October 2017, to individuals through CBA's retail branch network (**branch sales**);

(b) from 1 July 2013 to about 3 July 2018, to individuals through CBA's digital channels via an online application process (**digital sales**); and

(c) from 1 July 2013 to about 3 July 2018, to employers as a default fund for employees who did not make a choice of fund (**employer sales**).

75 In respect of employer sales, individuals became members of Essential Super when they:

(a) commenced employment with an employer who had nominated Essential Super as the default fund for employees who did not make a choice of superannuation fund; and

(b) did not make a choice of superannuation fund for superannuation contributions by that employer (PJ [58]).

76 In addition to the three distribution channels set out above, individuals also became members of Essential Super between September 2014 and August 2016 where they had accrued default amounts as members of the Colonial First State First Choice Superannuation Trust, which amounts were transferred to Essential Super (**ADA Transfers**) (PJ [60]).

77 During the relevant period, 390,400 individuals became members of Essential Super (excluding those members who never had funds in their Essential Super account) (PJ [59]). Of those, 191,364 became members pursuant to branch sales, 135,499 became members pursuant to digital sales, 22,872 became members pursuant to employer sales, and 40,665 became members as a result of ADA Transfers (PJ [60]).

***Branch sales***

78 Branch sales involved a customer becoming a member of Essential Super in circumstances where staff members initiated the Essential Super account opening process in CBA's "CommSee" system within a branch and assisted the customer to complete the application (PJ [61]). Where CommSee was unavailable, a customer could lodge a paper application to become a member of Essential Super within a branch (PJ [62]).

79 During the relevant period, CBA staff who had completed the prescribed training and testing (**authorised staff**) were permitted to undertake the account opening process for Essential Super with customers (PJ [63]). CBA staff who had not completed the prescribed training and testing (**non-authorised staff**) could perform a "warm handover" to authorised staff to assist

interested customers with opening an Essential Super account. Alternatively, non-authorised staff could call the Essential Super call centre and assist customers to become a member of Essential Super together with an authorised staff member in the call centre (PJ [64]).

80 Non-authorised staff were provided with approved scripts to use when discussing Essential Super with a customer or a potential customer (PJ [65]). The scripts contained approved phrases, including (PJ [66]):

> "Have you heard about Essential Super; it's a superannuation fund, which can easily be viewed and managed in NetBank alongside a customer's day to day banking."
>
> "Essential Super is a simple superannuation fund, which can be easily viewed and managed in NetBank alongside a customer's day to day banking".
>
> "Congratulations on your new job. If your employer pays super on your behalf Essential Super issued by CFS is a simple and easy online account that accepts employer and personal contributions. I can't provide advice on this however let me introduce you to an accredited branch member who can help you?"

81 The text preceding the approved phrases included the statements (PJ [67]):

> "Prepositioning Factual Information: I am not qualified to provide you advice about Essential Super, however let me introduce you to one of our Essential Super specialists (CSS) who can help you further.
>
> …
>
> Non-accredited staff should preposition Factual Information at the start of any interaction when discussing Essential Super."

82 Authorised staff were trained by CBA to engage with customers or potential customers in respect of Essential Super under a "general advice model" (PJ [69]). The training included various modules relating to the provision of general advice about superannuation (PJ [70]). Authorised staff were also provided with (PJ [71]):

(a) a "General Advice Warning" approved script, which authorised staff were required to use and which generally read as follows: "I can provide you general advice about Essential Super, however, you will need to decide if it is a suitable product for you by reading the PDS"; and

(b) guides to use when introducing Essential Super to a customer or potential customer, including guides titled:

  (i) "Start a Super Conversation";

  (ii) "Essential Super QRG";

  (iii) "How to discuss insurance or Essential Super with a customer"; and

(iv) "Essential Super Insurance: Common questions and suggested responses".

83 All staff, both authorised and non-authorised, were required to follow "standard operating procedures" when interacting with customers in the course of branch sales (PJ [68]). The standard operating procedures comprised one-page documents that contained links to other documents and that set out the steps that CBA staff were required to follow. Different standard operating procedures applied to "personal" (individual) customers and to "business" (employer) customers, and the standard operating procedures were amended throughout the relevant period. In broad terms, the standard operating procedures that applied to personal customers during the relevant period directed authorised staff to take the following steps when completing a branch sale for a personal customer (SAFID [55]-[58]):

(a) provide an oral, general advice warning to the customer before beginning the Essential Super application;

(b) provide an Essential Super information pack to the customer, which included (among other things) copies of the Financial Services Guide and the Product Disclosure Statement, and provide the customer with an opportunity to read the Product Disclosure Statement before opening the account;

(c) discuss the product benefits and features, including fees;

(d) confirm the customer's personal details and NetBank registration;

(e) initiate the Essential Super account opening process and complete the application with the customer;

(f) update the account with the customer's tax file number, if provided, and to discuss the implications if it is not provided;

(g) in the period before 28 March 2015, allow the customer to select investment and insurance options and, in the period after 28 March 2015, explain the default investment and insurance options and how these could be changed by the customer;

(h) provide 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);

(i) in the period after 23 October 2013, confirm with the customer whether they would like to search for lost or inactive super; and

(j) direct the customer to the declaration and obtain the customer's signature.

84 Authorised staff could access the general advice warning approved script and the guides referred to above, as well as other approved scripts for interacting with customers in branch sales, via hyperlinks in the standard operating procedures and on the Essential Super intranet or "iSource" pages (SAFID [62]).

85 The standard operating procedures contained links to approved scripts for authorised staff to use in branch sales. During the course of the hearing, the Court was taken to a copy of an approved script for the relevant period, which contained approved phrases, including:

> "Generally, customers find that Essential Super is a straightforward superannuation product with the convenience of on line access through NetBank. Would you be interested in taking out Essential Super?"
>
> "I'm letting my customers know about an exciting product called Essential Super. Essential Super is an online superannuation account which helps people to manage their super through NetBank. It also has the convenience of accepting employer contributions."
>
> "Many of our customers have found that selecting their own superannuation fund, rather than using the fund their employer provides, enables them to take greater control of their super. As Essential Super is accessible through NetBank, this makes it even easier as it provides flexibility for super and banking to be managed in the one place."
>
> "… I am also letting all my customers know about Essential Super, a competitively priced superannuation account that allows customers to take more control of their super. Essential Super can be managed online in NetBank alongside a customer's day to day banking. Would you be interested in opening an Essential Super account?"
>
> Customer: A friend of mine told me you have a new super account (Essential Super). Is it a good account? Staff: "I am able to provide you general advice about Essential Super, however you will need to decide if it is right for you by reading the PDS. Customers have found that Essential Super has provided them greater control over their superannuation as it can be viewed and managed online through NetBank. It has a competitive fee structure and is easy to open. Would you be interested in opening an account?"

***Digital sales***

86 Digital sales were completed by individuals by completing an online application to open an Essential Super account via a digital channel (PJ [76]). The form and content of the online application varied over the relevant period, but the key features remained largely the same (PJ [78]). The application process (PJ [77]; SAFID [71]-[74]):

(a) contained details on how to apply for Essential Super;

(b) directed the customer to read the Product Disclosure Statement in respect of Essential Super;

(c) required the customer to confirm their personal details;

(d) in the period before 28 March 2015, required the customer to select their investment and insurance options and, in the period after 28 March 2015, to view the default options selected;

(e) asked the customer whether they wished to take steps to direct their employer to make superannuation contributions on their behalf to their Essential Super account; and

(f) prompted customers to make their first contribution to their Essential Super account (whether by directing their employer to pay contributions to their Essential Super account or otherwise) and to consolidate their superannuation funds into their Essential Super account.

87 Between 1 July 2013 and March 2015, the "landing page" in digital channels contained the following statements (SAFID [71(a)]):

> Important Information This application form provides general information only and is not financial advice. It does not take into account your individual objectives, financial situation or needs ... A Product Disclosure Statement (PDS) (PDF XXKB) for Essential Super is available from commbank.com.au/super or by calling 13 40 74. You should read the PDS and assess whether the information is appropriate for you before making an investment decision..."

88 From July 2015, the "landing page" in digital channels also contained a general advice warning as follows (SAFID [73]-[75]):

> The information being provided to you is general advice only. This information doesn't take into account your objectives, financial situation or needs.

***Employer sales***

89 Employer sales occurred either in-person at one of CBA's retail branches or through one of the digital channels using an online application form (PJ [72]). Once an employer had been set up as a "standard employer sponsor" with respect to Essential Super, the employer was able to add employees as members of Essential Super in a branch, by calling the Essential Super call centre or via one of the digital channels (PJ [73]). Only authorised staff were permitted to assist employers to be set up as a "sponsor" (PJ [74]).

90 The processes in respect of both forms of employer sales were substantially similar to the branch sales and digital sales in respect of individuals described above.

91 At all relevant times, CBA had in place standard operating procedures for authorised staff conducting in-branch employer sales (SAFID [66]). The standard operating procedures

changed throughout the relevant period. In broad terms, however, the standard operating procedures directed authorised staff to take the following steps (SAFID [67]-[68]):

(a) identify whether a customer may be interested in Essential Super;

(b) use an "Essential Super tag" that incorporated the general advice warning;

(c) provide the customer with copies of the Financial Services Guide and Product Disclosure Statement to read;

(d) discuss the product benefits and features (saves time and can easily add, remove and pay employees in NetBank);

(e) explain what employee information was necessary to open the Essential Super accounts;

(f) confirm the relevant business details and NetBank registration;

(g) initiate the employer arrangement and to complete the "Employer Acknowledgement"; and

(h) explain how employees can be added in the future and, if no employees added at the opening of the account, to follow up with the business owner.

92 In relation to digital employer sales, CBA provided an online application form for employers which stated (PJ [75]):

> Reasons for applying:
>
> - To have a central depository for all your employee super details
>
> - The ability to create a superannuation account for your employees.
>
> Before you get started
>
> - Please download and read the Essential Super Product Disclosure Statement (PDF 415KB) and Financial Services Guide (PDF 603.72KB).
>
> Important information
>
> - This application form provides general information only and is not financial advice
>
> …
>
> - This application form provides general information only and is not financial advice. It does not take into account your individual objectives, financial situation or needs.
>
> … A Product Disclosure Statement (PDF 600KB) for Essential Super is available from commbank.com.au/super or by calling 13 40 74. You should read the PDS and assess whether the information is appropriate for you before making an investment decision.

### *ADA Transfers*

93 Individuals who became members of Essential Super as a result of ADA Transfers received a welcome pack after their Essential Super accounts had been opened. The welcome pack contained a covering letter, a document titled "Investment Confirmation" summarising the Essential Super account, a Product Disclosure Statement, a "Super Choice" form to instruct the member's employer to pay future contributions to Essential Super, a non-lapsing death benefit nomination form and a booklet with information regarding NetBank and superannuation (PJ [79]).

## Group accounting

94 Extensive lay and expert evidence was led by CBA at trial concerning the structure of the CBA Group, the relevant accounting practices that operated within the CBA Group, and the practical consequences of those practices (including in relation to the distribution of profit earned by CFSIL from Essential Super). The evidence was accepted by the trial judge. Relevant aspects of that evidence for the purpose of the appeal are as follows.

95 The CBA Group reported on the financial performance of CBA and its subsidiaries on a consolidated basis. The financial results of all transactions that occurred within the CBA Group were therefore presented in the CBA Group's financial statements for each reporting period (PJ [171]).

96 Relevantly in respect of Essential Super, the revenue earned from Essential Super by CFSIL in each financial year was recorded as "funds management income" which formed part of the CFS total recorded "funds management income" (together with other subsidiaries of CFS). The CFS "funds management income" was recorded as part of the Wealth Management total "funds management income", which was in turn recorded as part of CBA Group's total "funds management income" in the CBA Group annual financial statements (PJ [173]).

97 During the relevant period, profits recognised in the CFSIL legal entity were distributed to the CBA legal entity (being CFSIL's ultimate parent entity) through the CBA Group's legal entity ownership structure as dividends, in accordance with the CBA Group Capital Management of Subsidiaries Branches Policy (**dividend policy**). Dividends retained by CBA were retained as earnings or paid to its shareholders (PJ [175]-[176]). Under the dividend policy, subsidiaries were required to pay dividends to CBA equal to their cash net profit after tax at least

semi-annually, save where the subsidiary needed to retain profits to remain solvent or to satisfy capital or regulatory requirements (PJ [176]).

98 For each year in the relevant period, CFSIL paid dividends to its immediate parent entity, which were then paid on from each entity above in the CBA Group structure ending at CBA (PJ [177]). Those payments were recorded in the annual financial statements of each entity (PJ [178]). The actual percentage of net profit after tax distributed by CFSIL by way of dividend ranged from a low of 44% to a high of 98%, in circumstances where CFSIL was subject to different capital requirements over time (PJ [182], [185]-[190]).

99 Mr Tony Samuel gave expert evidence which was accepted by the trial judge. Mr Samuel's evidence included the following opinions:

(a) Consistently with the principles relevant to the presentation and preparation of consolidated financial statements and CBA's accounting policy, all intercompany transfers between CBA and CFSIL would be eliminated in the CBA Group's consolidated financial statements, so that only transactions with external parties would be reported (PJ [221], [230]).

(b) It is a common and recognised business practice for corporate groups to maintain an appropriate allocation of costs and revenues between members of the group so as to permit appropriate reporting about the performance of separate entities and business units within the group (PJ [222]).

(c) Statutory financial reporting can be contrasted with management reporting. Statutory reporting is concerned with the presentation of financial statements in accordance with requirements of the Act, which incorporates the Australian Accounting Standards. The Act requires consolidated financial statements to be prepared where the preparation of such statements is required by an accounting standard, which is normally the case where an entity controls one or more other entities. Management reporting, on the other hand, is optional, for internal use and there are no legal or accounting requirements. Management reporting is the foundation for monitoring performance, tracking financial performance against plans or forecasts and making strategic business decisions. In this regard, management reporting includes details typically not contained in statutory reporting and provides greater insights into the financial position of the group and, specifically, individual business units. CBA Group's method of recording its financial

transactions using journal entries in a general ledger is consistent with the Act's requirements and common accounting practices (PJ [224]-[226]).

(d) The journal entries made in the CBA Group General Ledger in relation to Essential Super between 2014 and 2018 reflected reallocations of income and costs from the CFS cost centre to the RBS cost centre and would have netted off to nil with no impact on either CBA or CFSIL because of how they were accounted for in the CBA General Ledger (PJ [227]).

(e) Ultimately, all or almost all of CFSIL's net profit after tax was distributed as dividends to CBA, including the profit derived from the sale of Essential Super (PJ [229]).

(f) All of the relevant cash transfers "cancelled out" on consolidation of the CBA Group accounts by reason of the double-entry accounting process adopted and the group dividend policy (PJ [238]).

## C. REASONS OF THE TRIAL JUDGE

100 The trial judge dismissed the proceeding brought by ASIC for four principal reasons:

(a) first, the impugned benefits did not constitute "benefits" within the meaning of s 963A of the Act (PJ [478]);

(b) second, the impugned benefits could not reasonably be expected to influence either the choice of financial product recommended or the financial product advice given to a retail client by CBA (PJ [503]);

(c) third, ASIC failed to establish that CBA provided financial product advice to any retail client in connection with the distribution of Essential Super (PJ [513], [526]); and

(d) fourth, even if the impugned benefits constituted conflicted remuneration within the meaning of s 963A, the impugned benefits were exempted from the prohibitions in Div 4 of Pt 7.7A of the Act pursuant to the transitional provisions in s 1528 of the Act and reg 7.7A.16 of the Regulations.

101 The trial judge's reasoning with respect to each of those matters is summarised in this section.

### No "benefit"

102 The trial judge observed that, for the purposes of s 963A, the character or circumstances of the benefit must be such that it could reasonably be expected to influence either the relevant financial product advice or the choice of financial product recommended. His Honour reasoned

that there is no "benefit" for the purposes of s 963A unless this objective criterion is satisfied (PJ [475]). On that basis, his Honour concluded that, in determining whether a benefit exists in the context of s 963A, the Court must determine whether a real commercial advantage exists after an assessment of any net benefits that may arise (PJ [476]). His Honour considered that the impugned benefits were not capable of constituting benefits for the purposes of s 963A having regard to the following matters:

(a) the impugned benefits involved transactions within the CBA group of companies and not transactions between arms-length entities (PJ [479]);

(b) Essential Super was a CBA-branded product that was jointly initiated, and thereafter jointly supported, by two business units within the CBA Group (PJ [479]);

(c) Essential Super was the sole superannuation product that was being developed and distributed by the CBA Group and, in those circumstances, there was no ability for CBA to recommend Essential Super over another superannuation product within the CBA Group (PJ [480]);

(d) the impugned benefits involved the allocation or attribution of costs and/or revenues between the two business units within the CBA Group that were responsible for the "manufacture" and distribution respectively of Essential Super (PJ [481]);

(e) the impugned benefits did not confer any commercial value or advantage for CBA because they involved a transfer from a subsidiary to its parent entity and therefore did not result in a change in overall value or financial position of CBA (PJ [490]-[491]);

(f) further, the impugned benefits were given in exchange for CBA's agreement to provide valuable services to CFSIL in connection with Essential Super and therefore represented consideration and/or compensation for those services, and there was no evidence that, in net terms, the impugned benefits delivered any profit, advantage or gain to CBA as the head entity of the CBA Group (PJ [492]).

**Reasonably expected to influence**

103 The trial judge concluded that, even if (contrary to his Honour's view) the impugned benefits could be capable of constituting a relevant benefit within the context of s 963A, the nature and the circumstances in which the impugned benefits were provided were not reasonably capable of influencing any choice of product or financial advice (PJ at [502]-[503]). In that regard, the trial judge made the following findings:

(a) first, there was no reasonable basis for any expectation that the impugned benefits would influence CBA frontline staff involved in the distribution of Essential Super when the staff had no knowledge of the internal accounting or allocation arrangements between CBA and CFSIL (PJ [505]);

(b) second, there could be no reasonable basis for any expectation that the contractual promise in the Distribution Agreements would influence CBA when the finance teams of CBA and CFSIL that implemented inter-company payments were not aware of the Distribution Agreements or their terms until September 2017 and, when the discrepancy was identified, no rectification attempts were made to account for the three years in which the contractual promise was unfulfilled (PJ [506]);

(c) third, in relation to the cash transfers, there were no transfers in the 2015, 2016 and 2017 financial years and, when CFSIL suspended its cash transfers under the 2018 Distribution Agreement, CBA continued to distribute Essential Super despite the suspension of payments (PJ [507]);

(d) fourth, the quantum of the impugned benefits did not take into account all of the expenses incurred by CBA in developing and distributing Essential Super, which exceeded $30 million and was borne solely by RBS (PJ [509(a)]); and

(e) fifth, the quantum of the impugned benefits was *de minimis* to CBA as it only amounted to about $23 million (PJ [509(b)]).

104 The trial judge also concluded that there cannot be conflicted remuneration where there is no possibility of a choice between financial products and a financial advisor recommending one product over another (PJ [514]-[515]). His Honour found that, in the present case, Essential Super was the only CBA-branded MySuper product distributed by CBA, there was no choice to be made by CBA when distributing the product between different financial products, and nor was the nature of the financial product advice (if provided) ever going to be different from that which was provided (PJ [516]-[517]).

**No financial product advice**

105 The trial judge concluded that ASIC had not adduced any evidence of any recommendation or statement of opinion actually provided to any retail customer by CBA in connection with Essential Super, let alone every, or almost every, branch customer. His Honour found that it was not possible, on the state of the evidence, to conclude in respect of any particular account

that a CBA staff member provided advice to the particular retail client of the kind that would fall within s 963A of the Act (PJ [519]-[520]).

**Transitional provisions**

106 The trial judge observed that, under s 1528(1), the provisions of Div 4 of Pt 7.7A of the Act do not apply to a benefit if (i) the benefit is given under an arrangement or arrangements entered into before 1 July 2013 and (ii) the benefit is not given by a platform operator (PJ [529]-[530]). Subsection 1528(1) is expressly subject to subs (2) which provides that the regulations may prescribe circumstances in which Div 4 of Pt 7.7A applies, or does not apply, to a benefit given to a financial services licensee or a representative of a financial services licensee.

107 With respect to the first condition stated in s 1528(1), the trial judge concluded that the impugned benefits were given pursuant to an arrangement that comprised the 2013 Distribution Agreement and which continued, with minor amendments, during the relevant period (PJ [544]). In that regard, his Honour observed that s 1528(1) applies to "arrangements", which expression is defined in s 761A more broadly than a contract or agreement (PJ [545]). His Honour found that the three Distribution Agreements were successive iterations of the same basic arrangement that was entered into before 1 July 2013 (PJ [545]).

108 With respect to the second condition, the trial judge observed that it was not in dispute that CFSIL is a platform operator (PJ [547]). However, it was necessary to consider the operation of the regulations made pursuant to s 1528(2). His Honour concluded that reg 7.7A.16 applied in this case to the exclusion of reg 7.7A.16A, with the result that the "arrangement" between CFSIL and CBA was exempted from the prohibitions on conflicted remuneration (PJ [549]-[553]).

**Section 963L**

109 Although it was not determinative of ASIC's application, the trial judge also concluded that the statutory presumption in s 963L of the Act did not apply to the circumstances of the present case. His Honour observed that s 963L is only engaged if: (i) there is a relevant benefit in the statutory sense prescribed by s 963A, and (ii) the value of the benefit is wholly or partially dependent on the total value and/or number of financial products acquired by retail clients (PJ [500]). His Honour found that s 963L had no application in this case because ASIC had failed to establish that the impugned benefits were "benefits" within the meaning of s 963A (PJ [501]).

## D. WAS CONFLICTED REMUNERATION GIVEN BY CFSIL TO CBA?

110 This section of the reasons considers the grounds of appeal concerning the proper construction of the definition of conflicted remunerations in s 963A of the Act and its application to the impugned benefits. The grounds of appeal concerning the potential application of the transitional provisions under s 1528 are addressed later in these reasons.

### Statutory provisions

111 Division 4 of Pt 7.7A of the Act prohibits the giving and acceptance of conflicted remuneration in certain circumstances. The prohibitions are contained within Ch 7 of the Act. The main object of Ch 7, as stated in s 760A, is to promote (amongst other things) confident and informed decision making by consumers of financial products, the provision of suitable financial products to consumers of financial products and fairness, honesty and professionalism by those who provide financial services.

112 Division 4 of Pt 7.7A was introduced into the Act in 2012 by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth). The Revised Explanatory Memorandum relevantly stated (at p 3):

> The FOFA reforms represent the Government's response to the 2009 *Inquiry into Financial Products and Services in Australia* by the Parliamentary Joint Committee on Corporations and Financial Services (PJC Inquiry), that considered a variety of issues associated with corporate collapses, including Storm Financial and Opes Prime.
>
> The Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (the Bill), along with the Corporations Amendment (Future of Financial Advice) Bill 2011, implements the FOFA reforms. The reforms focus on the framework for the provision of financial advice. The underlying objective of the reforms is to improve the quality of financial advice while building trust and confidence in the financial advice industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest. …

113 The statutory provisions in Div 4 of Pt 7.7A commenced on 1 July 2012, subject to the application of the transitional provisions contained within Pt 10.18 of the Act. The provisions relevant to the disposition of this appeal are as follows.

#### *The prohibitions*

114 At all material times, s 963E(1) of the Act provided:

> (1) A financial services licensee must not accept conflicted remuneration.
>
> Note: This subsection is a civil penalty provision (see section 1317E).
>
> (2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee accepts conflicted remuneration; and

(b) the licensee is the, or a, responsible licensee in relation to the contravention.

Note: This subsection is a civil penalty provision (see section 1317E).

115 Section 963K of the Act provided:

> An issuer or seller of a financial product must not give a financial services licensee, or a representative of a financial services licensee, conflicted remuneration.
>
> Note: This section is a civil penalty provision (see section 1317E).

***The definition of conflicted remuneration***

116 Section 963A defined "conflicted remuneration" for the purpose of Div 4, Pt 7.7A.

> ***Conflicted remuneration*** means any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:
>
> (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
>
> (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.
>
> Note: A reference in this Subdivision (including sections 963A, 963AA, 963B, 963C and 963D) to giving a benefit includes a reference to causing or authorising it to be given (see section 52).

117 The note at the end of s 963A was inserted with effect from 19 March 2016 by the *Corporations Amendment (Financial Advice Measures) Act 2016* (Cth). Section 963AA was inserted with effect from 1 January 2018 and provided that the Regulations may prescribe circumstances in addition to those set out in s 963A in which a benefit given to a financial services licensee or representative in relation to a life risk insurance product constitutes conflicted remuneration.

118 A number of the terms used in s 963A are defined elsewhere in the Act.

119 The word "benefit" is relevantly defined in s 9 of the Act as "any benefit, whether by way of payment of cash or otherwise".

120 The meaning of the expression "financial product" is governed by Div 3 of Pt 7.1 of the Act. Section 762A explains that the Division has subdivisions which, first, set out a general definition of financial product, second, specify particular kinds of facilities that are financial products, and third, specify particular kinds of facilities that are not financial products. The general definition in s 763A states that a financial product is a facility through which, or

through the acquisition of which, a person makes a financial investment, manages financial risk or makes non-cash payments. The specific inclusions in s 764A relevantly include, in para (1)(g), a "superannuation interest within the meaning of the" SIS Act. In the SIS Act, the expression "superannuation interest" is defined as a beneficial interest in a superannuation entity (which is defined to include a regulated superannuation fund).

121 In the proceeding, ASIC alleged, and each of the respondents admitted, that Essential Super was a superannuation product within the meaning of s 761A of the Act. Having regard to the definition of the expression "superannuation product" in s 761A, the effect of the allegation and the admission is that Essential Super was a superannuation interest within the meaning of the SIS Act, which is a beneficial interest in a superannuation entity. The allegation and the admission clearly apply with respect to superannuation accounts opened by individuals in the Essential Super fund. It is less clear that the allegation and the admission apply with respect to employers who selected Essential Super as a default fund for employees who did not make a choice of superannuation fund. The primary judge made no finding that the services provided to employers in those circumstances constituted a financial product (rather than a financial service in the nature of a superannuation trustee service within the meaning of s 766H). On the appeal, ASIC addressed no submissions to the question whether CBA's dealings with employers with respect to Essential Super constituted the provision of a financial product to the employers. As I consider that ASIC's allegations fail for other reasons, it is not necessary to explore this issue further.

122 The meaning of the expression "financial product advice" is governed by s 766B(1) of the Act which relevantly provides as follows:

> (1) For the purposes of this Chapter, ***financial product advice*** means a recommendation or a statement of opinion, or a report of either of those things, that:
>
> (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
>
> (b) could reasonably be regarded as being intended to have such an influence.
>
> (1A) However, subject to subsection (1B), the provision or giving of an exempt document or statement does not constitute the provision of financial product advice.
>
> …
>
> (9) In this section:

***exempt document or statement*** means:

(a) a document prepared or a statement given, in accordance with the requirements of this Chapter, other than:

(i) a Statement of Advice; or

(ii) a document or statement of a kind prescribed by regulations made for the purposes of this subparagraphs; or

(b) any other document or statement of a kind prescribed by regulations made for the purpose of this paragraph.

…

123 Relevantly, a Product Disclosure Statement is a document prepared in accordance with the requirements of Ch 7 and is therefore an exempt document or statement for the purpose of s 766B(9) unless prescribed by regulations. For completeness, it is noted that reg 7.1.08(1) of the Regulations provides that a Product Disclosure Statement containing personal advice, or general advice about a financial product other than a financial product to which the Product Disclosure Statement relates, is not an exempt document or statement for the purpose of s 766B(9).

124 Sections 766B(3) and (4) respectively define two types of financial product advice, being personal advice and general advice. General advice is defined to mean financial product advice that is not personal advice. The distinction has no particular relevance to the present appeal. At trial, it was necessary for ASIC to establish that CBA gave financial product advice to retail clients within the meaning of s 766B(1).

125 The meaning of the expression "retail client" is governed by ss 761G and 761GA. Section 761G(6)(a) relevantly provides that, if a financial product provided to a person is a superannuation product, the product is provided to the person as a retail client. It was common ground that individuals who opened superannuation accounts in the Essential Super fund were retail clients. Consistently with the observations above with respect to the expression "product advice", the trial judge made no finding that employers who selected Essential Super as their default fund were retail clients, and ASIC addressed no submissions to the question whether CBA's dealings with employers with respect to Essential Super were capable of constituting the provision of a financial product advice to the employers as retail clients. Again, as I consider that ASIC's allegations fail for other reasons, it is not necessary to explore this issue further.

***Statutory presumption***

126 Section 963L creates a statutory presumption that certain "volume-based" benefits constitute conflicted remuneration unless the contrary is proved. That section provides as follows.

> It is presumed for the purposes of this Division that a benefit of one of the following kinds is conflicted remuneration, unless the contrary is proved:
>
> (a) a benefit access to which, or the value of which, is wholly or partly dependent on the total value of financial products of a particular class, or particular classes:
>
> (i) recommended by a financial services licensee, or a representative of a financial services licensee, to retail clients, or a class of retail clients; or
>
> (ii) acquired by retail clients, or a class of retail clients, to whom a financial services licensee, or a representative of a financial services licensee, provides financial product advice;
>
> (b) a benefit access to which, or the value of which, is wholly or partly dependent on the number of financial products of a particular class, or particular classes:
>
> (i) recommended by a financial services licensee, or a representative of a financial services licensee, to retail clients, or a class of retail clients; or
>
> (ii) acquired by retail clients, or a class of retail clients, to whom a financial services licensee, or a representative of a financial services licensee, provides financial product advice.

**Proper construction of s 963A (appeal ground 1)**

127 By ground 1 of its notice of appeal, ASIC contends as follows:

> The trial judge erred in construing "conflicted remuneration" within the meaning of s 963A, and in particular in concluding that:
>
> (a) there can be no "benefit" for the purposes of s 963A of the Corporations Act unless the benefit could reasonably be expected to influence either the relevant financial product advice or the choice of financial product recommended (Reasons [475]);
>
> (b) there can be no "benefit" for the purposes of s 963A of the Corporations Act unless a real commercial advantage exists after an assessment of any net benefits (Reasons [476]);
>
> (c) for there to be "conflicted remuneration", the benefit must be capable of altering the choice of financial product that might otherwise be recommended or the financial product advice that might otherwise be given (Reasons [462]);
>
> (d) in the context of s 963A of the Corporations Act, influence should be understood as a benefit which has the capacity to have an effect on the choice "between different financial products" (Reasons [468]);
>
> (e) s 963A of the Corporations Act does not operate where no other financial product is available (Reasons [516]);
>
> (f) (i) s 963A(a) of the Corporations Act does not apply unless a choice of a financial product is recommended;

(ii) s 963A(b) of the Corporations Act does not apply unless financial product advice is given,

to retail clients (Reasons [463], [513]);

(g) s 963A of the Corporations Act does not apply unless the relevant arrangements can be expected to generate a genuine conflict of interest (Reasons [470]);

(h) s 963A applies to arms-length entities that are not part of a single consolidated group, and to legal entities that have separate and distinct ownership. The provisions were never intended to operate to entities within a consolidated group of companies (Reasons [479]).

128 The issues raised by ground 1, and developed in the course of argument by the parties, can be conveniently identified as follows:

(a) Does the word "benefit" in s 963A have the meaning of net benefit, or does it mean any benefit (grounds 1(a) and (b))?

(b) Does the prospect of conflicted remuneration only arise in circumstances where the financial services licensee receiving the benefit has a choice of financial product to recommend or a choice of financial product advice to give (grounds 1(c), (d), (e) and (g))?

(c) Does the prospect of conflicted remuneration only arise in circumstances where the financial services licensee recommends a financial product or gives financial product advice to retail clients (ground 1(f))?

(d) Can the prospect of conflicted remuneration arise in circumstances where a benefit is given by one legal entity to another within a wholly-owned group of companies (ground 1(h))?

129 The principles with respect to statutory construction are well known and were not in dispute between the parties. While the task of statutory construction must begin with a consideration of the text itself, the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision and the mischief it is seeking to remedy: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [4] (French CJ), at [47] (Hayne, Heydon, Crennan and Kiefel JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ); [36]-[37] (Gageler J). Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires the Court to prefer an interpretation of a statutory

provision that would best achieve the purpose or object of the Act (whether or not the purpose or object is expressly stated in the Act).

130 Of the body of principles that guide statutory construction, four have particular relevance to the present appeal. First, general words will be given their plain and ordinary meaning unless the context otherwise requires: *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 at 647 (Dixon J). Second, all words in a statutory provision are ordinarily to be given some meaning and effect: *Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ); *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***) at [71] (McHugh, Gummow, Kirby and Hayne JJ). Third, the Court should endeavour to construe a statutory provision as a whole, and not as a series of isolated words: *Mersey Docks and Harbour Board v Henderson Bros* (1888) 13 App Cas 595 at 599-600 (Lord Halsbury). The task is not to "pull apart a provision, or composite phrase within a provision, into its constituent words, select one meaning, divorced from the context in which it appears, and then reassemble the provision": *Sea Shepherd Australia Ltd v Commissioner of Taxation* (2013) 212 FCR 252 at [34] (Gordon J). Fourth, the Court must seek to construe a statutory provision so that it is consistent with the language and purpose of all provisions of the statute as a whole: *Project Blue Sky* at [69]-[70]. Relatedly, where the same word appears in different parts of a statute, the Court should seek to give that word the same meaning. This is a "sensible working hypothesis" which may be rebutted by the context, purpose or surrounding text: *Workpac Pty Ltd v Skene* (2018) 264 FCR 536 at [106] (Tracey, Bromberg and Rangiah JJ); *Australian Building & Construction Commissioner v Construction Forestry, Mining & Energy Union* (2018) 262 FCR 473 at [3] (Allsop CJ); see also *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643 (Gibbs J); *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J).

***Meaning of benefit***

131 The first question of construction in contest between the parties on the appeal concerns the meaning of the word "benefit".

132 ASIC submitted that a "benefit" within the meaning of s 963A comprises *any* advantage, monetary or otherwise, including a reduction of detriment. Section 963A does not require the Court to identify the advantage obtained, account for the corresponding detriment (if any), and assess the overall result. All that is required is a benefit *simpliciter*. ASIC submitted that the trial judge erred in finding that "benefit" requires that a "real commercial advantage exist after an assessment of any net benefits that may arise" (PJ [476]).

133 The respondents argued that the approach adopted by the trial judge was correct. They submitted that, in any event, the trial judge's reasons for concluding that the impugned benefits did not constitute benefits within the meaning of s 963A do not stand or fall upon any assessment of "net benefits"; rather, those reasons rest upon a broad assessment of the character of the impugned benefits, the relationship between CBA and CFSIL and the circumstances surrounding both the Essential Super product and the impugned benefits.

134 I accept ASIC's submission that, in s 963A, the word "benefit" means any advantage, monetary or non-monetary, including a reduction of detriment. That construction accords with the ordinary meaning of the word when read in context and aligns with the apparent purpose of the provision.

135 The definition of the word "benefit" in s 9 is "any benefit, whether by way of payment of cash or otherwise". The ordinary meaning of the word "benefit" is "anything that is for the good of a person or thing" (Macquarie Dictionary) or "advantage, profit, good" (Oxford Dictionary). An available meaning of the word "benefit" is net benefit. It can be said that a commercial transaction is only a benefit to a person if it is profitable. However, the context in which the word is used in s 963A, and generally within Div 4 of Pt 7.7A, confirms that the intended meaning of the word is any advantage given to a person. The following matters of context can be noted.

136 First, the definition of conflicted remuneration in s 963A commences with the words "any benefit". The pronoun "any" indicates that the definition applies to any identifiable benefit.

137 Second, the definition prescribes the type of benefit that is prohibited: namely, any benefit, whether monetary or non-monetary, given to a financial services licensee (or their representative) who provides financial product advice to persons as retail clients that, because of the nature of the benefit or circumstances in which it is given, can reasonably be expected to have the effects stated in paragraphs (a) and (b). The central inquiry to which the section is directed is whether a benefit, given to an identified person, can reasonably be expected to have the stated effects. In answering that question, the Court is required to take into account the nature of the benefit and the circumstances in which it is given. The inquiry encompasses the overall commercial or financial effect of the contract or arrangement by which the benefit is given, including any consideration given by the financial services licensee in return for the benefit and whether the financial services licensee gains an overall net commercial advantage from the contract or arrangement.

138 The primary judge reasoned that:

> 475 Section 963A refers to "benefit" by a qualification that is expressed in mandatory terms. The character or circumstances of the benefit must be such that it "could reasonably be expected to influence" either the relevant financial product advice or the choice of financial product recommended. There is no "benefit" for the purposes of s 963A unless this objective criterion is satisfied.
>
> 476 In construing whether a benefit exists in the context of s 963A, the Court should take a substance over form approach and ask whether a real commercial advantage exists after an assessment of any net benefits that may arise. This approach also aligns with the statutory purpose of the Conflicted Remuneration Provisions as outlined in the explanatory memoranda to the FOFA reforms.

139 Respectfully, I agree with the observation of the primary judge at [475], but I consider that the conclusion at [476] does not follow. The conclusion involves a conflation of the word "benefit" with the prescribed effects of the benefit stated in the definition. The relevant enquiry mandated by the section is whether *any* benefit given to the financial services licensee has the stated effects. The definition does not call for an initial enquiry as to whether the impugned benefit is of a particular kind before considering whether it has the stated effects.

140 While I consider that the trial judge erred in that respect, the error does not affect the outcome of the proceeding. The effect of the error was that, when considering whether a benefit was given to CBA, the trial judge took into account factors that were relevant to assessing whether the impugned benefits had the prescribed effect. As will be discussed later in these reasons, I agree with the trial judge's assessment of that issue.

141 A number of other arguments were advanced on this issue which can be referred to briefly.

142 ASIC observed that the word "benefit" is used in a number of other provisions in Div 4 of Pt 7.7A. The word should be given a consistent meaning across those provisions, unless the context demands otherwise. In some of those provisions, construing the word "benefit" as meaning net benefit introduces uncertainty. For example, s 963AA provides that regulations may prescribe circumstances in which a benefit is conflicted remuneration. The regulation making power would involve a degree of uncertainty if the power is confined to "net benefits". In other provisions, it is clear that the word "benefit" is not intended to mean net benefit. For example, s 963D applies if a benefit is in whole or in part remuneration for work carried out or to be carried out. I accept ASIC's submission that the broader statutory context supports the conclusion that the word "benefit" in s 963A means benefit *simpliciter*.

143 ASIC also submitted that construing the word "benefit" in s 963A as any monetary or non-monetary advantage is consistent with the apparent purpose of the conflicted remuneration regime in Div 4 of Pt 7.7A, as identified in the extrinsic materials. The Revised Explanatory Memorandum to the *Corporations Amendment (Further Future Of Financial Advice Measures) Bill 2012* (Cth) stated at paragraph 2.16:

> The concept of conflicted remuneration covers a broad range of monetary and non-monetary benefits, covering both traditional product commissions, volume payments from platform operators to financial advice dealer groups, and 'soft-dollar' (non-monetary) benefits.

144 The Revised Explanatory Memorandum consistently emphasises that the statutory regime is directed to any benefit given to a financial services licensee that could reasonably be expected to have the stated effects. For example, paragraph 2.51 states (emphasis added):

> A monetary or non-monetary benefit given to a licensee or representative by the employer of the licensee or representative is not necessarily conflicted remuneration. If the payment of the benefit is remuneration for work carried out (for example, an employee's salary), then this will not be conflicted remuneration so long as it is not within the definitions in section 963A. While this allows payment of salaries to employee advisers, it means that ***any proportion of that employee's salary that could reasonably be expected to influence advice is conflicted remuneration***. An important consideration in these circumstances would be the extent to which any volume-based proportion of a salary package is presumed to be conflicted remuneration by virtue of section 963L and whether the recipient could prove that it could not reasonably be expected to influence advice.

145 I accept ASIC's submission. The purpose of the conflicted remuneration regime is to prohibit benefits of any kind if (and only if) the benefits could reasonably be expected to have the effects stated in s 963A.

146 The respondents submitted that support for their preferred construction of the word "benefit" can be drawn from the meaning given to that word in s 623 (which appears in Ch 6 of the Act that regulates takeovers). Broadly, s 623 prohibits a bidder, during an offer period for a takeover bid, from giving a benefit to a person if the benefit is likely to induce the person to accept the takeover bid and the benefit is not offered to all shareholders in the target company. The respondents argued that the predecessor provision to s 623 has been construed as requiring the conferral of a real commercial advantage or some real value on the recipient, assessed in a holistic manner, including through the lens of "net benefits". Consistently with the principle of statutory construction that a word should be given the same meaning wherever it appears in a statute unless the context otherwise requires, the respondents argued that a "benefit" for the purpose of s 963A should be read in the same way.

147 There are a number of difficulties with the respondents' argument. First, the principle of statutory construction on which they rely has much less force in circumstances where the word in question is used in different parts of a statute which deal with different subject matter, and where the statute is otherwise large, complex and frequently amended: see, for example, *Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449 (in relation to words appearing in different parts of a statute); *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research* (2011) 197 FCR 374 at [34]-[35] (Murphy J); *Thirteenth Beach Coast Watch Inc v Environment Protection Authority* (2009) 29 VR 1 at [10] (Cavanough J) (in relation to large, frequently amended statutes). Second, the respondents' argument fails to recognise that the case law on which they rely concerns the interpretation of the predecessor of s 623, being s 698 of the *Corporations Law*, which took a materially different form. Since it came into operation in 2001, s 623 has not been the subject of direct judicial consideration.

148 Section 698 of the *Corporations Law* relevantly provided as follows:

> (1) Subject to subsection (5), if a Part A statement is served on a target company, the offeror, or an associate of the offeror, shall not, during the takeover period, give, offer to give or agree to give to a person whose shares may be acquired under the takeover scheme, or to an associate of such a person, any benefit not provided for under takeover offers or, if the takeover offers are varied in accordance with Division 5 of Part 6.3, under the takeover offers so varied.
>
> (2) Subject to subsection (5), a person who proposes to send takeover offers within the next following 4 months (in this subsection called the 'proposed offeror'), or an associate of such a person, shall not give, offer to give or agree to give to a person whose shares may be acquired under the takeover scheme, or to an associate of such a person, any benefit that the proposed offeror is not proposing to provide for under the takeover offers.

149 The most significant difference between s 698 of the *Corporations Law* and s 623 of the Act is that the former was not qualified by a requirement that the relevant benefit is "likely to induce" the recipient to accept an offer under the takeover bid. It was in that statutory context that the word "benefit" in s 698 of the *Corporations Law* was found to mean an "advantage, profit, good" that was not replicated under the takeover bid and, when assessed on a holistic basis, gave rise to a "net benefit"*:* see *Primac Holdings Ltd v IAMA Ltd* (1996) 22 ACSR 454 at 463-4 (Dowsett J)*; Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Ltd* (1993) 177 CLR 508 at 518 (Mason CJ, Dawson, Toohey and Gaudron JJ)*; Savage Resources Ltd v Pasminco Investments Pty Ltd* (1998) 159 ALR 304 at 319-20 (Hely J)*; Boral Energy Resources Ltd v TU Australia (Queensland) Pty Ltd* (1998) 43 NSWLR 638 at 673-4, 680-1 (Santow J).

150 In *Aberfoyle Ltd v Western Metals Ltd* (1998) 84 FCR 113 (***Aberfoyle***), Finkelstein J concluded that, properly understood, s 698 of the *Corporations Law* was confined to "the provision of benefits that are connected with or have the potential to influence or induce a decision to sell shares in the target company" (at 148). It is apparent that the current form of s 623 of the Act reflects the reasoning of Finkelstein J in *Aberfoyle*.

151 The respondents also referred the Court to the Takeovers Panel Guidance Note No. 21 *Collateral Benefits* (April 2008) at [31] and the Takeovers Panel decision in *Re Powertel (No 3)* [2003] ATP 28 at [44], [49]. Both relate to the Takeovers Panel's powers to make a declaration of unacceptable circumstances under s 657A of the Act. As such, neither assists in the proper construction of the word "benefit" in s 963A of the Act.

152 For those reasons, I reject the respondents' arguments based on s 623 of the Act.

153 On 2 August 2023, after the hearing of the appeal and shortly before the delivery of these reasons, the High Court delivered judgment in *The King v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23. The decision concerned the proper construction of s 70.2(5) of the *Criminal Code* (Cth), and specifically the meaning of the word "benefit" in that provision. The question that arose for decision was whether "benefit" meant amounts paid under a contract for the performance of the contractual obligations (which can be broadly described as the gross benefit), or whether it meant the amount received under the contract for the performance of the contractual obligations less costs paid to enable performance (which can broadly be described as the net benefit). The High Court concluded that, in that statutory context, the word had the former meaning (at [10] and [61]). Given the different statutory context, the decision provides limited assistance in the interpretation of s 963A. I note, however, that there is nothing in the reasons of the High Court that are inconsistent with the foregoing consideration of the meaning of the word "benefit" in s 963A.

154 It follows that I would uphold grounds 1(a) and (b) of the appeal. In s 963A, the word "benefit" means any advantage, monetary or non-monetary, including a reduction of detriment.

***Reasonably be expected to influence***

155 The second question of construction in contest between the parties on the appeal concerns the two phrases in paragraphs (a) and (b) of the definition in s 963A. Those phrases are:

(a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; and

(b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

156 ASIC submitted that the trial judge adopted an unduly narrow construction of those phrases, requiring that the benefit be capable of altering the choice of financial product that might otherwise be recommended or the financial product advice that might otherwise be given (PJ [462], [468]) and concluding that s 963A cannot operate where the financial services licensee only offers a single financial product (PJ [516], [517]).

157 The respondents submitted that paragraph (a) of the definition has no application when there is no choice to be made between two or more different financial products by the licensee when making a recommendation to retail clients. Rather, the paragraph is only engaged when an advisor, confronted with the choice of recommending two or more alternative products, might be induced to recommend one product over another to a retail client on the basis of the prohibited benefit attending the former. If there is no alternative product or no range of alternative financial products available, then the licensee or representative cannot elect or choose between the products to recommend. The respondents submitted that this interpretation of paragraph (a) is consistent with the ordinary and natural meaning of the statutory text, as well as the underlying purpose of the prohibition on conflicted remuneration which is to reduce the potential for, and existence of, conflicts between the interests of the licensee and the interests of retail clients.

158 I accept ASIC's submission. In my view, the prohibition is capable of operation in circumstances where a financial services licensee offers a single financial product (or a single financial product of a particular kind) to retail clients. Whether the prohibition is applicable will depend upon the nature of the benefit and the circumstances in which it is given. Contrary to their submissions, it is the respondents' construction that implies a limitation on the statutory language which is not found in the statutory text and is not otherwise warranted having regard to the statutory purpose.

159 It is, of course, necessary to read the phrases in paragraphs (a) and (b) of s 963A as a whole. The following features of those paragraphs are noted.

160 First, the test expressed by the words "could reasonably be expected to influence" is prospective in nature. The use of the conditional future tense ("*could* reasonably be *expected"*) conditions the definition of conflicted remuneration in s 963A (and, by extension, the

prohibitions contained in ss 963E and 963K) on the likelihood of the relevant benefit affecting the choice of financial product recommended or the financial product advice given in the future.

161 Second, the words "could reasonably be expected" are capable of more than one meaning. The Macquarie Dictionary defines the verb "to expect" in this context as "to look forward to", "to regard as likely to happen" or "to anticipate the occurrence or the coming of". Thus, the word "expected" imports a concept of future likelihood. As yet, there has been no occasion to determine whether the standard of likelihood is "more probable than not" or some lower standard such as "real commercial possibility". Respectfully, I agree with the observation of the primary judge (at PJ [468]) that a "mere possibility" of influence would be insufficient. The issue did not arise in any of *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515; 407 ALR 1 (***ASIC v Westpac (Omnibus)***), *Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 2)* [2022] FCA 786; 162 ACSR 1, or *Australian Securities and Investments Commission v Forex Capital Trading Pty Limited, in the matter of Forex Capital Trading Pty Limited* [2021] FCA 570. The outcome of this appeal is not affected by the standard applied, as I would dismiss the appeal even applying the lower standard of "real commercial possibility". As the parties did not address submissions to this issue, I refrain from expressing any concluded view on it.

162 Third, the word "reasonably" imports an objective standard. That is, the expectation is determined by reference to what is objectively reasonable and not, for example, by reference to the subjectively held views and beliefs of the persons giving or receiving the benefit. Although an objective standard is required, evidence of the motives and intentions of the persons giving or receiving the benefit would be relevant to the assessment of whether the benefit could reasonably be expected to influence the choice of financial product recommended or the financial product advice given. For example, the negotiations between the product issuer and the financial services licensee may reveal that the benefit was agreed to be paid for the express purpose of causing the licensee to recommend the product. The converse may also occur. Evidence of such negotiations constitute part of the circumstances in which the benefit is given and is therefore relevant to the assessment.

163 Fourth, the ordinary meaning of the word "influence" is "to modify, affect" or sway", or to "move or impel" something (Macquarie Dictionary). I respectfully agree with the trial judge that the word "influence" invokes a causal nexus between the benefit and the effects stated in

paragraphs (a) and (b) (PJ [466]). The relevant benefit must therefore be capable of affecting the choice of financial product recommended or the financial product advice given.

164 The phrase "influence the choice of financial product recommended by the licensee" does not circumscribe when and how the relevant choice is made by the licensee, save that it must be influenced by the benefit. A licensee may choose to offer only a single financial product (or a single financial product of a particular kind) to retail clients. A necessary consequence of that choice is that the licensee can recommend only that product to retail clients. If that choice to offer a single financial product is influenced by a benefit given to the licensee, there is no apparent reason based on the statutory text why the prohibition against conflicted remuneration should not apply. The relevant inquiry is whether the issuer or seller of the financial product has given, and the financial services licensee has accepted, a benefit that could reasonably be expected to influence the choice made by the financial services licensee to offer only that product. If that is the effect of the benefit (having regard to the nature of the benefit and the circumstances in which it is given), the effect is necessarily to influence the choice of financial product recommended by the licensee.

165 Similarly, the phrase "influence the financial product advice given … by the licensee" does not circumscribe when and how the relevant decision is made by the licensee about the financial product advice to be given, save that it must be influenced by the benefit. I respectfully agree with the conclusion of Beach J in *ASIC v Westpac (Omnibus)* that paragraph (b) is concerned with "the capacity of a benefit to influence the *content* of financial product advice, and not whether the benefit will influence a decision to give, or not to give, financial product advice" (at [91], emphasis added). Again, a licensee may choose to offer financial product advice having a singular content (for example, to invest in a particular financial product). If that choice is influenced by a benefit given to the licensee, there is no apparent reason based on the statutory text why the prohibition against conflicted remuneration should not apply.

166 Construing paragraphs (a) and (b) in accordance with their ordinary language, and eschewing the imposition of limitations that are not founded in the statutory text, best promotes the statutory purpose as stated in s 760A of the Act and the Revised Explanatory Memorandum (as set out earlier).

167 It follows that I would uphold grounds 1(c), (d), (e) and (g) of the appeal. The possibility of conflicted remuneration within the meaning of s 963A is not confined to circumstances where the financial services licensee receiving the benefit is "confronted" with a choice of financial

product to recommend or a choice of financial product advice to give, but can apply in circumstances where a financial services licensee has chosen to offer only a single financial product (or a single financial product of a particular kind) to retail clients and has chosen to offer financial product advice having a singular content (for example, to invest in a particular financial product). Again, while I consider that the trial judge erred in that respect, the error does not affect the outcome of the proceeding. The impugned benefits were not conflicted remuneration for other reasons given by the trial judge.

***Recommending a financial product or providing financial product advice***

168 The third question of construction in dispute between the parties is whether the prospect of conflicted remuneration only arises in circumstances where the financial services licensee recommends a financial product or gives financial product advice to retail clients.

169 ASIC submitted that, while the definition of conflicted remuneration requires there to be a connection between the benefit and the financial product recommended and the financial product advice that may be given by the financial services licensee, it was unnecessary for ASIC to prove that the relevant financial product was in fact recommended or that financial product advice was in fact given to each retail client – or *most* retail clients – who acquired the relevant financial product (in this case, an Essential Super account). On that basis, ASIC submitted that the trial judge erred in concluding that a further threshold issue is the requirement that such recommendation or advice is provided (PJ [513]).

170 I do not accept ASIC's submission, although I would respectfully express the requirements of s 963A in a different manner to the trial judge.

171 It is an express requirement of the definition in s 963A that the financial services licensee (or their representative) provides financial product advice to persons as retail clients. It is also implicit from the definition that the financial product advice that is provided by the licensee (as referred to in the chapeau) concerns "the choice of financial product recommended" (as referred to in paragraph (a) of the definition) or "the financial product advice given" (as referred to in paragraph (b) of the definition), as applicable in the circumstances of the case.

172 As noted earlier, financial product advice means a recommendation or a statement of opinion that is intended to influence a person in making a decision in relation to a particular financial product or class of financial products (or could reasonably be regarded as being intended to have such an influence). One form of financial product advice is to recommend a financial

product. Another form of financial product advice is to make a statement of opinion that is intended to influence a person in making a decision in relation to a financial product.

173 It follows from the statutory text that a benefit given to a financial services licensee cannot constitute conflicted remuneration in respect of a particular financial product or class of financial products if the licensee does not provide financial product advice to persons as retail clients in respect of the financial product or class of financial products. In that regard, I respectfully express my agreement with the following statement of Beach J in *ASIC v Westpac (Omnibus)* at [94]:

> Broadly speaking, the elements of a contravention of s 963K are, first, an issuer or seller of a financial product gives a "benefit" to a financial services licensee or a representative of a financial services licensee, second, the financial services licensee, or representative, provides financial product advice to persons as retail clients and, third, because of the nature of the benefit or the circumstances in which it was given, the benefit could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients or to influence the financial product advice given to retail clients by the licensee or representative.

174 The foregoing interpretation of s 963A, based on the statutory text, is also confirmed by the extrinsic materials. The Revised Explanatory Memorandum states (at paragraph 2.15):

> If an activity does not involve providing financial product advice within the meaning of section 766B of the Corporations Act, then benefits given in relation to that activity cannot be conflicted remuneration.

175 It can be accepted that the definition in s 963A does not require proof that the financial services licensee provides financial product advice on every occasion on which it distributes the relevant financial product. Apart from anything else, the definition is prospective in nature and is conditioned on the likelihood of the relevant benefit affecting the choice of financial product recommended or the financial product advice given in the future. It is clear, though, that a necessary element of the definition is that the financial services licensee provides financial product advice. The burden of proving that element lies on ASIC. If the financial services licensee does not provide financial product advice, there is no potential for the benefit to influence the choice of financial product recommended (because there will be no recommendation) or the financial product advice given (because there will be no advice).

176 CBA advanced a submission to the effect that none of the statements said to have been made by its branch staff to Essential Super customers could constitute financial product advice in circumstances where the statements made were confined to those contained in the Product Disclosure Statement for Essential Super. The submission relied on s 766B(1A) which

stipulates that the provision or giving of an exempt document or statement does not constitute the provision of financial product advice and s 766B(9) which stipulates that an exempt document or statement is one prepared and given respectively in accordance with the requirements of Ch 7. CBA submitted that, if statements contained in a Product Disclosure Statement are exempt, the repetition of such statements by branch staff cannot constitute financial product advice. I doubt the correctness of that submission, but it is unnecessary to express a concluded view. Relevantly, the exemption in s 766B(9) applies to the Product Disclosure Statement, not to statements or information of a kind contained in the Product Disclosure Statement. The apparent purpose of the exemption is to recognise that the preparation of documents in accordance with the requirements of Ch 7 carries its own safeguards, and for that reason the document is exempt. On its terms, the exemption extends no further.

177 For the foregoing reasons, I would dismiss ground 1(f) of the appeal.

***Benefits given between entities within a group of companies***

178 The fourth question of construction in contest between the parties on the appeal concerns the question whether the prospect of conflicted remuneration can arise in circumstances where a benefit is given by one legal entity to another within a wholly-owned group of companies, as occurred in this case.

179 ASIC submitted that the trial judge erred in concluding (at PJ [479]) that the conflicted remuneration provisions were never intended to operate between business units in the same group of companies or entities. ASIC argued that the relevant provisions make neither direct nor indirect provision for financial services licensees and issuers or sellers of financial products operating within the same group and that there is no textual, or other, justification for excluding companies within the same consolidated group from the operation of the provisions. ASIC submitted that, as with independent providers' financial product advice, vertically integrated financial services groups may also be susceptible to the conflicts of interest that the provisions are directed toward.

180 The respondents did not contest the proposition that the conflicted remuneration provisions are capable of applying to companies within the same group. Rather, they submitted that the trial judge's reasons at PJ [479] should be understood as a factual finding in the circumstances of this case.

181 Respectfully, I consider that the trial judge's statements at PJ [479], that the conflicted remuneration provisions were never intended to operate between business units in the same group of companies or entities within a consolidated group of companies, but rather are directed to benefits that exist between arms-length entities that are not part of a single consolidated group, were expressed too broadly. To that extent, I would uphold appeal ground 1(h).

182 As the trial judge correctly determined, however, the fact that a benefit is given by one entity to another entity within a group of companies is a relevant circumstance in assessing whether the benefit constitutes conflicted remuneration. Indeed, and as discussed below, the whole of the circumstances which lead to the giving of the impugned benefit must be taken into account in assessing whether the benefit could reasonably be expected to influence the choice of financial product recommended or the financial product advice given by the recipient of the benefit.

183 In the course of argument on the appeal, ASIC advanced a contention that the statutory phrase "because of the nature of the benefit or the circumstances in which it is given" should be read disjunctively. Based on the use of the conjunction "or" within the phrase, ASIC argued that it is open to find that a benefit is conflicted remuneration if the nature of the benefit is such that it could reasonably be expected to influence the choice of financial product recommended or the financial product advice given by the recipient of the benefit, regardless of the circumstances in which the benefit is given. Adopting that approach in the present case, ASIC submitted that the impugned benefits received by CBA constituted conflicted remuneration by reason of their nature.

184 I reject that contention. It leads to the definition of conflicted remuneration being applied in an artificial manner whereby relevant circumstances bearing upon the central issue, the propensity of the benefit to influence the choice of financial product recommended or the financial product advice given, are ignored. The plain meaning of the subordinate clause "because of the nature of the benefit or the circumstances in which it is given", when read in context, is that it is necessary to consider both the nature of the benefit and the circumstances in which the benefit is given. The use of the word "or" does not preclude a conjunctive construction where the context and purpose of the legislative provision requires it: see, for example, *Pileggi v Australian Sports Drug Agency* (2004) 138 FCR 107 at [37] (Kenny J); *Federal Commissioner of Taxation v Industrial Equity Ltd* (2000) 98 FCR 573 at [19]-[21]; *Unity APA Ltd v Humes Ltd (No 2)* [1987] VR 474 at 481-2 (Beach J). The use of the conjunction "or" conveys that

either the nature of the benefit or the circumstances in which it is given may lead to a conclusion that the benefit could reasonably be expected to influence the choice of financial product recommended or the financial product advice given. However, both factors must be considered in assessing the reasonably expected effect of the benefit.

**Was a benefit given to CBA (appeal grounds 2 and 3)?**

185 By grounds 2 and 3 of its notice of appeal, ASIC contends that the trial judge erred in concluding that the impugned benefits were not benefits within the meaning of s 963A.

186 Having regard to my reasoning with respect to the meaning of the word "benefit" in s 963A, I accept ASIC's contention.

187 As stated above, a "benefit" within the meaning of s 963A means any advantage, monetary or non-monetary. In the present case, CBA received the contractual promise in the Distribution Agreements and the cash transfers. By the contractual promise, CFSIL agreed to pay CBA 30% of net revenue earned by CFSIL in each financial year from Essential Super over the relevant period. The cash transfers comprised cash payments from CFSIL to CBA totalling more than $22 million, which sums were paid in purported performance of the contractual promise. The contractual promises and the cash transfers had value and thereby conferred an advantage on CBA. They therefore constitute benefits for the purposes of s 963A.

188 It can be accepted that, if the question of benefit is considered from the perspective of the CBA Group, the contractual promise and the cash transfers did not generate any advantage for the Group. As the trial judge found, consistently with the evidence of Mr Samuel, from a financial accounting perspective for the CBA Group, any transfer of value from CFSIL to CBA simply "cancels out" upon consolidation of the accounts (PJ [488]). However, the question of whether a benefit is given under s 963A must be determined at an entity level. Conflicted remuneration is defined as a benefit given to a financial services licensee or its representative. Similarly, s 963E prohibits a financial services licensee from accepting conflicted remuneration and s 963K prohibits an issuer or seller of a financial product from giving conflicted remuneration to a financial services licensee or its representative. The statutory question is whether a benefit is given to and accepted by a financial services licensee. For the reasons already given, the contractual promise made in favour of CBA, and the cash transfer made to it, are benefits when considered at an entity level.

189 As has been emphasised already in these reasons and as discussed below, the fact that the contractual promise and the cash transfers were made between two entities within the same group of companies is nevertheless a relevant circumstance in assessing whether the contractual promise and the cash transfers could reasonably be expected to influence the choice of financial product recommended or the financial product advice given.

190 For those reasons, I would uphold grounds 2 and 3 of the notice of appeal.

**The application of s 963L (appeal grounds 4 and 5)**

191 By ground 4 of its notice of appeal, ASIC contends that the trial judge erred in concluding that the presumption in s 963L of the Act did not apply because the impugned benefits were not "benefits" for the purpose of s 963A. By ground 5, ASIC contends that the trial judge should have concluded that, as the impugned benefits were a "benefit" for the purposes of s 963A, the presumption provided for by s 963L of the Act applied. It can be observed that ground 5 involves a non-sequitur. The application of s 963L is not dependent merely on the fact that a benefit is given; it depends upon whether the benefit has the characteristics specified in that section. On the appeal, however, ASIC advanced submissions that the value of the impugned benefits received by CBA was partly dependent on the total number of Essential Super products acquired by retail clients (to the extent of the fixed monthly member fee), and partly dependent on the value of the Essential Super products acquired by the retail clients (to the extent of the administration fee based on a percentage of funds under management). ASIC accepted that the relationship between the value of the impugned benefits and the value and number of Essential Super products was indirect because CFSIL did not earn revenue from Essential Super products that were acquired but never funded. However, ASIC submitted that the impugned benefits were sufficiently dependent on the total value or number of Essential Super products acquired by retail clients to engage the s 963L presumption.

192 By contention 2 of its notice of contention, CBA contends that, if the trial judge erred in concluding that the presumption in s 963L of the Act did not apply because the impugned benefits were not "benefits" for the purposes of s 963A, s 963L had no application because access to, or the value of, the impugned benefits was not wholly or partly dependent on the total value of financial products or on the number of financial products that were recommended to, or acquired by, retail clients of CBA.

193 As I have concluded that the contractual promise and the cash payments were benefits given to CBA for the purposes of s 963A, it necessarily follows that I respectfully consider that the trial

judge erred in concluding (at PJ [501]) that s 963L had no application for that reason. I would therefore uphold ground 4 of the appeal. Given his Honour's conclusion on the question of "benefit", his Honour did not consider whether the conditions specified in paragraphs (a) and (b) of s 963L applied to the impugned benefits.

194 There is no dispute between the parties as to the relevant facts. The impugned benefits received by CBA comprised a promise of payment, and the receipt of a payment, which was a fixed percentage of the total net revenue earned by CFSIL in relation to the Essential Super fund in each financial year. CFSIL only earned revenue from funded accounts, being accounts into which funds had been paid by an account holder. The revenue earned by CFSIL comprised a monthly membership fee, a management/administration fee based on a percentage of funds under management, and an insurance administration fee calculated as a percentage of premiums for insurance held by members through Essential Super.

195 The respondents submitted that the conditions in paragraphs (a) and (b) of s 963L were not satisfied because the value of the impugned benefits was not determined by the number or value of Essential Super products acquired by retail clients, but by the value of funds invested in the Essential Super accounts. That is, the value of the revenue earned by CFSIL (from which the impugned benefits were calculated after deduction of costs) was dependent upon the value of funds placed into Essential Super accounts by accountholders. The nexus between the impugned benefits and the Essential Super products acquired was therefore indirect and, in the respondents' submission, this is insufficient to engage s 963L.

196 It is clear that the conditions in paragraphs (a) and (b) of s 963L require a causal nexus between the value of the relevant benefit and the number or value of relevant financial products recommended to or acquired by retail clients. The critical words in s 963L are "wholly or partly dependent on". The ordinary meaning of the word "dependent" is "conditioned" or "contingent" (Macquarie Dictionary). The inclusion of the word "dependent" in s 963L invokes the common usage of the word in mathematics whereby a dependent variable is defined as a variable that changes as a result of a change in another variable (usually called the independent variable). The word "partly" makes clear that s 963L may operate in circumstances where the value or number of financial products recommended to or acquired by retail clients is not the only factor that determines access to, or the value of, the relevant benefit, although that factor must be an operative factor (in the sense that a change in the former relevantly affects access to, or the value of, the latter).

197 The extrinsic materials provide support for this reading of the provision. The Revised Explanatory Memorandum indicates that s 963L is intended to be broad in its application, its primary purpose being to shift the burden of proof in respect of a particular category of benefits that, on their face, give rise to a conflict of interest between the financial services licensee and the retail client, and where the circumstances that rebut or negate the existence of conflict will be peculiarly in the knowledge of those paying and receiving the benefits (at [2.19]). The Revised Explanatory Memorandum describes the application of s 963L in the context of employee remuneration arrangements in the following manner (at [2.20], emphasis added):

> If an employee is remunerated based on a **range of performance criteria, one of which is the volume of financial product(s) recommended, the part of the recommendation that is linked to volume is presumed to be conflicted**. However, if it can be proved that, in the circumstances, the remuneration could not reasonably be expected to influence the choice of financial product recommended, or the financial product advice given, to retail clients (section 963A), the remuneration is not conflicted and is not banned. This will depend on all of the circumstances at the time the benefit is given or received. Factors that will be relevant in assessing whether a benefit could reasonably be expected to influence the advice will include the weighting of the benefit in the total remuneration of the recipient, how direct the link is between the benefit and the value or number of financial products recommended or acquired and the environment in which the benefit is given.

198 In the present case, the value of the impugned benefits (being a proportion of the net revenue earned by CFSIL from Essential Super) was dependent, in the sense of being causally affected by, two things.

199 First, the value was affected by the membership fees earned by CFSIL, which in turn was largely dependent upon the number of Essential Super accounts held by individuals. The member fee was initially $5 per month and later increased to $5.88 per month. I used the expression "largely dependent upon" because CFSIL did not charge a member fee in respect of accounts which had no funds contributed. Thus, there existed the possibility of Essential Super being acquired by retail clients in circumstances where no revenue was earned by CFSIL and, as a result, no fee was paid to CBA. Despite that possibility, I consider that it is correct to conclude that the value of the impugned benefits was partly dependent on the number of Essential Super products acquired by retail clients, because the revenue earned by CFSIL through the membership fee was causally affected by the number of Essential Super accounts opened. For that reason, I consider that the condition in paragraph (b) of s 963L was satisfied and the presumption in s 963L was applicable. This is a sufficient basis on which to uphold appeal ground 5.

200 Second, the value of the impugned benefits was also affected by the value of funds contributed to Essential Super accounts held by members. Throughout the relevant period, CFSIL charged members a management fee, later changed to an administration fee and an investment fee, which was a percentage of funds under administration (in other words, the funds held in Essential Super accounts). The question that arises is whether those circumstances support a conclusion that the value of the impugned benefits was partly dependent on either the number of Essential Super products acquired by retail clients (for the purposes of paragraph (b) of s 963L) or the value of Essential Super products acquired by retail clients (for the purposes of paragraph (a) of s 963L). Although the answer is not entirely free from doubt, in my view the preferable conclusion is in the negative. The relevant fees (and thereby the impugned benefits) were not dependent upon the number of Essential Super products acquired by retail clients, because those fees did not vary according to the number of products acquired. The fees varied according to the funds contributed to the accounts. Nor, in my view, were the relevant fees (and thereby the impugned benefits) dependent upon the value of Essential Super products acquired by retail clients. The condition in paragraph (a) of s 963L contemplates that the relevant financial product has a value at the time the product is recommended or at the time it is acquired. That will be the case for many classes of financial products. However, it is not the case for superannuation products. A superannuation product, being a facility through which an individual may accumulate superannuation savings, cannot be considered to have a value at the time it is recommended by the licensee or acquired by the retail client. The product only has value at a later point in time when funds are contributed to the account by the account holder. In those circumstances, it cannot be said that the relevant fees (and thereby the impugned benefits) were wholly or partly dependent upon the value of Essential Super products acquired by retail clients.

201 In conclusion, I would uphold grounds 4 and 5 of the appeal and conclude that the presumption in s 963L was applicable in the circumstance of this case. As the parties acknowledged on the appeal, however, the presumption has little, if any, practical importance in circumstances where evidence was adduced on the principal issue raised by the proceeding: whether because of the nature of the impugned benefits or the circumstances in which they were given, the impugned benefits could reasonably be expected to influence the choice of financial product recommended by CBA or the financial product advice given to retail clients by CBA.

**Provision of financial product advice (appeal grounds 9 and 10)**

202 Within the structure and logic of the definition of conflicted remuneration in s 963A, the question whether the financial services licensee provides financial product advice in respect of a particular product naturally precedes the question whether the alleged benefit could reasonably be expected to influence the choice of financial product recommended or the financial advice given by the licensee. For that reason, it is appropriate to address ASIC's appeal grounds 9 and 10 before addressing appeal grounds 6, 7 and 8.

203 By appeal grounds 9 and 10, ASIC challenged the trial judge's conclusion that ASIC had failed to prove that CBA provided financial product advice in respect of Essential Super to retail clients.

204 As discussed earlier in the context of appeal ground 1, a benefit given to a financial services licensee cannot constitute conflicted remuneration if the licensee does not provide financial product advice to persons as retail clients in respect of the financial product in question. In the circumstances of the present case, ASIC was required to prove that CBA provided financial product advice in relation to Essential Super to retail clients. That does not require proof that CBA provided financial product advice on every occasion on which it distributed Essential Super; but there must be evidence from which the Court can conclude that financial product advice was given on at least some occasions.

205 In s 766B of the Act, the phrase "financial product advice" is defined as a recommendation or a statement of opinion, or a report of either of those things, that is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence. Section 766B also stipulates that there are two types of financial product advice: personal advice and general advice. In broad terms, personal advice is financial product advice that is given or directed to a person in circumstances where the provider of the advice has considered one or more of the person's objectives, financial situation and needs, or a reasonable person might expect the provider to have considered one or more of those matters. General advice is financial product advice that is not personal advice. The giving of personal advice is subject to more onerous regulatory obligations in comparison to the giving of general advice.

206 The boundary between the "mere" distribution of a financial product and the provision of financial product advice in relation to the product was the subject of some discussion in

*Australian Securities and Investment Commission v Westpac Securities Administration Limited* ***(Westpac Securities)*** (2019) 272 FCR 170. That decision recognised that there can be no "bright line distinction" between the two (at [22] per Allsop CJ; see also [218] per Jagot J and [339] per O'Bryan J), and that statements made for the purpose of promoting, selling and distributing a financial product do not necessarily (or even ordinarily) contain a recommendation or statement of opinion of the kind that constitutes financial product advice (at [22] per Allsop CJ, [238] per Jagot J and [339] per O'Bryan J). Rather, a court must seek to characterise the communication or exchange at issue in all of the circumstances (at [22] per Allsop CJ).

207 ASIC's case with respect to financial product advice given in respect of Essential Super was advanced at a high level of abstraction. In its written submissions, ASIC submitted that:

> ASIC's case was that financial product advice was provided as follows:
>
> (a) to individuals and employers, to become a member or Employer Sponsor of Essential Super;
>
> (b) to individuals, to take life and total and permanent disability insurance through their Essential Super accounts;
>
> (c) to individuals, to fund their Essential Super accounts once open by doing one or more of:
>
> (i) directing employer superannuation contributions to those accounts to ensure regular contributions;
>
> (ii) consolidating all superannuation interests into an Essential Super account; and
>
> (iii) making contributions from a bank account.

208 The submission identifies the broad topic or subject of the alleged financial product advice, but fails to identify the written or spoken words that were said to constitute the advice (being the recommendation or statement of opinion that was intended – or could reasonably be regarded as being intended – to influence a person to make one of the above decisions in relation to Essential Super).

209 ASIC's pleading likewise suffered from a failure to allege the written or spoken words that were said to constitute the financial product advice. The pleading contained allegations concerning the facts that:

(a) only authorised staff were permitted to initiate and assist a customer sign up for an Essential Super account;

(b) CBA staff were trained with respect to the distribution of Essential Super;

(c) non-authorised staff were required to use approved scripts when discussing Essential Super with customers;

(d) CBA had in place "standard operating procedures" for branch staff to follow with respect to Essential Super;

(e) authorised staff were trained to sell Essential Super under a "general advice model"; and

(f) authorised staff had approved scripts, a general advice warning and sales guides to use when discussing Essential Super with customers.

210 After pleading those matters, ASIC pleaded a bare conclusion that CBA "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 a decision to open an Essential Super account or to choose between investment options within Essential Super or whether to take out insurance within Essential Super. At no point in the pleading did ASIC identify specific parts of a training manual, a standard operating procedure or a script that contained words and statements that were said to constitute the recommendation or statement of opinion relied upon by ASIC.

211 The same difficulty affected ASIC's arguments on the appeal. There was a lack of attention to the identification of specific words and statements within training manuals, standard operating procedures or scripts that that were said to constitute relevant recommendations or statements of opinion. Instead, ASIC placed considerable reliance on the fact that CBA's internal documents stated that Essential Super would be distributed under a "general advice model". ASIC's submission appeared to be that an inference could be drawn from those documents that financial product advice was provided to Essential Super customers by CBA. Indeed, an impression was gained that ASIC considered it sufficient to rely on those documents to prove that CBA gave financial product advice to customers when distributing Essential Super.

212 When pressed in the course of argument on the appeal, ASIC took the Court to certain of the training manuals, standard operating procedures and scripts that were in evidence. As set out earlier in these reasons, one of the scripts included the following "approved" statements:

> Generally, customers find that Essential Super is a straightforward superannuation product with the convenience of on line access through NetBank. Would you be

> interested in taking out Essential Super?
>
> I'm letting my customers know about an exciting product called Essential Super. Essential Super is an online superannuation account which helps people to manage their super through NetBank. It also has the convenience of accepting employer contributions.
>
> Many of our customers have found that selecting their own superannuation fund, rather than using the fund their employer provides, enables them to take greater control of their super. As Essential Super is accessible through NetBank, this makes it even easier as it provides flexibility for super and banking to be managed in the one place.

213 One of the standard operating procedures titled "Essential Super Account Opening – Personal Customer" referenced a similar "approved script" which contained the text: "Would you be interested in finding out more about Essential Super, an easy to set up superannuation account that can be managed through NetBank with other CommBank accounts?". The documents also suggested the following script for the purposes of choosing a fund for compulsory superannuation payments: "Would you like to have your employer(s) pay your super into your Essential Super account?". The standard operating procedure also informed the CBA staff that:

> Customers are offered a pre-approved level of cover based on their age for: Death only or Death and Total and Permanent Disability (TPD). Customers can halve or double or opt-out of their pre-approved insurance.
>
> Customer can choose their own investment mix, or select the Lifestage fund which will be managed for them.

214 The respondents submitted that appeal grounds 9 and 10 should be rejected for two main reasons. First, the statements relied on by ASIC to establish the provision of financial product advice did not constitute a recommendation or statement of opinion necessary to bring it within s 766B of the Act. Second, in the case of branch sales, even if the statements relied upon could rise to the level of financial product advice, the training materials did not establish that any such statements were in fact conveyed to customers by CBA branch staff in the context of branch sales, and ASIC had failed to adduce any other evidence of interactions between CBA branch staff and customers.

215 In order to prove that CBA gave financial product advice to retail clients in respect of Essential Super, it was not sufficient for ASIC to establish that CBA instructed its staff that Essential Super was to be distributed pursuant to a "general advice model". Nor does the respondents' acceptance that branch sales were effected under a general advice model amount to an admission that general advice was given. It is apparent from the documentary evidence that CBA gave instructions to its staff about a "general advice model" in an effort to ensure that its staff did not offer personal financial product advice in relation to Essential Super. It does not

follow from the instruction, however, that CBA staff did in fact provide financial product advice to customers in connection with Essential Super, whether general or otherwise.

216 In order to prove that CBA gave financial product advice to retail clients in respect of Essential Super, it was necessary to establish (on the balance of probabilities) that statements of a particular kind were made to retail clients, and that the content of those statements satisfied the definition of financial product advice. Proof of that fact does not necessarily require evidence from individual staff members or individual customers. The fact may be proved to the requisite standard by a combination of documentary evidence and inference. The evidence established that CBA developed and implemented comprehensive processes and procedures for the distribution of Essential Super by branch staff across a network of more than 1000 branches. CBA trained its staff with respect to the types of statements that were permitted to be made to customers or potential customers in relation to Essential Super, and staff were provided with scripts and guides for that purpose. The evidence also established that CBA monitored the implementation of its processes and procedures for the distribution of Essential Super, including through an external review undertaken by KPMG. CBA sought to ensure that the distribution of Essential Super was conducted in a systematic and uniform manner that minimised compliance and other risks. In these circumstances, the Court will readily infer that a large and sophisticated commercial organisation such as CBA would ensure that its processes and procedures are followed. In turn, the Court will readily infer that statements of the kind contained in training and other materials provided to branch staff are likely to have been communicated to customers who acquired Essential Super on many occasions.

217 Having reviewed the documentary evidence relied on by ASIC, I am not persuaded that the trial judge erred in concluding that ASIC had failed to prove that CBA provided financial product advice to persons as retail clients in respect of Essential Super. In my view, the statements contained in the relevant sales "scripts" for Essential Super are not of the requisite character to meet the definition of financial product advice. As defined, financial product advice must involve a recommendation or statement of opinion intended to influence a person in making a decision in relation to a particular financial product or could reasonably be regarded as being intended to have such an influence. As observed by Sackville AJA in *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [364], the dictionary definition of "recommendation" includes to commend by favourable representations and to represent or urge as advisable or expedient.

218 The statements in the relevant scripts were to the following effect:

(a) that Essential Super is a straightforward superannuation product;

(b) that Essential Super has the convenience of on-line access through NetBank, which means that superannuation and banking can be managed in the one place;

(c) that employer contributions can be accepted into Essential Super;

(d) that client can take control of their superannuation by selecting their own superannuation fund rather than using the fund their employer provides;

(e) that Essential Super is a competitively priced superannuation account; and

(f) that customers are able to choose their own investment mix and level of insurance.

219 None of those statements were truly a recommendation of the product within the meaning of the definition of financial product advice. Whilst recognising that statements of fact may in some circumstances constitute a recommendation (see *Westpac Securities* at [20] per Allsop CJ), the foregoing statements did not rise above simple statements of fact about the basic features or administrative machinery of Essential Super. They can properly be seen as mere marketing or promotional statements, in the sense of informing potential clients about the basic features of Essential Super, without containing an implied recommendation (cf *Westpac Securities* at [218] per Jagot J). The scripts asked the client whether they were interested in Essential Super. In my view, the scripts did not expressly or impliedly commend or urge a particular course of action, which I consider to be the ordinary meaning of the word "recommendation" (see *Westpac Securities* at [336]).

220 In my view, ASIC failed to establish that the trial judge's conclusion was contrary to the evidence or contrary to the weight of evidence. The limited evidence to which the Court was taken by ASIC on the appeal tended to confirm rather than undermine the trial judge's assessment. ASIC failed to discharge its burden of proving that CBA staff made statements to retail clients that satisfied the definition of financial product advice.

221 For those reasons, I would reject grounds 9 and 10 of the appeal. The rejection of those appeal grounds leads to the conclusion that the appeal must be dismissed. It is nevertheless appropriate to consider fully appeal grounds 6, 7 and 8 as the issues raised by those grounds also lie at the heart of the appeal and were fully argued.

**Reasonably be expected to influence (appeal grounds 6, 7 and 8)**

222 By appeal grounds 6 and 7, ASIC contends that the trial judge erred in finding that the impugned benefits were not capable of influencing and could not be reasonably expected to influence the choice of financial product recommended by CBA or the financial product advice given by CBA, and that his Honour ought to have found the impugned benefits could reasonably be expected to influence either or both of those matters. By appeal ground 8, ASIC also challenged three discrete factual findings made by the trial judge:

(a) that, in 2019, when CFSIL suspended its cash transfers under the 2018 Distribution Agreement, CBA continued to distribute Essential Super (PJ [507(c)]);

(b) that there was no choice to be made of financial product recommended by CBA (PJ [516]-[517]); and

(c) that the nature of the financial product advice (if provided) was never going to be different from that which was provided (PJ [517]).

223 ASIC's case at trial, and maintained on the appeal, was focussed upon two matters. The first matter related to the nature of the impugned benefits. ASIC argued that the fee payable to CBA under the Distribution Agreements (the contractual promise) entitled CBA to receive a share in the net revenue earned from Essential Super accounts. As a consequence, the greater the volume of sales of the product, the more revenue CBA would be likely to receive because it would be expected that member fees and investment and administration fees would grow as more individuals acquired accounts with Essential Super. For that reason, ASIC argued that the fee could reasonably be expected to influence CBA's choice to recommend Essential Super, or to give financial product advice to the same effect. The second matter related to the circumstances in which the impugned benefits were given. ASIC argued that the Distribution Agreements were entered into following extensive consideration by senior executives of CBA and CFSIL, including the consideration of legal advice, and following extensive commercial negotiations conducted at arms-length. The Distribution Agreements formally identified the services that CBA was to provide to CFSIL, imposed minimum service standards, and contained processes and mechanisms to monitor the performance and quality of those services. The fee promised to CBA under the Distribution Agreements was significant and ongoing over a long period of time. ASIC submitted that, in 2012 and the first half of 2013, CBA set up operational processes in anticipation of distributing Essential Super: in respect of branch sales, it trained staff to create interest in and to sell the product; from 1 July 2013 (after entering into

the 2013 Distribution Agreement), it implemented processes for the sale of Essential Super; and, it incurred the costs associated with its staff actually distributing Essential Super under a general advice model. ASIC argued that the impugned benefits were conferred on CBA in the context of a real contractual arrangement involving real consideration, and from these facts the Court ought to conclude that that impugned benefits could reasonably be expected to influence CBA's decision to distribute Essential Super. That the Distribution Agreements were entered into between two related entities within the same corporate group was, in ASIC's submission, of no moment.

224 On the appeal, ASIC also placed reliance on the fact that CFSIL was the issuer of nine superannuation products, including one other MySuper product, and that there were myriad other superannuation products (and MySuper products) on the market in the relevant period. ASIC relied on those facts as demonstrating that CBA chose to distribute only one superannuation product, being Essential Super. The respondents objected to ASIC advancing that argument on the basis that it did not form part of the case run at trial. For the reasons explained below, ASIC's reliance on those matters does not assist it.

225 ASIC argued that the trial judge (at PJ [502]-[503] and [505]-[512]) found that the impugned benefits could not reasonably be expected to influence the choice of financial product recommended by CBA to retail clients or the financial product advice given to retail clients by CBA for three reasons: CBA and CFSIL had incurred costs in developing Essential Super; CBA frontline staff did not know of the impugned benefits; and the impugned benefits were *de minimis* to CBA. ASIC submitted that these three considerations, in total or individually, did not answer ASIC's case. ASIC submitted that the costs incurred by CBA were sunk; CBA was influenced to put processes in place so that authorised staff would sell Essential Super under a general advice model; and the finding that the impugned benefits were *de minimis* did not engage with the circumstances ASIC relied upon (including, in particular, the careful, detailed and entity-specific negotiations in 2013), which could reasonably be expected to lead to CBA selling the Essential Super product.

226 ASIC further submitted that the trial judge erred with respect to three facts relied on in support of his conclusion as to influence:

(a) First, ASIC submitted that the trial judge erred in finding that CBA continued its distribution of Essential Super after CFSIL suspended the cash transfers in 2019

(PJ [507(c)]). It was an agreed fact that the distribution of the product ceased in branches in October 2017 and via digital channels in July 2018 (SAFID [44]).

(b) Second, ASIC submitted that the trial judge erred in finding that there was no choice of financial product to be made in CBA's distribution of Essential Super (PJ [516]-[517]). ASIC argued that CBA chose to distribute, and in the circumstances recommend, Essential Super.

(c) Third, ASIC submitted that the trial judge erred in finding that the nature of the financial product advice was never going to be different from that which was provided (PJ [517]). ASIC argued that CBA gave recommendations to retail clients to become members of Essential Super, to fund their Essential Super funds, and to take insurance through their Essential Super accounts. This financial product advice tended to increase the amount to which CBA was entitled to be paid by CFSIL. The financial advice could have been different from that which was provided: for example, CBA may have recommended that customers become a member of another fund.

227 ASIC's submissions, as summarised above, do not establish error in the trial judge's overall evaluation of the question whether the impugned benefits could reasonably have been expected to influence the choice of financial product recommended or the financial product advice given by CBA. ASIC's arguments fail to give due weight to the totality of the factual findings concerning the circumstances in which the impugned benefits were given by CFSIL to CBA. The trial judge took into account the totality of those circumstances and, in my view correctly, concluded that the impugned benefits could not reasonably have been expected to influence the choice of financial product recommended, or the financial product advice given, by CBA.

228 The facts as found by the trial judge demonstrate that the impugned benefits had no bearing on CBA's decision to choose to develop and distribute Essential Super. The evidence showed that the decision was made by CBA in response to the MySuper reforms. CBA, as the parent entity of the CBA Group, considered that there was a commercial need for the Group to have a MySuper product. The CBA Group Executive Committee paper that recommended the development of the product observed that the product would have a range of benefits: bank customers would have the convenience of a simple superannuation product that was accessible via NetBank alongside the customer's transaction account; most Australians have simple superannuation needs and the product would allow the customer to take the same super and transaction accounts as they transfer from job to job; the product would support CBA's

retention of young customers, particularly those burdened by multiple super funds due to casual work and job changes; CBA's competitors already offered competitive products and CBA needed to respond; and the commencement of the MySuper legislation would herald a new generation of MySuper-style funds.

229 It can be accepted that, in choosing to develop and distribute Essential Super, the CBA Group Executive Committee was motivated by the potential financial return that would be generated from the product. That is to be expected. However, the Business Case presented to the CBA Group Executive Committee was focussed on the financial return to the CBA Group as a whole, not the forecast earnings of one Group entity compared to another, and not the fees payable by one entity to another. Essential Super (then called Simple Super) was described as a "joint initiative of Wealth Management and Retail Banking Services". The Business Case described the "opportunities" afforded by the development of the product in terms of the CBA Group. Those opportunities included:

(a) attracting new superannuation business currently held with competitors to the Group;

(b) meeting more of "our" customers' needs and maximise customer share of wallet through a superannuation product that is linked to a transaction account via NetBank;

(c) attain "CBA's" natural share of the superannuation market with legislated growth potential;

(d) generate Group risk premium income for CommInsure; and

(e) generate revenue from managed funds for CFS.

230 The financial summary contained in the Business Case, and the estimated net present value of the project, was presented on a Group basis, not an entity basis. The Business Case did not refer to a "fee" payable by Wealth Management to RBS, but stated (in a single sentence within a lengthy document):

> The business case assumes a 50% share of costs and benefits between RBS and CFS business units. RBS and CFS Finance teams will be engaged following business case approval to agree to allocation methodology.

231 The CBA Group Executive Committee gave its approval to the project, being the development and distribution of Essential Super, in May 2012 before any work had been done on developing a methodology for allocating costs and benefits between RBS and CFSIL. The approval was given on the basis of the expected financial return to the CBA Group. The fee payable by CFSIL to CBA under the 2013 Distribution Agreement had not been formulated when the

project was approved and the internal documents reveal that the payment of a fee between CFSIL and CBA was irrelevant to the decision to develop and distribute the product. There was no evidence to suggest that at any relevant time CBA contemplated distributing a MySuper product other than Essential Super.

232 Whether or not CBA's decision to distribute Essential Super, and not one or more of the other superannuation products issued by CFSIL, can be described as a choice, the circumstances in which that decision was made demonstrate that the decision was not to any degree influenced by the fee that was ultimately agreed to be paid by CFSIL to CBA under the Distribution Agreements. If anything, the converse was true: the decision to pay the fee under the Distribution Agreements was the result of the decision by the CBA Group to develop and distribute Essential Super in response to the MySuper reforms.

233 ASIC relied heavily on the facts that the Distribution Agreement was a detailed document defining the services to be supplied by CBA, and CBA trained its staff to distribute Essential Super in compliance with its contractual obligations. ASIC's reliance on these matters was misplaced. The Distribution Agreement between CFSIL and CBA was a mandatory requirement under APRA Standard SPS 231 governing outsourcing. It is unsurprising that CFSIL and CBA took those obligations seriously. The reviews of the Distribution Agreement that occurred in 2015 and 2018, and which resulted in the amended Distribution Agreements being entered into, were also undertaken by CFSIL in compliance with its obligations under APRA Standard SPS 231. The evidence shows that the fee payable by CFSIL to CBA was irrelevant to the decisions to renew the Distribution Agreements in 2015 and 2018. Similarly, CBA was subject to a range of financial services obligations associated with distributing Essential Super, and it is unsurprising that CBA trained its staff in that respect. None of those actions taken by CFSIL and CBA have any necessary bearing upon the question whether the fee payable under the Distribution Agreements could reasonably be expected to influence CBA's decision to distribute Essential Super or any financial product advice given by CBA in relation to Essential Super.

234 The trial judge's conclusion that the fee payable under the Distribution Agreements could not reasonably have been expected to influence CBA's decision to distribute Essential Super or any financial product advice given in relation to Essential Super is further supported by the lack of awareness of the fee as between relevant employees of CFSIL and CBA and the failure to pay the fee for a considerable period of time. As set out earlier in these reasons:

(a) The finance teams in CBA and CFSIL did not become aware of the 2015 Distribution Agreement (or the earlier 2013 Distribution Agreement) until September 2017. Until then, they were working on the basis of a 50:50 profit share and not the 70:30 profit share agreed in the Distribution Agreements.

(b) While a payment was made between CFSIL and CBA in respect of the 2014 financial year (albeit on the basis of a 50:50 share of the net loss incurred in that financial year), no payments were made in the ensuing 2015, 2016 and 2017 financial years.

(c) After the forgoing matters were discovered in September 2017, an adjustment was made in respect of journal entries made for the months of July, August and September 2017 so that the year to date for the 2018 financial year reflected the 70:30 profit share, but there was no attempt to rectify the position for previous financial years.

235 Collectively, the above circumstances demonstrate that CBA's decision to distribute Essential Super was motivated by commercial objectives that preceded the negotiation of the fee payable under the Distribution Agreements, and the payment of the fee was immaterial to that decision. That remained the case throughout the relevant period.

236 For those reasons, I would reject appeal grounds 6 and 7.

237 The specific complaints raised by appeal ground 8 do not affect the foregoing conclusions. Addressing each of those grounds in turn:

(a) With respect to appeal ground 8(a), it appears that the primary judge was in error to find that, in 2019 when CFSIL suspended its cash transfers under the 2018 Distribution Agreement, CBA continued to distribute Essential Super despite the suspension of payments (PJ [507(c)]). However, that finding was not material and does not affect the correctness of the trial judge's overall evaluation.

(b) Appeal ground 8(b) largely replicates appeal ground 1(e) discussed earlier. It can be accepted that the prohibition against conflicted remuneration is capable of operation in circumstances where a financial services licensee offers a single financial product (or a single financial product of a particular kind) to retail clients. Accordingly, the fact that CBA only distributed Essential Super did not preclude the prohibition against conflicted remuneration (contrary to the trial judge's finding at PJ [516] and [517]). However, whether the prohibition is applicable will depend upon the nature of the benefit and the circumstances in which it is given. For the reasons explained above, the trial judge was

correct to conclude that the impugned benefits could not reasonably have been expected to have influenced CBA's decision to distribute only Essential Super as a MySuper product.

(c) I reject appeal ground 8(c). The trial judge's finding that the nature of (any) financial product advice given by CBA was never going to be different from that which was provided (PJ [517]) reflected his Honour's findings concerning the commercial reasons for which Essential Super was developed and distributed as summarised above. The evidence supported that finding.

238 The rejection of appeal grounds 6 and 7 also leads to the conclusion that the appeal must be dismissed.

## E. TRANSITIONAL PROVISIONS

### Overview

239 By grounds 11 and 12, ASIC appeals the trial judge's conclusion that the relevant transitional provisions were applicable so as to exempt the impugned benefits from the prohibition of conflicted remuneration in Div 4 of Pt 7.7A. The relevant transitional provisions comprised s 1528(1) of the Act and regulations made pursuant to s 1528(2) of the Act, specifically regs 7.7A.16, 7.7A.16A and 7.7A.16B of the Regulations.

240 By ground 11, ASIC challenges the trial judge's finding that, throughout the relevant period, the impugned benefits were given under an arrangement entered into prior to 1 July 2013 (PJ [545] and [546]). ASIC contends that the trial judge should have found that:

(a) the 2015 Distribution Agreement was not the same "arrangement" as the 2013 Distribution Agreement;

(b) further or alternatively, the 2018 Distribution Agreement was not the same "arrangement" as the 2013 Distribution Agreement.

241 By ground 12, ASIC also contends that the trial judge should have found that the impugned benefits were given by CFSIL:

(a) whilst acting in the capacity as a platform operator, such that reg 7.7A.16A applied; or

(b) whilst not acting in the capacity as a platform operator, such that reg 7.7A.16B applied,

with the consequence (in either case) that benefits that related to persons who became members of Essential Super after 1 July 2014 remained subject to the conflicted remuneration prohibition.

242 For the reasons that follow, I consider that ground 11 should be dismissed but that ground 12 should be upheld. Arriving at that conclusion is not straightforward. The regulations that were made pursuant to s 1528(2) of the Act were complex and presented many difficult questions of construction. The complex and unclear drafting of such regulations should be deprecated. Persons conducting business within the financial services industry should be able to determine whether the law applies to them without having to undertake a difficult exercise of statutory interpretation. Given the difficulties in understanding and interpreting the regulations, it is fortunate that s 1528 was amended with effect on 1 January 2021 by the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019* (Cth) and the regulations made pursuant to that section were repealed.

**Section 1528**

243 Throughout the relevant period, s 1528 provided (relevantly) as follows:

> (1) Subject to subsections (2) and (3), Division 4 of Part 7.7A, as inserted by item 24 of Schedule 1 to the amending Act, does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee, if:
>
> (a) the benefit is given under an arrangement entered into before the application day; and
>
> (b) the benefit is not given by a platform operator.
>
> (2) The regulations may prescribe circumstances in which that Division applies, or does not apply, to a benefit given to a financial services licensee, or a representative of a financial services licensee.

244 The phrase "application day" was defined in s 1528(4). It is common ground between the parties that the "application day" was 1 July 2013 (ie, one year after Div 4 of Pt 7.7A commenced).

245 It can be seen that s 1528 establishes a regime by which the transitional application of Div 4 of Pt 7.7A to a benefit is governed by s 1528(1) and regulations made pursuant to s 1528(2). Under such a statutory regime, it is permissible to have regard to both the legislative provisions and the regulations made pursuant to it in order to ascertain the nature of the legislative scheme and to assist in the interpretation of the legislative provisions: see for example *Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Limited* (1934) 52 CLR 85 at 89-95 (Dixon J);

*O'Connell v Nixon* (2007) 16 VR 440 at [28] (Nettle JA, with whom Chernov JA and Redlich JA agreed).

246 Before turning to the applicable regulations, it is convenient to note the following matters with respect to the structure of s 1528.

247 It can be seen that s 1528(1) exempted benefits if they were given under an arrangement entered into before the application day by persons other than platform operators. Plainly, the converse is also true: s 1528(1) did not exempt benefits given by a platform operator, even if the benefits were given under an arrangement entered into before the application day.

248 The Revised Explanatory Memorandum explained the intended regime as follows:

> 2.82 The obligations in Division 4 (conflicted remuneration) generally apply from the date of commencement, 1 July 2012. However, they do not apply to benefits given to a licensee or representative if the benefit is given under an arrangement entered into before the day of commencement and the benefit is not given by a platform operator.
>
> …
>
> 2.84 The regulations may prescribe circumstances in which the conflicted remuneration obligations will or will not apply to benefits given to a financial services licensee, or a representative of a financial services licensee.
>
> 2.85 It is intended to provide for payments made by platform operators under this provision. It is also intended that the regulations will provide for conflicted remuneration with respect to both individual and group risk insurance products within superannuation to be banned from 1 July 2013, to align with the start date of the MySuper reforms.

249 At the time of the Revised Explanatory Memorandum, the form of cl 1528(1)(a) in the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012* (Cth) referred to an arrangement entered into before the commencement date of Div 4 of Pt 7.7A. Hence, paragraph 2.82 refers to such an arrangement. That aspect of s 1528(1) was revised to insert the phrase "application day" and the accompanying definition in s 1528(4). Apart from that change, it can be seen that the intended regime was to exempt benefits given to a licensee (or representative) if the benefit was given under an arrangement entered into before the application day and the benefit is not given by a platform operator. In respect of benefits given by a platform operator, it was intended that the regulations would prescribe circumstances in which the conflicted remuneration provisions would or would not apply.

250 It is relevant in that context to note the statutory definition of a "platform operator", in order to understand the reason for treating benefits given by platform operators differently. At all

relevant times, s 1526(1) defined "platform operator" as "the provider of a custodial arrangement, or custodial arrangements". "Custodial arrangement" was defined as having the same meaning as it has in s 1012IA(1), subject to s 1526(2). Section 1012IA(1) defined "custodial arrangement" as follows:

> ***Custodial arrangement*** means an arrangement between a person (the ***provider***) and another person (the ***client***) (whether or not there are also other parties to the arrangement) under which:
>
> (a) the client is, or is entitled, to give an instruction that a particular financial product, or a financial product of a particular kind, is to be acquired; and
>
> (b) if the client gives such an instruction, a person (the acquirer), being the provider or a person with whom the provider has or will have an arrangement, must (subject to any discretion they have to refuse) acquire the financial product, or a financial product of that kind; and
>
> (c) if the acquirer acquires the financial product, or a financial product of that kind, pursuant to an instruction given by the client, either:
>
> (i) the product is to be held on trust for the client or another person nominated by the client; or
>
> (ii) the client, or another person nominated by the client, is to have rights or benefits in relation to the product or a beneficial interest in the product, or in relation to, or calculated by reference to, dividends or other benefits derived from the product.

251 The effect of s 1526(2) is to make clear that the reference to client instructions in the definition of "custodial arrangement" includes directions given by a beneficiary of a superannuation fund in respect of amounts invested in an investment option of the fund or a strategy to be followed in relation to the investment of a particular asset class or assets of the fund.

252 Thus, it can be seen that platform operators are persons who provide a custodial arrangement to clients whereby the client can give ongoing instructions to the provider to acquire financial products and the provider of the custodial arrangement holds the financial product on trust for the client. Subsection 1526(2) makes clear that trustees of superannuation funds come within that definition. It was common ground that CFSIL, as the trustee of Essential Super, was a platform operator. As such, s 1528(1) did not exempt benefits given by CFSIL. It is therefore necessary to consider the regulations to determine whether the impugned benefits were exempt under the transitional provisions.

253 As will be seen, the word "instructions" is used in the regulations made pursuant to s 1528(2). Given the foregoing statutory context, it is tolerably clear that the word "instructions" is used in the sense of the definition of "custodial arrangement"; viz, an instruction given by a client that a particular financial product, or a financial product of a particular kind, is to be acquired

or, in the context of superannuation funds, a direction given by a beneficiary of a superannuation fund in respect of amounts invested in an investment option of the fund or a strategy to be followed in relation to the investment of a particular asset class or assets of the fund.

**Regulations 7.7A.16, 7.7A.16A and 7.7A.16B**

254 The applicable regulations during the relevant period were regs 7.7A.16, 7.7A.16A and 7.7A.16B (which I will refer to as regs 16, 16A and 16B for ease of reference). The regulations were introduced by the *Corporations Amendment Regulation 2013 (No. 5)* (Cth), commencing 1 July 2013. The regulations were amended during the relevant period, but the amendments are not material to the issues that arise on this appeal and can be ignored for present purposes.

255 For completeness, reference should also be made to reg 7.7A.16C which was also made as part of the suite of regulations under s 1528(2). However, reg 7.7A.16C concerned benefits paid under a remuneration arrangement between an employer and an employee and therefore had no application to the impugned benefits.

256 The Explanatory Statement that was issued in respect of the *Corporations Amendment Regulation 2013 (No. 5)* (Cth) gave a description of the scheme of regs 16, 16A and 16B. In some respects, the description was inaccurate and in other respects the description was as unclear as the regulations themselves. The Explanatory Statement commences with the headline statement that the regulations outline the application of the ban on conflicted remuneration including:

> … for benefits paid by platform operators, the ban will apply in relation to new clients from 1 July 2014; and for non-platform providers, the ban will apply in relation to new clients and investments in new products by existing clients from 1 July 2014 …

257 The foregoing statement of the policy intent of the regulations is written with commendable simplicity and clarity. Unfortunately, the same cannot be said for the regulations that were drafted to give effect to that policy statement.

***Regulation 7.7A.16***

258 The starting point for understanding the regulatory regime is reg 16 which reversed the effect of s 1528(1)(b) in relation to platform operators. The regulation stated as follows:

> **7.7A.16 Application of ban on conflicted remuneration—platform operator (Division 4 of Part 7.7A of Chapter 7 of the Act does not apply)**
>
> (1) This regulation:

(a) is made for subsection 1528(2) of the Act; and

(b) prescribes a circumstance in which Division 4 of Part 7.7A of Chapter 7 of the Act does not apply to a benefit.

Note: Subsection 1528(1) of the Act sets out a rule about when Division 4 of Part 7.7A of Chapter 7 of the Act does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee. Subsection 1528(2) of the Act permits regulations to prescribe circumstances in which that Division applies, or does not apply, to a benefit.

(2) The circumstance is that:

(a) the benefit is given by a platform operator; and

(b) either:

(i) the benefit is given under an arrangement that was entered into before the application day, within the meaning of subsection 1528(4) of the Act; or

(ii) the benefit would have been given as mentioned in subparagraph (i) had it not been redirected under one or more later arrangements.

(3) For subregulation (2), if a party to an arrangement changes, the arrangement is taken to have continued in effect, after the change, as the same arrangement.

(4) If this regulation and regulation 7.7A.16A or 7.7A.16B are able to apply in relation to the benefit, disregard this regulation.

259 It can be seen that reg 16(2) exempted benefits given by a platform operator if the benefits were given under an arrangement entered into before the application day. However, reg 16(4) stated that reg 16 was to be disregarded if reg 16A or 16B was applicable. As will be seen, regs 16A and 16B prescribed circumstances in which Div 4 of Pt 7.7A applied to a benefit. Their effect was to carve out of the general exemptions provided by s 1528(1) and reg 16 certain types of benefits. Thus, the regulatory scheme operated such that s 1528(1) and reg 16 generally exempted benefits given under an arrangement entered into before the application day, but regs 16A and 16B reduced the scope of that general exemption.

260 The intended operation of the regulations was explained in the Explanatory Statement in the following manner:

> Regulation 7.7A.16 is made for the purposes of subsection 1528(2) of the Act and prescribes circumstances in which the ban on conflicted remuneration in Division 4 of Part 7.7A of the Act does not apply to a benefit given by a platform operator. That is, regulation 7.7A.16 provides for the 'grandfathering' of these payments. Consistent with the grandfathering arrangements for non-platform operators contained in subsection 1528(1) of the Act, this regulation provides for the grandfathering of any benefit given under an arrangement entered into before the application date.
>
> …
>
> A person subject to Division 4 of Part 7.7A of the Act will be a platform operator or

> not a platform operator. Taken together regulation 7.7A.16 and subsection 1528(1) of the Act create a consistent starting point for both platform and non-platform operators. However, in both cases it is possible for a benefit following from a pre-application date arrangement to remain subject to Division 4 if it falls within the scope of regulation 7.7A.16A or 7.7A.16B as discussed below.

261 Pausing at this point, and ignoring regs 16A and 16B, the effect of reg 16(2) was to exempt the impugned benefits given by CFSIL if the benefits were given under an arrangement that was entered into before the application day. In my view, the trial judge was correct to find that the impugned benefits were given by CFSIL under such an arrangement. The relevant arrangement was recorded in each of the 2013, 2015 and 2018 Distribution Agreements which were in materially the same form throughout the relevant period. The 2013 Distribution Agreement commenced prior to 1 July 2013 (on 27 June 2013).

262 The word "arrangement" has been used in Australian statutes regulating commercial activities for a long time, including in statutes relating to taxation, competition and corporations. In those statutory contexts, the word has been given a consistent meaning being a consensual dealing which may be informal, less than a binding contract or agreement and not legally enforceable: see for example *Newton v Federal Commissioner of Taxation* (Cth) (1958) 98 CLR 1 at 7-8; *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 444 (Gibbs and Mason JJ); *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* (2017) 254 FCR 311 at [95] (Besanko, Foster and Yates JJ); *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)* (2020) 275 FCR 342 at [60] (Allsop CJ, Wigney and Abraham JJ). That meaning of the word, which is long-standing, is reflected in the following definition of "arrangement" in s 761A of the Act:

> ***arrangement*** means, subject to section 761B, a contract, agreement, understanding, scheme or other arrangement (as existing from time to time):
>
> (a) whether formal or informal, or partly formal and partly informal; and
>
> (b) whether written or oral, or partly written and partly oral; and
>
> (c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights.

263 ASIC placed reliance on principles within the sphere of the law of contract to argue that each of the 2013, 2015 and 2018 Distribution Agreements constituted new agreements, not merely amendments to pre-existing agreements. From that premise, ASIC submitted that each of the Distribution Agreements constituted separate arrangements and not one arrangement. The conclusion is not supported by the premise. The use of the expression "arrangement" in s 1528(1) and the regulations made under s 1528(2) indicate that the legislation and

accompanying regulations are directed to a consensual dealing between two parties, regardless of its legal form. The question raised is whether the consensual dealing was entered into before the application day. In my view, it is indisputable that the impugned benefits were given by CFSIL under an arrangement with CBA entered into before the application day.

264 However, it is necessary to consider the operation of regs 16A and 16B which apply Div 4 of Pt 7.7A to certain types of benefits and, if applicable, override s 1528(1) and reg 16.

***Regulations 7.7A.16A and 7.7A.16B***

265 Regulations 16A and 16B were drafted in an exceptionally complex manner. They provided as follows:

> **7.7A.16A Application of ban on conflicted remuneration—platform operator (Division 4 of Part 7.7A of Chapter 7 of the Act applies)**
>
> (1) This regulation:
>
> (a) is made for subsection 1528(2) of the Act; and
>
> (b) prescribes circumstances in which Division 4 of Part 7.7A of Chapter 7 of the Act applies to a benefit; and
>
> (c) does not apply in relation to a benefit to which regulation 7.7A.16C applies.
>
> Note: Subsection 1528(1) of the Act sets out a rule about when Division 4 of Part 7.7A of Chapter 7 of the Act does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee. Subsection 1528(2) of the Act permits regulations to prescribe circumstances in which that Division applies, or does not apply, to a benefit.
>
> (2) The circumstance is that:
>
> (a) the benefit is given by a person acting in the capacity as a platform operator; and
>
> (b) the benefit is given under an arrangement that was entered into before the application day, within the meaning of subsection 1528(4) of the Act; and
>
> (c) the benefit:
>
> (i) relates to an acquisition (including a regulated acquisition, within the meaning of subsection 1012IA(1) of the Act) of a financial product on the instructions of a person who had not given an instruction to the person acting in the capacity of a platform operator to open an account on the platform before 1 July 2014; or
>
> (ii) does not relate to a person who opened an account on the platform before 1 July 2014.
>
> (3) For subregulation (2), treat a benefit as having been given by a person acting in the capacity as a platform operator if it:
>
> (a) is given by a platform operator; and

(b) relates to activities undertaken in connection with the platform as a result of instructions to the platform operator from a client who has set up, or is setting up, an account on the platform.

(4) For subregulation (2), if a retail client has an interest in a financial product before 1 July 2014, treat a benefit as relating to an acquisition of the financial product whether it is paid in relation to the initial acquisition of the financial product or the subsequent holding of the financial product.

(5) For subregulation (2), if a party to an arrangement changes, the arrangement is taken to have continued in effect, after the change, as the same arrangement.

(6) If this regulation and regulation 7.7A.16 are able to apply in relation to the benefit, disregard regulation 7.7A.16.

**7.7A.16B Application of ban on conflicted remuneration—person other than platform operator (Division 4 of Part 7.7A of Chapter 7 of the Act applies)**

(1) This regulation:

(a) is made for subsection 1528(2) of the Act; and

(b) prescribes a circumstance in which Division 4 of Part 7.7A of Chapter 7 of Chapter 7 (sic) of the Act applies to a benefit; and

(c) does not apply in relation to a benefit to which regulation 7.7A.16C applies.

Note: Subsection 1528(1) of the Act sets out a rule about when Division 4 of Part 7.7A of Chapter 7 of the Act does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee. Subsection 1528(2) of the Act permits regulations to prescribe circumstances in which that Division applies, or does not apply, to a benefit.

(2) The circumstance is that:

(a) the benefit is given by a person who is not acting in the capacity of a platform operator; and

(b) the benefit is given under an arrangement that was entered into before the application day, within the meaning of subsection 1528(4) of the Act; and

(c) the benefit:

(i) is given in relation to the acquisition, on or after 1 July 2014, of a financial product, for the benefit of a retail client; or

(ii) does not relate to a financial service provided, before 1 July 2014, for the benefit of a retail client; and

(d) the client did not have an interest in the product before 1 July 2014.

Note: For the definition of *platform operator*, see subsection 1526(1) of the Act.

(3) For subregulation (2), treat a benefit as having been given by a person acting in the capacity as a platform operator if it:

(a) is given by a platform operator; and

(b) relates to activities undertaken in connection with the platform as a

result of instructions to the platform operator from a client who has set up, or is setting up, an account on the platform.

*Continuity of arrangement*

(4) For subregulation (2):

(a) if a party to an arrangement changes, treat the arrangement as having continued in effect, after the change, as the same arrangement; and

(b) if a retail client has an interest in a financial product before 1 July 2014, treat a benefit as relating to an acquisition of the financial product whether it is paid in relation to the initial acquisition of the financial product or the subsequent holding of the financial product.

…

*Relationship with regulation 7.7A.16*

(7) If this regulation and regulation 7.7A.16 are able to apply in relation to the benefit, disregard regulation 7.7A.16.

266 It can be seen that each of regs 16A and 16B prescribed circumstances in which Div 4 of Pt 7.7A applied to a benefit. Each applied where the benefit was given under an arrangement that was entered into before the application day. However, reg 16A applied where the benefit was given by a person acting in the capacity as a platform operator, and reg 16B applied where the benefit was given by a person who was not acting in the capacity of a platform operator.

*Acting in the capacity of a platform operator*

267 The phrase "acting in the capacity of a platform operator" did not appear in s 1528(1) or reg 16. Each of reg 16A(3) and 16B(3) contained the following provision concerning the phrase:

> … treat a benefit as having been given by a person acting in the capacity as a platform operator if it:
>
> (a) is given by a platform operator; and
>
> (b) relates to activities undertaken in connection with the platform as a result of instructions to the platform operator from a client who has set up, or is setting up, an account on the platform.

268 Three aspects of reg 16A(3) and 16B(3) require elucidation:

(a) what is intended to be conveyed by the use of the verb "treat", and are regs 16A(3) and 16B(3) intended to constitute a deeming provision or an exhaustive or inclusive definition of the phrase "acting in the capacity of a platform operator";

(b) what types of activities are encompassed within the phrase "activities undertaken in connection with the platform as a result of instructions to the platform operator from a client who has set up, or is setting up, an account on the platform"; and

(c) what type of relationship between the benefit and the specified activities is conveyed by the verb "relates" in this context?

269 The use of the verb "treat" in reg 16A(3) and 16B(3) is suggestive of a deeming provision. As explained by Windeyer J in *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1969) 122 CLR 49 at 65-67, deeming provisions may have a number of statutory purposes:

> … the verb "deem", or derivatives of it, can be used in statutory definitions to extend the denotation of the defined term to things it would not in ordinary parlance denote. This is often a convenient device for reducing the verbiage of an enactment. But that the word can be used in that way and for that purpose does not mean that whenever it is used it has that effect. After all, to deem means simply to judge or reach a conclusion about something. A judge, or a juryman, is a deemster, although, except in the Isle of Man, that name has long been archaic. The words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has – the way in which it is to be adjudged. This need not import artificiality or fiction. It may be simply the statement of an indisputable conclusion, as if for example one were to say that on attaining the age of twenty-one years a man is deemed to be of full age and no longer an infant. Hundreds of examples of this usage of the word appear in the statute books. …
>
> … There is no presumption, still less any rule, that wherever the word "deemed" appears in a statute it demonstrates a "fiction" or some abnormality of terminology. Sometimes it does. Often it does not. Much depends upon the context in which the word appears …

270 In their discussion of the use of deeming provisions in legislative instruments, the learned authors of Pearce C and Geddes R, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2014) observe (at [4.58]):

> The word 'deemed' may also be used in a definition to extend its meaning, not in a fictional sense, but to include matters that might or might not fall within the scope of the word defined. Abundant caution may suggest to the drafter that a word may be construed in such a way as not to cover the full ambit of matters desired. When 'deemed' is used in this way, the position is similar to that where the word 'includes' is used in a definition.

271 When read in context, I consider it to be clear that regs 16A(3) and 16B(3) are intended to operate as an inclusive definition. The regulations require benefits to be treated as having been given by a person acting in the capacity as a platform operator if the benefits are given by a platform operator and relates to the specified activities. As discussed below, the specified activities are clearly "platform operator" activities. The regulations do not create a regulatory fiction; rather, the regulations appear to have been drafted out of an abundance of caution.

272 It follows that regs 16A(3) and 16B(3) do not operate as an exhaustive definition of the phrase "acting in the capacity of a platform operator", but rather as an inclusive definition. The phrase

"acting in the capacity of a platform operator" otherwise takes its ordinary meaning. That interpretation of the intended operation of regs 16A(3) and 16B(3) is supported by the Explanatory Statement which states (emphasis added):

> It is noted that it is possible for a platform operator not to be operating in the capacity as a platform operator. For example, the platform operator may also be the responsible entity of a managed investment scheme or the employer of staff. In order to fall within the scope of regulation 7.7A.16A, it is necessary for a person to not only be a platform operator, but also be acting in the capacity as a platform operator. If a person is not operating in the capacity as a platform operator, they will come within the scope of regulation 7.7A.16B or 16C. Subregulation 7.7A.16A(3) provides further clarity on when a benefit has been given by a person acting in the capacity as a platform operator **as including activities** that are undertaken in connection with the platform where a client has provided instructions to the platform operator, for example, setting up a cash management account that is linked to the client's account on the platform.

273 Pausing at this point, I would readily conclude that the impugned benefits were given by CFSIL in its capacity as a platform operator. CFSIL is a platform operator because it is the trustee of the Essential Super, and the benefits were given to CBA for the provision of marketing, distribution and administrative services in respect of Essential Super. The ordinary meaning of the phrase "in its capacity as a platform operator" would include benefits given to receive the services provided by CBA. On that basis, I would conclude that reg 16B did not apply to the impugned benefits, but reg 16A was capable of applying.

274 Having reached that conclusion, it is strictly unnecessary to answer the further question that arise with respect to the interpretation of regs 16A(3) and 16B(3). However, I would add the following further observations with respect to those questions.

275 It is apparent that the word "instructions" which appears in regs 16A(3)(b) and 16B(3)(b) must take its meaning from the definition of "custodial arrangement", which is central to the definition of platform operator. As explained above, the word "instruction" refers to an instruction given by a client of a platform operator that a particular financial product, or a financial product of a particular kind, is to be acquired or, in the context of superannuation funds, a direction given by a beneficiary of a superannuation fund in respect of amounts invested in an investment option of the fund or a strategy to be followed in relation to the investment of a particular asset class or assets of the fund. The activities contemplated by regs 16A(3)(b) and 16B(3)(b) are therefore activities undertaken in connection with the platform in implementing the instructions; in other words, investment activities undertaken on the instruction (or direction) of the client (or beneficiary).

276 The verb "relates" requires a connection between the benefit given by the platform operator and the investment activities undertaken on the instruction of the client. The type of connection that is required must be ascertained having regard to the legislative context and purpose. A question that arises is: what aspect of the benefit must have the required connection with the investment activities? In particular, is the relevant connection with the amount of the benefit to be given (in other words, the method of calculating the benefit)? Additionally or alternatively, is the relevant connection with the services, events or activities for which the benefit is given? In the present case, the answer to those questions produces different conclusions.

277 The amount of the impugned benefits was calculated on the basis of the net revenue earned by CFSIL from Essential Super. The net revenue was necessarily based (in part) on the revenue earned by CFSIL from Essential Super which was based (in part) on a percentage of funds under administration. Funds under administration were accumulated from investment instructions given by the account holder. It follows that, if the relevant connection is with the amount of the benefit given, it would be open to conclude that the impugned benefits given by CFSIL were in relation to the investment activities undertaken on the instruction of the client. That was the contention advanced by ASIC.

278 Conversely, the services or activities undertaken by CBA for which the impugned benefits were paid by CFSIL were defined in schedule 2 of the Distribution Agreements. The services comprised marketing, distribution and administrative services performed by CBA. None of those services involved investment activities undertaken on the instruction of the client. It follows that, if the relevant connection is with the services, events or activities for which the benefit is given, it would be necessary to conclude that the impugned benefits were not given by CFSIL in relation to the investment activities undertaken on the instruction of the client. That was the contention advanced by the respondents.

279 There are strong contextual reasons for construing the relevant relationship as being between the benefit and the activities for which the benefit is paid, rather than the activities upon which the benefit is calculated. The prohibition against conflicted remuneration is directed to benefits given to a person that influences that person's behaviour (in respect of the choice of financial product recommended or financial product advice given). The focus of the regime is on the conflict that arises for the financial services licensee (or representative) who receives a benefit which influences their financial product recommendations or advice. Having regard to the

statutory context, I consider that a benefit relates to investment activities undertaken on the instruction of the client if the benefit is given in return for, or as reward for, such activities.

*The requirements of reg 16A(2)(c)*

280 Having concluded that the impugned benefits:

(a) were given by CFSIL acting in the capacity as a platform operator for the purposes of reg 16A(2)(a); and

(b) were given under an arrangement that was entered into before the application day for the purposes of reg 16A(2)(a),

it is necessary to consider whether the impugned benefits satisfied either of the requirements of reg 16A(2)(c):

(i) that the benefits relate to an acquisition of a financial product on the instructions of a person who had not given an instruction to the person acting in the capacity of a platform operator to open an account on the platform before 1 July 2014; or

(ii) that the benefits do not relate to a person who opened an account on the platform before 1 July 2014.

281 In my view, the impugned benefits do not satisfy the circumstance described in paragraph (c)(i). For the reasons already given, and having regard to the subject matter and purpose of the legislative regime, I consider that the relevant relationship must be with the services, events or activities for which the benefit is given. In the present case, the impugned benefits were given in relation to the marketing, distribution and administrative services performed by CBA. It follows that the circumstance described in paragraph (c)(i) was not satisfied.

282 Conversely, I consider that the impugned benefits do satisfy the circumstance described in paragraph (c)(ii). The circumstance in that paragraph does not concern investment instructions and the implementation of such instructions. The circumstance is framed more broadly. It merely requires that the impugned benefits relate to persons who opened an account on the platform after 1 July 2014. The regulatory intention is stated in the Explanatory Statement as follows:

> Subparagraph 7.7A.16A(2)(c)(ii) is designed to ensure benefits paid by a platform operator that do not specifically relate to a person who opened an account on the platform before 1 July 2014 and otherwise would be conflicted remuneration are subject to Division 4 of Part 7.7A of the Act. An example of this may include a

> marketing or sponsorship payment from a platform operator to a licensee that is designed to incentivise the licensee to recommend the platform to its clients.

283 In the present case, the impugned benefits were given by CFSIL in return for marketing, distribution and administration services provided by CBA in connection with Essential Super and which continued after 1 July 2014. I consider it open to conclude that the impugned benefits related to persons who opened an account with Essential Super after 1 July 2014, because the relevant services, for which the impugned benefits were given, were aimed at such persons. The services were designed to facilitate persons opening an account with Essential Super. Reading the text of the regulation in context (which includes the extrinsic materials), the regulatory intention is to apply Div 4 of Pt 7.7A in those circumstances.

### Conclusion

284 It follows from the foregoing analysis that reg 16A was applicable to the impugned benefits, with the effect that the impugned benefits were not exempted from Div 4 of Pt 7.7A by virtue of the transitional provisions. Respectfully, I consider that the primary judge erred in reaching a contrary conclusion (at PJ [549]). While ground 11 of the appeal should be dismissed, ground 12 should be upheld. That conclusion does not, however, affect the outcome of the appeal. The appeal must be dismissed because the impugned benefits did not satisfy the definition of conflicted remuneration in s 963A.

285 On the appeal, argument was also addressed to the question of onus of proof with respect to the transitional provisions. In circumstances where the relevant facts were not in dispute and the application of the transitional provision depended upon issues of construction, it is unnecessary to express any view on where the onus of proof lay and I refrain from doing so.

## F. CONCLUSION

286 For the reasons given above, the appeal should be dismissed. Although I would allow certain of the grounds of appeal as set out in the above reasons, the appeal fails because ASIC has not established that, in the relevant period:

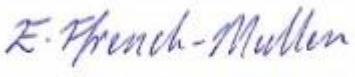
(a) CBA provided financial product advice in respect of Essential Super to persons as retail clients; and

(b) the impugned benefits could reasonably have been expected to influence CBA's choice to recommend Essential Super to retail clients (if any such recommendation was made), or that the impugned benefits could reasonably have been expected to influence

financial product advice given by CBA to retail clients in respect of Essential Super (if any such advice was given).

287 Although ASIC succeeded in respect of a number of grounds of appeal, it failed on the ultimate issues in dispute. The grounds on which it succeeded were integers of the ultimate issues on which it failed. In those circumstances, it is appropriate that ASIC pays the respondents' costs of the appeal and that there be no change to the orders made by the trial judge dismissing the proceeding with costs.

I certify that the preceding two hundred and sixty-eight (268) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate: 

Dated: 17 August 2023

# REASONS FOR JUDGMENT

## JACKMAN J:

288 I agree with the reasons of O'Bryan J, except in relation to the transitional provisions. My reasons in that regard are as follows.

### Salient Provisions of the Act

289 Section 1528 provided at the relevant time:

> (1) Subject to subsections (2) and (3), Division 4 of Part 7.7A, as inserted by item 24 of Schedule 1 to the amending Act, does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee, if
>
> (a) the benefit is given under an arrangement entered into before the application day; and
>
> (b) the benefit is not given by a platform operator.
>
> (2) The regulations may prescribe circumstances in which that Division applies, or does not apply, to a benefit given to a financial services licensee, or a representative of a financial services licensee.

290 The application day was relevantly 1 July 2013: subs 1528(4). Division 4 of Pt 7.7A contains the provisions dealing with conflicted remuneration.

291 The regulations as at 30 June 2013 provided relevantly in reg 7.7A.16:

> (1) This regulation:
>
> (a) is made for subsection 1528(2) of the Act; and
>
> (b) prescribes circumstances in which Division 4 of Part 7.7A of the Act does not apply to a benefit given to a financial services licensee or a representative of a financial services licensee.
>
> (2) Division 4 does not apply to the benefit if the benefit is given:
>
> (a) by a platform operator; and
>
> (b) under an arrangement that was entered into before the application day, within the meaning of subsection 1528(4) of the Act.

292 By the *Corporations Amendment Regulation 2013 (No.5) 2013 No. 151* (Cth), reg 7.7A.16 was amended, and regs 7.7A.16A and 7.7A.16B were introduced. It is convenient to set out the version of those regulations as they stood in light of subsequent amendments effective from 16 December 2014. There is no material difference for the purpose of this appeal between that version, and the earlier versions of the instrument which commenced on 1 July 2013 and 1 July 2014 respectively.

293 Regulation 7.7A.16 provided relevantly that:

> (1) This regulation:
>
> (a) is made for subsection 1528(2) of the Act; and
>
> (b) prescribes a circumstance in which Division 4 of Part 7.7A of Chapter 7 of the Act does not apply to a benefit.
>
> (2) The circumstance is that:
>
> (a) the benefit is given by a platform operator; and
>
> (b) either:
>
> (i) the benefit is given under an arrangement that was entered into before the application day, within the meaning of subsection 1528(4) of the Act; or
>
> (ii) the benefit would have been given as mentioned in subparagraph (a) had it not been redirected under one or more later arrangements.
>
> (3) For subregulation (2), if a party to an arrangement changes, the arrangement is taken to have continued in effect, after the change, as the same arrangement.
>
> (4) If this regulation and regulation 7.7A.16A or 7.7A.16B are able to apply in relation to the benefit, disregard this regulation.

294 Regulation 7.7A.16A provided relevantly that:

> (1) This regulation:
>
> (a) is made for subsection 1528(2) of the Act; and
>
> (b) prescribes circumstances in which Division 4 of Part 7.7A of Chapter 7 of the Act applies to a benefit; and
>
> (c) does not apply in relation to a benefit to which regulation 7.7A.16C applies.
>
> (2) The circumstance is that:
>
> (a) the benefit is given by a person acting in the capacity as a platform operator; and
>
> (b) the benefit is given under an arrangement that was entered into before the application day, within the meaning of subsection 1528(4) of the Act; and
>
> (c) the benefit:
>
> (i) relates to an acquisition (including a regulated acquisition, within the meaning of subsection 1012IA(1) of the Act) of a financial product on the instructions of a person who had not given an instruction to the person acting in the capacity of a platform operator to open an account on the platform before 1 July 2014; or

(ii) does not relate to a person who opened an account on the platform before 1 July 2014.

(3) For subregulation (2), treat a benefit as having been given by a person acting in the capacity as a platform operator if it:

(a) is given by a platform operator; and

(b) relates to activities undertaken in connection with the platform as a result of instructions to the platform operator from a client who has set up, or is setting up, an account on the platform.

(4) For subregulation (2), if a retail client has an interest in a financial product before 1 July 2014, treat a benefit as relating to an acquisition of the financial product whether it is paid in relation to the initial acquisition of the financial product or the subsequent holding of the financial product.

(5) For subregulation (2), if a party to an arrangement changes, the arrangement is taken to have continued in effect, after the change, as the same arrangement.

(6) If this regulation and regulation 7.7A.16 are able to apply in relation to the benefit, disregard regulation 7.7A.16.

295 Regulation 7.7A.16B provided relevantly that:

(1) This regulation:

(a) is made for subsection 1528(2) of the Act; and

(b) prescribes a circumstance in which Division 4 of Part 7.7A of Chapter 7 of the Act applies to a benefit; and

(c) does not apply in relation to a benefit to which regulation 7.7A.16C applies.

(2) The circumstance is that:

(a) the benefit is given by a person who is not acting in the capacity of a platform operator; and

(b) the benefit is given under an arrangement that was entered into before the application day, within the meaning of subsection 1528(4) of the Act; and

(c) the benefit:

(i) is given in relation to the acquisition, on or after 1 July 2014, of a financial product, for the benefit of a retail client; or

(ii) does not relate to a financial service provided, before 1 July 2014, for the benefit of a retail client; and

(d) the client did not have an interest in the product before 1 July 2014.

(3) For subregulation (2), treat a benefit as having been given by a person acting in the capacity as a platform operator if it:

(a) is given by a platform operator; and

(b) relates to activities undertaken in connection with the platform as a

result of instructions to the platform operator from a client who has set up, or is setting up, an account on the platform.

(4) For subregulation (2):

(a) if a party to an arrangement changes, treat the arrangement as having continued in effect, after the change, as the same arrangement; and

(b) if a retail client has an interest in a financial product before 1 July 2014, treat a benefit as relating to an acquisition of the financial product whether it is paid in relation to the initial acquisition of the financial product or the subsequent holding of the financial product.

…

(7) If this regulation and regulation 7.7A.16 are able to apply in relation to the benefit, disregard regulation 7.7A.16.

296 Section 1526(1) defines "platform operator" as "the provider of custodial arrangement, or custodial arrangements". "Custodial arrangement" is defined as having the same meaning as it has in subs 1012IA(1), subject to subs (2).

297 Section 1012IA(1) defines "custodial arrangement" as follows:

***Custodial arrangement*** means an arrangement between a person (the ***provider***) and another person (the ***client***) (whether or not there are also other parties to the arrangement) under which:

(a) the client is, or is entitled, to give an instruction that a particular financial product, or a financial product of a particular kind, is to be acquired; and

(b) if the client gives such an instruction, a person (the acquirer), being the provider or a person with whom the provider has or will have an arrangement, must (subject to any discretion they have to refuse) acquire the financial product, or a financial product of that kind; and

(c) if the acquirer acquires the financial product, or a financial product of that kind, pursuant to an instruction given by the client, either:

(i) the product is to be held on trust for the client or another person nominated by the client; or

(ii) the client, or another person nominated by the client, is to have rights or benefits in relation to the product or a beneficial interest in the product, or in relation to, or calculated by reference to, dividends or other benefits derived from the product.

298 Subsection 1526(2) provides that:

The definition of ***custodial arrangement*** in subsection 1012IA(1), is to be read as if the reference in that definition to an instruction included a reference to:

(a) a direction of the kind mentioned in paragraph 58(2)(d) or (da) of the *Superannuation Industry (Supervision) Act 1993* that will involve the

acquisition of a particular financial product, or a financial product of a particular kind; and

(b) a direction of the kind mentioned in subsection 52B(4) of the *Superannuation Industry (Supervision) Act 1993* that will involve the acquisition of a particular financial product, or a financial product of a particular kind.

299 The paragraphs of the *Superannuation Industry (Supervision) Act 1993* (Cth) which are referred to in that provision are as follows. Sections 58(2)(d) and (da) refer to:

(d) a direction given by a beneficiary to take up, dispose of or alter the amount invested in an investment option, where:

(i) the entity is a registrable superannuation entity; and

(ii) the direction is given in circumstances prescribed by the regulations for the purposes of this paragraph; or

(da) a direction given by a member of regulated superannuation fund to attribute (or continue to attribute) an amount that is an accrued default amount for the member to a MySuper product or an investment option within a choice product in the fund;

300 Subsection 52B(4) refers to directions given by a specified beneficiary or a specified class of beneficiaries to give directions to the trustee where:

(a) the directions relate to the strategy to be followed by the trustee in relation to the investment of a particular asset or assets of the fund; and

(b) the directions are given in circumstances prescribed by regulations made for the purposes of this paragraph.

301 It should also be noted that the word "arrangement" is defined in s 761A of the Act relevantly as follows:

a contract, agreement, understanding, scheme or other arrangement (as existing from time to time):

(a) whether formal or informal, or partly formal and partly informal; and

(b) whether written or oral, or partly written and partly oral; and

(c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights.

302 Grandfathering was removed from 1 January 2021 by the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019* (Cth).

**Was the alleged benefit given under an arrangement that was entered into before or after 1 July 2013?**

303 This question arises under each of subs 1528(1), regs 7.7A.16, 7.7A.16A and 7.7A.16B. I approach the issue on the basis that the benefit alleged by ASIC consisted of the contractual promises by CFSIL to pay a service fee of 30% of net revenue pursuant to the 2013, 2015 and 2018 Distribution Agreements, together with payments actually made by CFSIL in performance of those promises.

304 The primary judge found that the 2013 Distribution Agreement had commenced prior to the Application Date, having been entered into on 27 June 2013, and continued as the same essential arrangement: [533]. His Honour found that the same result follows if the 50:50 profit split is regarded as a separate arrangement that mistakenly operated until the relevant finance personnel became aware of the Distribution Agreement in 2017. The primary judge held that ASIC was wrong to characterise the issue as being whether the 2015 Distribution Agreement was merely a variation of the 2013 Distribution or constituted a new agreement for the purposes of grandfathering, pointing out that the grandfathering provisions operate in respect of "arrangements", which are defined in s 761A of the Act in wider terms than contracts: [545]. His Honour found that the promise to pay 30% of total net revenue of the Essential Super Fund to CBA in consideration for the services CBA was providing under the Distribution Agreements never changed from 27 June 2013: [545]. Accordingly, His Honour found that the 2013 Distribution Agreement, which commenced on 27 June 2013 prior to the Application Date, continued as one arrangement, with minor and inconsequential amendments throughout the relevant period: [546].

305 On appeal, ASIC makes two cumulative contentions. First, ASIC relies on what it submits is the primacy of written agreements, as recognised by the High Court in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at [32]-[35], and submits that there were three arrangements: the 2013 Distribution Agreement, the 2015 Distribution Agreement and the 2018 Distribution Agreement. In my view, reliance on that principle in the present context is misplaced. The point of the High Court's reasoning in that passage was to distinguish written agreements from oral agreements, saying that where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. That issue does not arise in the present case.

306 Second, ASIC submits that the issue is to be determined by a contractual analysis as to whether a later agreement merely amends the earlier agreement, or whether the later agreement brings the earlier agreement to an end and replaces it. ASIC relies upon the reasoning of the High Court in *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at [22]-[23], that the determining factor in applying that distinction is the intention of the parties as disclosed by the later agreement. ASIC relies also on the proposition that a potentially critical factor militating in favour of a conclusion that the manifest intention of the parties, objectively ascertained, was to bring the earlier agreement to an end and replace it, is where the terms of the two relevant agreements deal with the same subject matter in different and inconsistent ways: *Hillam v Iacullo* (2015) 90 NSWLR 422 at [73]-[74] (Leeming JA, with whom Basten and Ward JJA agreed); *Balanced Securities Limited v Dumayne Property Group Pty Ltd* (2017) 53 VR 14 at [74] and [78] (Whelan and Ferguson JJA and Cameron AJA).

307 In support of the second line of argument, ASIC points out that the parties chose to execute an entirely new agreement in 2015 rather than making changes by way of an amending deed or other document. Further, ASIC points out that the terms of the two agreements deal with the same subject matter (the distribution and administration of Essential Super, and the remuneration payable to CBA) and claims that they do so in different and inconsistent ways. ASIC draws attention to the fact that the 2015 Distribution Agreement does not refer to the 2013 Distribution Agreement, it provides for a new five-year term commencing on 2 June 2015, it expressly uses the language of appointment, it amends the risk management clause, it contains an "entire agreement" provision and the service standards set out in the schedule provide for different target standards. In relation to the 2018 Distribution Agreement, a recital expressly recorded that the parties wish to "replace the Existing Agreement by entering into this new Agreement in relation to the Services", its term overlaps with the term of the 2013 Distribution Agreement and that of the 2015 Distribution Agreement and re-starts the 5-year term, it expressly uses the language of appointment, it contains a new clause dealing with anti -corruption, ethical procurement and diversity, it amends the risk management clause, it contains an "entire agreement" provision, the service standards set out in the schedule are significantly and materially different and it contains a new schedule requiring CBA to report unaccredited sales and the number of unaccredited staff members to CFSIL.

308 The respondents supported the reasoning of the learned primary judge, emphasising that the statutory definition of "arrangement" is much wider than contracts, and includes any

arrangement or understanding, whether it is formal or informal, written or oral, or enforceable or not enforceable: see *Norcast S.ár.L* v *Bradken Ltd (No. 2)* [2013] FCA 235; (2013) 219 FCR 14 at [283]. The respondents criticised ASIC for wrongly framing the question by reference to principles of contractual construction when the relevant question posed by the grandfathering provisions concerns the broader "arrangement" pursuant to which the alleged benefits were given. The respondents submitted that that arrangement consisted of an intragroup agreement or understanding that CFSIL would make the stipulated payments to CBA in consideration for the services provided by CBA, as reflected in the schedule to the Distribution Agreement, and from its inception, that arrangement never changed. The respondents submitted that the 2013 Distribution Agreement continued throughout the relevant period with only minor and inconsequential amendments, and those amendments were of no relevance to the arrangement for a 70/30 split of net revenue between CFSIL and CBA. CBA drew attention to the fact that in each year from 2013 to 2017, CBA executed quarterly documents certifying its material compliance with the Distribution Agreements, and in 2015 to 2017 it did so in terms referring to the 2013 Distribution Agreement dated 27 June 2013, despite the fact that the 2015 Distribution Agreement had commenced operation on 2 June 2015.

309 CBA drew attention to some of the documents leading up to the execution of the 2015 Distribution Agreement and the 2018 Distribution Agreement as evidence of the intention of the parties to continue the arrangement which had commenced before 1 July 2013. On 22 April 2015, a board paper of CFSIL stated that, as a result of a review, it was proposed to amend the Distribution Agreement in ways which were not viewed as material. The minutes of the CFSIL board meeting on 22 April 2015 state that the Board "approved the continuation of the outsourcing arrangement with CBA and the proposed amendments to the Agreement". As to the 2018 Distribution Agreement, the CFSIL board paper dated 28 February 2018 which recommended the approval of the 2018 Distribution Agreement referred in two places to the "continuation" of the outsourced arrangement with CBA for Essential Super. In my view, if the matter were a contractual question of the kind considered in the authorities to which I have referred above, then that material would be extrinsic to the intention of the parties as disclosed by the later agreement. However, the present question is not simply a contractual one, but requires the application of the broad definition of "arrangement", which extends to the understanding between the parties, even if it is not enforceable. In that context, in my view the material is admissible on the question as to whether the parties intended an earlier arrangement to continue.

310 In my view, the respondents' argument should be accepted. The promise by CFSIL to pay CBA 30% of net revenue of the Essential Super Fund in return for services to be provided by CBA as agreed from time to time was given under an arrangement entered into on 27 June 2013 which continued thereafter throughout the relevant period. While there were changes made to the terms of the Distribution Agreements, including the specification of the services and service standards to be met by CBA, there was continuity of the arrangement to pay 30% of net revenue in return for the services agreed upon from time to time. The regulations themselves make clear that the matter is not to be treated as a contractual question as to whether a new contract has been entered into to replace the previous contract, as distinct from merely amending the previous contract. A compelling indication of that intention is provided in the language of the regulations which makes clear that if a party to an arrangement changes, the arrangement is taken to have continued in effect, after the change, as the same arrangement: regs 7.7A.16(3), 7.7A.16A(5), and 7.7A.16B(4)(a). That is to be contrasted with the relevant principle under the common law of contract, whereby a change to a party would ordinarily mean that a new contract had been entered into. The conclusion is also supported by the Explanatory Statement to the *Corporations Amendment Regulation 2013 (No. 5)* 2013 No. 151 (Cth) (the **Explanatory Statement**) which states in attachment A, page 2: "If the changes to an arrangement extend beyond a change to a party, the parties will need to give consideration to whether the changes are sufficiently material to trigger a new arrangement." In my view, the changes made in 2015 and 2018 were not sufficiently material to lead to the conclusion that a new arrangement had been entered into, as distinct from the continuation of the same arrangement. References in the CFSIL board papers and minutes to the 2015 and 2018 Distribution Agreements as amendments or continuations of the existing arrangement with CBA were, in my view, natural and appropriate descriptions of the commercial reality of a single on-going arrangement.

311 Accordingly, in my view, the alleged benefits throughout the relevant period were given under an arrangement that was entered into before 1 July 2013.

312 In relation to the 2014 payment made by CFSIL to CBA, which was calculated by reference to a 50:50 net revenue split, that benefit was made pursuant to the understanding between CFSIL and CBA which was formed in late 2012, before the execution of the 2013 Distribution Agreement.

**Was the alleged benefit given by a person acting in the capacity as a platform operator?**

313 It is common ground between the parties that CFSIL was a platform operator at all material times. That fact, however, is only an initial step towards the present issue concerning whether the benefit was given by a person acting in the capacity as a platform operator. A crucial distinction between regs 7.7A.16A and 7.7A.16B concerns whether the benefit is so given. Regulation 7.7A.16A(2)(a) requires that the benefit *is* given by a person acting in the capacity as a platform operator, whereas reg 7.7A.16B(2)(a) requires that the benefit is given by a person who is *not* acting in the capacity of a platform operator. Both regulations contain in subreg (3) the provision that one is to treat a benefit as having been given by a person acting in the capacity as a platform operator if it:

(a) is given by a platform operator (which is satisfied by the common ground between the parties in the present case that CFSIL was a platform operator); and

(b) relates to activities undertaken in connection with the platform as the result of instructions to the platform operator from a client who has set up, or is setting up, an account on the platform.

314 The primary judge held that the requirement that the benefit must relate to the acquisition of a financial product by the platform operator on the instruction of a client does not apply to the present case. His Honour reasoned that the alleged benefits related to funded Essential Super accounts, but they did not relate to activities undertaken in relation to the platform, consisting of the acquisition of a financial product by the platform operator as a result of instructions to CFSIL from members as to their investment option, as required by the extended definition of platform operator in subs 1526(2): [552].

315 ASIC submitted that the alleged benefits were given in the capacity of a platform operator within the meaning of subreg (3) because the benefits are a percentage of CFSIL's earnings from Essential Super and therefore "relate to" CFSIL's activities in administering and investing the funds placed in Essential Super accounts, which CFSIL must invest in accordance with the client's chosen investment option. Accordingly, ASIC submits, the activities are undertaken by CFSIL in connection with the platform as a result of instructions to CFSIL from clients.

316 CBA submitted that the alleged benefits do not relate to activities by the platform operator acquiring financial products on instructions from retail clients. Rather, the payment (and promise of payment) in the present case is simply a service fee to CBA for distribution services, contacting potential members and presenting them with the option of signing up. In the process

of discussing Essential Super with potential members, no activities were being undertaken on instructions from existing retail clients to the platform operator.

317 In my view, the submissions by CBA are correct. In the first place, I read subreg (3) as an exhaustive statement (expressed imperatively by the word "treat") as to when a benefit is to be treated as having been given by a person acting in the capacity as a platform operator. The circumstances set out in subreg (3) are such an obvious case of a benefit being given in that capacity that I do not see the practical point of the subreg if it were intended merely to be an inclusive definition. CBA expressly submitted that subreg (3) was exhaustive, and provided for the only way in which a benefit is given by a person acting in the capacity as a platform operator (T127.18-27). ASIC did not take issue with that construction, and its written submissions at [67] proceeded implicitly on the same basis. I therefore regard it as being common ground between the parties that subreg (3) is exhaustive, and not merely inclusive. In the second place, the alleged benefit in the present case related to the distribution services provided by CBA, which involved attracting new clients and presenting them with the opportunity to become members. The alleged benefit did not relate to the actual activities which are undertaken on clients' instructions to CFSIL once they have set up, or are in the process of setting up, an account on the platform. Although the expression "relates to" is capable of a wide operation, I regard any connection between the alleged benefit and the carrying out of the instructions of actual existing clients as too tenuous to fall within paragraph 3 of each of regs 7.7A.16A and 7.7A.16B.

318 I note that the Explanatory Statement includes the following passage:

> Subparagraph 7.7A.16A(2)(c)(ii) is designed to ensure benefits paid by a platform operator that do not specifically relate to a person who opened an account on the platform before 1 July 2014 and otherwise would be conflicted remuneration are subject to Division 4 of Part 7.7A of the Act. An example of this may include a marketing or sponsorship payment from a platform operator to a licensee that is designed to incentivise the licensee to recommend the platform to its clients.

The example given in the last sentence is referred to only as a possibility, the operative word being "may", not "would". Moreover, the quoted passage is directed to subpara 7.7A.16A(2)(c)(ii), rather than to 7.7A.16A(3). The passage does not appear to be intended to elucidate the meaning of giving a benefit in the capacity as a platform operator.

319 The consequence of that reasoning is that reg 7.7A.16A cannot apply, because the circumstance referred to in subreg (2)(a) is not satisfied. The further consequence is that reg 7.7A.16B(2)(a)

will be satisfied, because the alleged benefit was given by a person who was *not* acting in the capacity of a platform operator.

**Does regulation 7.7A.16B apply to the alleged benefit?**

320 I have set out the relevant terms of reg 7.7A.16B above. The reasoning to this point has established that the elements of paras (2)(a) and (b) are satisfied. The remaining analysis focuses then on paras (2)(c) and (d).

321 Paragraph (c) poses the question whether the benefit:

(a) is given in relation to the acquisition, on or after 1 July 2014, of a financial product, for the benefit of a retail client; or

(b) does not relate to a financial service provided, before 1 July 2014, for the benefit of a retail client.

322 ASIC points out that para (c)(ii) operates as an alternative to para (c)(i), such that only one of those paragraphs needs to be satisfied. ASIC then relies on a broad and literal construction of para (c)(ii) as requiring merely that the benefit "does not relate to a financial service provided before 1 July 2014, for the benefit of a retail client", and submits that those literal words are satisfied in the present case. ASIC emphasises the width of the connecting phrases "in relation to" and "relate to". ASIC also draws attention to the statement in the Explanatory Statement, Attachment A, p 5 that: "Together, regs 7.7A.16A and 7.7A.16B grandfather benefits given by platform operators and persons other than platform operators under a consistent approach. In both cases, benefits given in relation to new clients from 1 July 2014 are not grandfathered, even if the benefit is given under a pre-application day arrangement." ASIC accepted that grandfathering would apply to those persons who opened accounts before 1 July 2014.

323 As to para (c)(i), CBA submits that the alleged benefit was not given by the platform operator in relation to the acquisition of a financial product for the benefit of a retail client. CBA submits that the "acquisition" of a financial product referred to in para (c)(i) is a reference to the acquisition of a financial product by the platform operator, and thus does not apply to the retail client signing up to Essential Super, being the acquisition of a financial product by the retail client himself or herself. CBA further submits that the expression "for the benefit of a retail client", combined with a "financial product", makes it clear that the language is concerned with the circumstance where products are being acquired by the platform operator, but in some way not necessarily on the instructions of a retail client but nonetheless for the benefit of its existing

retail client. Again, CBA submits that the alleged benefit was payable for the provision of services in connection with the distribution of Essential Super by CBA. The alleged benefit was not being given in relation to the acquisition of a financial product for the benefit of an existing retail client. CBA further points out that para (c) must be construed in the context of para (d), which refers to the client not having an interest in the product (noting the use of the definite article in "the client") before 1 July 2014. Accordingly, in applying the regulation, one must be able to say what the product is, when it was acquired, and the identity of the client for whom the product was acquired.

324 As to para (c)(ii), CBA submits that the "financial service" must be a financial service provided to an existing retail client of the platform operator, emphasising that para (c)(ii) must be construed in the context of para (d) which refers to existing clients. CBA submits that that is not satisfied in the present case in which the alleged benefit related to distribution services by CBA which were anterior to the potential client being an existing client of CFSIL. The alleged benefits did not relate to a financial service being provided to existing retail clients of the platform operator.

325 CBA submits that a literal interpretation of para (c)(ii) would rob para (c)(i) of any operation and that one should not interpret para (c)(ii) in a way which would destroy any purpose in para (c)(i) and be inconsistent with para (d). CBA submits that one must construe para (c)(ii) as being concerned with financial services to existing retail clients. CBA points out a passage in the Explanatory Statement, attachment A, page 4, in which an example is given of the intended application of para (c)(ii), being a marketing or sponsorship payment from a product issuer to a licensee that is designed to incentivise the licensee to recommend the issuer's products.

326 In my view, CBA's submissions should be accepted. There are two principal reasons for that conclusion.

327 First, para (c)(ii) must be construed in the context of para (d). Paragraph (d) contemplates an existing retail client, and an actual financial product (or perhaps class of financial products) in respect of which one can say definitively whether the particular client had an interest before 1 July 2014. In that context, para (c)(ii) is directed to the timing question of whether the benefit relates to a financial service which was provided to an existing retail client in relation to a particular financial product (or class of products) *before 1 July 2014 or from 1 July 2014*, irrespective of whether such product or products were acquired by that retail client. If the

benefit does not relate to such a service provided before 1 July 2014, then para (c)(ii) is satisfied. The alleged benefit in the present case related to services by CBA to attract potential members of Essential Super, rather than relating to services being provided to existing retail clients of CFSIL.

328 The example given in the Explanatory Statement to which CBA referred (ie, that para (c)(ii) applies to a marketing or sponsorship payment from a product issuer to a licensee that is designed to incentivise the licensee to recommend the issuer's products) confirms that para (c)(ii) was intended to apply to benefits which relate to financial services for the benefit of a retail client. Accordingly, the example indicates that the word "not" in para (c)(ii) is intended to apply to the timing issue of whether such a financial service was not provided before 1 July 2014, rather than the question whether a financial services was provided at all. I have given consideration to the Explanatory Statement pursuant to s 15AB(1)(b)(i) of the *Acts Interpretation Act 1901* (Cth) to determine the meaning of a provision which is ambiguous or obscure.

329 Second, I agree that a literal construction of para (c)(ii) would give para (c)(i) little or no practical work to do. A benefit "given in relation to the acquisition, on or after 1 July 2014, of a financial product, for the benefit of a retail client" (ie, para (c)(i)) would almost invariably be a benefit which literally "does not relate to a financial service provided, before 1 July 2014, for the benefit of a retail client" (ie, para (c)(ii)). It would appear from the text and structure of para (c) that subpara (c)(i) was intended to have a substantial scope of operation independent of subpara (c)(ii), being the first of two alternatives set out in that paragraph.

330 While the quantification of the payment of 30% of net revenue to CBA would have been affected by the amount of investments by retail clients of CFSIL (including those who became members on or after 1 July 2014) from which the revenue of CFSIL was generated, that is too tenuous a connection to satisfy the circumstances to which para (c) refers. I agree, as CBA has submitted, that the alleged benefits in the present case were given in relation to activities concerned with attracting potential retail clients rather than the acquisition of financial products for the benefit of existing retail clients or the provision of financial services to existing retail clients.

**Do the conflicted remuneration provisions have any application?**

331 It follows from the conclusions I have reached that neither reg 7.7A.16A nor reg 7.7A.16B has any application to the alleged benefits in this case. That leaves the field clear for the application

of reg 7.7A.16 which prescribes a circumstance in which the conflicted remuneration provisions Div 4 of Pt 7.7A do *not* apply.

332 The circumstance referred to in reg 7.7A.16(2) is satisfied where the benefit is given by a platform operator (which it is common ground is satisfied), and the benefit is given under an arrangement that was entered into before 1 July 2013 (which I have found to be the case, given the continuity throughout the relevant period of the arrangement reflected in the 2013 Distribution Agreement entered into on 27 June 2013). Accordingly, reg 7.7A.16 is satisfied, and therefore Div 4 of Pt 7.7A of the Act does not apply.

**Miscellaneous Matters**

333 There was considerable debate as to which party bears the onus of proving the elements of regs 7.7A.16, 7.7A.16A and 7.7A.16B. In light of the conclusions I have reached it is not necessary to decide that question. It is well established that the plaintiff bears the onus of establishing the ingredients of a provision which defines the scope of the application of a prohibition, as distinct from a provision which defines an exception: *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257-9; *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 171 CLR 88 at 94-95; *Australian Securities and Investments Commission v Lewski* (2018) 266 CLR 174 at [83]. In my view, the substance of the language used in regs 7.7A.16, 7.7A.16A and 7.7A.16B defines the scope of a prohibition, rather than providing an exception as such. Accordingly, had it been necessary to do so, I would have found that the relevant onus of proof with respect to the application or non-application of the grandfathering provisions lay with ASIC.

334 I note that there was some debate concerning pleadings, and in particular the way in which these regulations were relied on in the respondents' defences. I read the defences as raising an issue as to the application of regs 7.7A.16, 7.7A.16A and 7.7A.16B and, I do not read the defences as conceding that the only available grandfathering was in relation to clients who opened accounts on or after 1 July 2014. That is also how the trial was conducted. I note further that in oral submissions in reply, after full argument had taken place on all these regulations, ASIC expressly took no point concerning the way in which issues concerning the regulations had been raised on appeal.

335 Finally, I wish to say something about the term "grandfathering". I have used the term only because it was adopted by the parties, reflecting the usage in the Explanatory Statement and elsewhere. The term "Grandfather Clause" originated in the second generation after the US

Civil War when a number of southern states enacted property, literacy or other voter qualifications but provided that they need not be met by men who had voted before 1867 or had served in the military in the Civil War or in certain earlier wars, or who were descended from such persons. The Louisiana Convention enacted the first such Grandfather Clause in 1898, whereby males entitled to vote before 1867, their sons and grandsons over 21, and foreign-born naturalised males over 21 were permitted to register to vote without meeting the literacy or property requirements. In Louisiana, more than 130,000 African Americans had voted in 1896, before the disenfranchising measures were enacted, but in 1900 the number was down to 5,320: Benno C. Schmidt, "Principle and Prejudice: The Supreme Court and Race in the Progressive Era" (1982) 82 *Columbia Law Review* 835 at 847. Similar Grandfather Clauses were enacted in the following decade by North Carolina, Alabama, Virginia, Georgia and Maryland. This was a blatant denial of the right to vote based on race, despite the 15th Amendment prohibiting the denial of voting rights "on account of race, color or previous condition of servitude". In 1915, the US Supreme Court held that an amendment to the Constitution of Oklahoma enacting a Grandfather Clause was invalid, being in contravention of the 15th Amendment: *Guinn v United States*, 238 US 347 (1915). The unanimous opinion of the Supreme Court was delivered by Chief Justice White, who had himself fought in the Civil War as a Confederate soldier from Louisiana. The Oklahoma legislature responded brazenly in 1916 by enacting a new registration law that gave permanent voting privileges to all those registered to vote in the 1914 general election, which had been held under the Grandfather Clause, and gave all others eligible in 1916 only 12 days to get their names on the rolls, unless prevented by illness or absence, or be perpetually disenfranchised. Oklahoma thereby grandfathered the Grandfather Clause (Benno C. Schmidt, *op. cit.*, p. 880), and it was not until 1939 that the Supreme Court (by majority) struck down the new Oklahoma scheme: *Lane v Wilson*, 307 US 268 (1939). It is surprising that the unexceptional technique in statutory drafting of preserving the operation of the previous legal regime, in limited and defined circumstances for those who were engaging in the relevant conduct at the time the legislation was passed, should be expressly associated with one of the more regrettable episodes of US legislative history. In an age when seemingly innocuous language is frequently made the object of censure, it is ironic that this usage has passed uncritically into current legal jargon. A more literal term, such as "preservation", might be considered more appropriate in contemporary Australia.

## Conclusion

336 Accordingly, in my view, the appeal should be dismissed with costs.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 17 August 2023