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Dear Mr Beaton

Royal Commission into Trade Union Governance and Corruption

We enclose on behalf of United Super Pty Ltd its Outline of Submissions in response to the Submissions of Counsel Assisting dated 31 October 2014.

Yours sincerely


Holding Redlich

ROYAL COMMISSION INTO TRADE UNION GOVERNANCE AND CORRUPTION

OUTLINE OF SUBMISSIONS OF UNITED SUPER PTY LTD AS TRUSTEE FOR CBUS

A. INTRODUCTION

1. The Construction and Building Unions Superannuation Fund (**Cbus**) is a \$27 billion, APRA¹-supervised, industry superannuation fund. Its members are typically employees (both union and non-union members) in the building and construction industry. Cbus is a not for profit fund managed solely for the benefit of its members. It complies with the “employer-sponsored fund” requirements of the *Superannuation Industry (Supervision) Act 1993* (Cth), including equal employee and employer representation on the board.²
2. Cbus takes steps to ensure its members are paid their superannuation entitlements. Given the transient nature of employment, and the high level of insolvencies and “phoenixing”, in the building and construction industry, Cbus takes a multi-faceted approach to monitoring and collecting its members’ arrears.
3. Cbus submits that the evidence is clear that:
 - (1) proceedings were instituted against the Lis-Con companies because they were in significant arrears, and constantly failing to meet payment due dates (Section C);
 - (2) it received a complaint about the disclosure of Cbus member information in 2013 and immediately investigated that complaint, which included remedial training for the employee involved. In May 2014 Cbus became aware of a more concerning disclosure of member information to the CFMEU, with members’ telephone numbers and addresses being part of this disclosure. In response, Cbus took immediate steps to ensure that members’ accounts remained secure. It engaged KPMG to assist with an investigation and

¹ Australian Prudential Regulation Authority.

determine whether a leak of this type of information was an isolated event, and has appointed Graeme Samuel AC to conduct a comprehensive independent review of its privacy compliance regime and its organisational structures (**Samuel Governance Review**). Throughout this time, it has reported on the matters to APRA (Section E); and

- (3) while organisational and cultural issues will be considered as part of the Samuel Governance Review, and reforms implemented if appropriate, the evidence before the Commission does not support a finding of an “unhealthy culture” at Cbus where the interests of the CFMEU are put before the interests of members (Section F). The culture at Cbus reflects an industry superannuation fund that is:
- (a) connected to its industry through employer and employee relationships;
 - (b) committed to engaging in the process of monitoring the timely payment of entitlements into the fund, and performing its duty to be prompt and diligent in the collection of arrears;
 - (c) operating in an industry with a transient workforce and a high turnover of failed and phoenix companies, making employees particularly vulnerable to the loss of their entitlements; and
 - (d) accountable to its members and APRA.
4. Cbus has acknowledged the wrongful conduct by two of its employees, as disclosed to the Commission, and an apology has been issued to the affected members. The manner in which the relevant employees engaged in their wrongful conduct itself demonstrates their knowledge that their actions were antithetical to the Cbus culture.
5. Cbus considers the wrongful conduct to be a concerning breach of the affected members’ privacy. Cbus also notes that there has been no pecuniary damage to any member’s retirement income as a result of this wrongful conduct. At all times, Cbus members’ funds and accounts have remained secure.

² *Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act) s 89.*

B. IMPORTANCE OF INDUSTRY SUPERANNUATION FUNDS IN AUSTRALIA

6. Cbus was established in 1984 to provide superannuation services for people in the building, construction and allied industries.³ At around this time, the High Court considered claims to the variation of existing awards to require employers to contribute 3% of employees' wages to an industry superannuation fund.⁴ The Court described superannuation entitlements as an important aspect of the terms or conditions of employment, "being in many circumstances in the interests of both employer and employee. They provide a reward for long and faithful service and afford security to an employee which may be conducive to a stable and productive relationship between him and his employer".⁵
7. Superannuation contributions have continued to grow in importance since this time. Contributions to all superannuation entities for the year to 30 June 2013 totalled \$115.3 billion, comprising employer contributions of \$77.5 billion and member contributions of \$26.5 billion.⁶ Cbus itself has grown to be a \$27.2 billion fund with 722,727 members.⁷ Superannuation, the age pension and voluntary savings form the so-called "three pillars" of Australia's retirement system. Of these, superannuation is of key importance to the future of higher retirement incomes for Australians, with the age pension providing a "safety net" level of income only.⁸
8. Notwithstanding the importance of superannuation, many Australians are not diligent in monitoring their superannuation entitlements. Many feel a lack of urgency or importance with respect to their future retirement, in contrast to

³ Cbus Member Supplementary Handbook (tendered 31 October 2014 pursuant to Practice Direction 6), p 2.

⁴ *Re Manufacturing Grocers' Employees Federation (Aust); Ex parte Australian Chamber of Manufacturers* (1986) 160 CLR 341. For further history of superannuation in Australia, see Chief Justice Robert French, "Superannuation – A Confluence of Legal Streams" (Speech Given at the Law Council of Australia Superannuation Committee Conference, Canberra, 26 February 2009).

⁵ *Re Manufacturing Grocers' Employees Federation (Aust); Ex parte Australian Chamber of Manufacturers* (1986), *ibid*, p 355 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

⁶ "APRA Releases Annual Superannuation Statistics to 30 June 2013" (Media Release 8 January 2014).

⁷ Cbus Annual Report 2013/2014, available at www.cbussuper.com.au/about-cbus/annual-report (accessed 11 November 2014).

⁸ For example, the introduction of the *Social Security and Veterans' Affairs Legislation Amendment (Male Total Average Weekly Earnings Benchmark) Act 1997* (Cth) ensured that the full rate age pension for a single adult would be maintained at a minimum rate equal to or greater than 25% of male total average weekly earnings only.

immediate financial priorities. Superannuation contributions also go directly to funds, and so many employees remain unaware of their non-payment.⁹

9. It is estimated that approximately 650,000 workers in Australia are affected by unremitted superannuation each year, with their outstanding superannuation entitlements amounting to approximately \$2.5 billion.¹⁰ The event of insolvency is often when employees miss out on superannuation entitlements. ASIC statistics demonstrate that unpaid superannuation represents the largest category of unpaid entitlements in insolvency.¹¹ The financial assistance provided to employees of insolvent companies under the *Fair Entitlements Guarantee Act 2012* (Cth) does not extend to outstanding superannuation entitlements. Secured creditors are also generally prioritised over superannuation entitlements, notwithstanding the statutory priority under s 556(1)(e) of the *Corporations Act 2001* (Cth).

Industry superannuation funds

10. Industry superannuation funds are not for profit, designed exclusively for the benefit of members, and governed by trustees representing employers and employees within the industry. Key features of industry-based superannuation funds include their lower administrative fees and no commission-based sales representatives. Cbus is managed solely for the benefit of its members, and has low fees.¹² It complies with the “employer-sponsored fund”¹³ requirements of the *SIS Act*, including the s 89 requirement of an equal number of employee and employer representatives on the board.¹⁴

⁹ Helen Anderson and Tess Hardy, “Who Should Be the Super Police? Detection and Recovery of Unremitted Superannuation” (2014) 37 *University of New South Wales Law Journal* 162, p 163-4.

¹⁰ “Super failure: Every year, \$2.5 billion worth of missing superannuation owed to workers” (Association of Superannuation Funds of Australia Limited Media Release, 6 October 2014). These figures relate to both solvent and insolvent companies. A copy of the TRIA partners research report referred to in the media release can be made available to the Commission, on request.

¹¹ ASIC’s *Report 372 Insolvency Statistics: External Administrators’ Reports (July 2012 to June 2013)*, analysed in Anderson and Hardy, above n 9, p 163.

¹² Cbus Members Supplementary Handbook (above n 3), p 3. Cbus Industry Superannuation Employer Handbook (September 2003), Atkin MFI-1, 3/10/14, tab 2, p 1.

¹³ *SIS Act* s 16.

¹⁴ In addition to having an independent director: see s 89(2) *SIS Act*.

11. According to APRA statistics, for eight of the past 10 years, industry funds have outperformed the retail funds run by the financial services sector, when measured as a percentage rate of return.¹⁵ The performance of Cbus is consistent with this trend. Over the last 30 years the average return to Cbus members per annum is 9.26%, and satisfaction among Cbus members is currently quantified as 7.94 out of 10.¹⁶ Two of Cbus' four investment options – Growth (Cbus MySuper) and Cbus Growth Super Income Stream – rank in the top 25% of returns for super funds.¹⁷
12. Although in light of the evidence Cbus has announced the Samuel Governance Review,¹⁸ there is historical context to the role played by the six sponsoring organisations of Cbus.¹⁹ From the 1980s, unions (and employer groups) played a significant role in advocating for the inclusion of superannuation entitlements in awards, which had the effect of greatly expanding the coverage of superannuation, and have since that time played a role at Cbus in monitoring employer compliance with superannuation entitlements.

Recovery by Cbus of superannuation entitlements

13. Ensuring employer compliance with superannuation entitlements is a key concern of Cbus. The building and construction industry has a high turnover of failed and phoenix companies,²⁰ making its employees particularly vulnerable to loss of their entitlements in the insolvency priority regime. A significant portion of Cbus members are under the age of 34,²¹ a group with a high level of non-engagement

¹⁵ With retail funds in brackets, the results each year since 2004 were 13.4% (10.8%), 13.2% (10.6%), 13.1% (12.4%), 16% (13.4%), -6% (-10.2%) -11.7% (-11.5%) 8.5% (8.7%), 9% (6.5%) 0.9% (-0.5%) and 14.4% (13.1%): Australian Prudential and Regulatory Authority, *Revised 2013 Annual Superannuation Bulletin* (5 February 2014), p 31-2 (“Table 12 – Entity ratios by fund types – trends”).

¹⁶ Cbus Annual Report 2013/4, above n 7, at pp 15, 60.

¹⁷ Super Ratings SR50 Balanced Survey and SRP50 Balanced Survey, as referred to in the Cbus Annual Report 2013/4, above n 7, p 1.

¹⁸ Addressed in Section E below.

¹⁹ Employer organisation Master Builders Association and the unions the ACTU, AMWU, AWU, CEPU and the CFMEU.

²⁰ The ABS has calculated a survival rate of 58.5% of construction businesses over a three year period. In other words, out of the 344,419 construction businesses operating on 1 July 2009, only 58.5% were still operating in June 2013: Australian Bureau of Statistics, *Counts of Australian Businesses, Including Entries and Exits*, 13 June 2014, p 14.

²¹ More than 30% of Cbus members are aged under 30, and the average age is 38.2: Cbus Annual Report 2013/4, above n 7, pp 54, 57.

with superannuation or retirement planning, and with monitoring their own contributions.²²

14. It is in this environment that Cbus adopts a multi-faceted approach to ensuring employees receive their superannuation entitlements. Cbus requires employers to pay superannuation contributions on a monthly basis,²³ and takes steps to recover arrears of superannuation contributions from employers who fail to pay superannuation monthly. Particularly given the low priority afforded to superannuation entitlements in insolvency, Cbus employs pre-litigation debt collection strategies and does not simply rely on the Court processes (and the associated delays) in pursuing arrears on behalf of its members. Nor can it only rely on the enforcement processes available to the ATO. The ATO does not pursue every case reported to it, particularly with respect to smaller businesses (such as construction companies), as it considers the superannuation debt to be “not recoverable” where “the costs of us pursuing the unpaid super is higher than the amount owed to you”.²⁴
15. Cbus takes the following steps for the recovery of payable, but unpaid, superannuation contributions.
16. First, Cbus ensures that:
 - (a) the payment of monthly payments is monitored;
 - (b) arrears letters are sent out to employers that fail to meet their monthly payments;²⁵ and
 - (c) there is a process of follow up correspondence and calls to employers that have failed to meet their monthly payments.²⁶

²² For example, a recent report concludes that a quarter of superannuation funds members in Australia between the ages of 25 to 34 check their superannuation account “hardly ever or never”: see Paul Ali, Malcolm Anderson, Martin Clark, Ian Ramsay and Chander Shekar, “Superannuation Knowledge, Behaviour and Attitudes in Young Adults in Australia: Centre for International Finance and Regulation Research Report” (September 2014), p 64.

²³ See paragraphs 27 to 29 below.

²⁴ See analysis in Anderson and Hardy, above n 9, at 185.

²⁵ See, for example, the spreadsheet listing the arrears letters sent to Lis-Con at Atkin MFI-1, 3/10/14, tab 6.

²⁶ See, for example, the IFCC record with respect to Lis-Con: Atkin MFI-1, 3/10/14, tab 5.

17. Secondly, Cbus engages Industry Funds Credit Control (**IFCC**) to provide debt recovery services.
18. Thirdly, if necessary, IFCC retains solicitors to pursue the arrears and where necessary institute proceedings.
19. In parallel to these steps, Cbus employs coordinators across Australia to, amongst other things, provide “on the ground” assistance to employers in making their superannuation contributions.²⁷
20. Through the arrears process, Cbus recovered more than \$100 million in superannuation payments for members in 2013/2014.²⁸

Requirement to be prompt and diligent in enforcing outstanding superannuation

21. As trustee of Cbus, United Super Pty Ltd (**Cbus Trustee**) owes its members a duty to act with the same care and skill as an ordinary person of business would exercise in conducting that business as if it were his or her own.²⁹
22. A long standing incident of the duty to act with care and skill is the requirement that trustees must not leave trust funds unnecessarily long in the hands of third parties,³⁰ and must be prompt and diligent in obtaining any portion of the trust estate that is outstanding, including by enforcing the payment of debts due.³¹ In the present context, clause 2.2(e) of the Cbus Trust Deed³² (**Trust Deed**) establishes that the obligations extend to recovering outstanding superannuation contributions from employers.

²⁷ In addition, industrial parties such as unions more generally play a role in ensuring the payment of superannuation, for the reasons discussed above in paragraphs 6 and 12. Unions also play a role in ensuring entitlements are paid through securing superannuation entitlements in industrial agreements and under industrial legislation.

²⁸ Cbus Annual Report 2013/4, above n 7, p 60.

²⁹ *Permanent Building Society (in liq) v Wheeler* (1994) 11WAR 187 at 235; *Breen v Williams* (1996) 186 CLR 71 at [70] (Gummow J); J D Heydon and M J Lemming, *Jacobs' Law of Trusts in Australia* (2006) at [1718] and the cases cited at footnote 157 therein. See also section 52(2)(b) of the *SIS Act*.

³⁰ *Jacobs' Law of Trusts in Australia*, above n 29, at [1720].

³¹ *Ibid* at [1720] and the cases cited at footnotes 193 and 199 therein.

³² Atkin MFI-1, 3/10/14, tab 1.

23. These obligations require the Cbus Trustee to take prompt recovery action to recover unpaid superannuation contributions for the benefit of members.³³

C. LIS-CON

24. At the relevant time, Lis-Con Concrete Constructions Pty Ltd and Lis-Con Services Pty Ltd (together, **Lis-Con**) were seriously in arrears with respect to the payment of superannuation entitlements to Cbus members. Lis-Con was behind in the payment of over \$662,000 of arrears by July 2013.³⁴ This was not a once-off. Lis-Con regularly failed to meet even its unilaterally asserted quarterly payment obligations,³⁵ with Lis-Con Concrete failing to pay quarterly 30-40% of the time,³⁶ and Lis-Con Services being outside this payment rate 80% of the time.³⁷
25. The submissions of Counsel Assisting conclude that the decision made by Cbus to commence proceedings against Lis-Con was made “acting at the direction of the CFMEU”.³⁸ The basis for the conclusion appears to be because Steve Gaske was a Cbus employee and an honorary President of the Queensland branch of the Construction and General Division of the CFMEU (even though Mr Atkin gave evidence that Mr Gaske referred Lis-Con for legal action on the basis of his role as a Cbus employee only³⁹) and an email from Lisa Zanatta.⁴⁰
26. Mr Atkin gave evidence that it was not usual for CFMEU officers to “dictate to Cbus when files for employers will be referred for legal action”.⁴¹ Yet unions can play a key role in bringing recalcitrant employers to the attention of Cbus. Some employees may choose to complain to traditional labour market intermediaries, such as unions, particularly given the background of union involvement in the award of superannuation. As noted above, many members are unaware of or

³³ The carve out in s 26 of the *Trustee Act 1958* (Vic) does not cover the extant circumstances, as the Cbus Trustee is presently in possession of the *chose in action* comprised of the right to recover superannuation contributions payable by employers and that right is not vested in another party.

³⁴ See n 44 below.

³⁵ Ibid.

³⁶ David Atkin, 23/10/14, T:851.44-852.7.

³⁷ David Atkin, 23/10/14, T:847.44-47; T:851.44-852.7.

³⁸ Outline of Submissions of Counsel Assisting the Commission, Part 8.3, at [27]-[47]. (Unless otherwise specified, all references to **Counsel Assisting’s Submissions** are references to Part 8.3 of those submissions.)

³⁹ David Atkin, 23/10/14, T:854.29-30.

⁴⁰ Counsel Assisting’s Submissions at [46].

disinterested in their superannuation entitlements and may rely on their union to assist with monitoring and compliance.⁴² However, as Mr Atkin pointed out, “just because the union has said that they want us to do something does not mean that we (Cbus) do it”.⁴³ To suggest legal proceedings were simply instituted at the direction of the CFMEU ignores that:

- (1) the Cbus Trustee has obligations to promptly enforce the payment of debts due;⁴⁴
- (2) Lis-Con was consistently late in its payments, to the extent that it owed in excess of \$662,817 in superannuation contributions to Cbus members, an amount three times larger than the next employer amount in arrears;⁴⁵ and
- (3) instituting proceedings involved the instruction of two third parties: IFCC⁴⁶ and solicitors Gregory Falk & Associates, who were required to certify, pursuant to s 347 of the *Legal Profession Act 2004* (NSW) that there were reasonable grounds for instituting both of the proceedings.⁴⁷

Lis-Con's obligation to pay employees' superannuation entitlements to Cbus on a monthly basis

27. While employers⁴⁸ are only under a statutory obligation to pay superannuation contributions quarterly,⁴⁹ participating employers admitted to the Cbus Fund have agreed to and are bound by the terms of the Trust Deed.⁵⁰

⁴¹ David Atkin, 23/10/14, T:854.11-13.

⁴² See above, paragraph 8.

⁴³ David Atkin, 23/10/14, T:892.17-19.

⁴⁴ See above, paragraphs 21-23.

⁴⁵ Based on advice the IFCC had provided to Mr Atkin: David Atkin, 23/10/14, T:928.24-39. See also Atkin MFI-1, 3/10/14, tab 7 (Statement of Claim filed on 19 July 2013 against Lis-Con Concrete Pty Ltd, claiming the sum of \$242,612.74 and Statement of Claim filed on 19 July 2013 against Lis-Con Services Pty Ltd, claiming the sum of \$420,204.60).

⁴⁶ A subsidiary division of Industry Super Holdings Pty Ltd, of which Cbus owns 16.1%.

⁴⁷ Atkin MFI-1, 3/10/14, tab 7 pp 4 and 3 of the respective Statements of Claim.

⁴⁸ See the definition of Employer in clause 7.2 of the Trust Deed, Atkin MFI-1, 3/10/14, tab 1.

⁴⁹ See s 46 of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

28. Clause 2.2 of the Trust Deed specifically provides that:⁵¹

- (a) Subject to this Deed and the Relevant Law, an Employer shall contribute to the Fund, in respect of a Member (whether engaged by it as an employee, contractor, sub-contractor or in whatever other legal relationship), such amount (whether or not calculated by reference to a percentage or rate of salary, wage or earnings) as the Employer is required by an Award or enterprise agreement applicable to the Member for that Member's Benefit. The amount shall not be less than the amount required to satisfy the Employer's obligations under the SGA Act **and must be paid to the Fund in the manner and at the times determined by the Trustee.**
- (b) **Sub-clause 2.2(a) does not apply in the event that the Employer is not covered or no longer covered by an Award or enterprise agreement.** In such case, the Employer shall contribute pursuant to sub-clause 2.2(c).
- (c) Subject to this Deed and the Relevant Law, each Employer from whom the Trustee may accept contributions shall contribute to the Fund and in respect of each Member (whether engaged by it as an employee, contractor, sub-contractor or in whatever other legal relationship), for whom it has agreed with the Trustee to make contributions, such **amount** as may be agreed upon from time to time by the Trustee and the Employer.
- (d) An Employer may make such other contributions to the Fund in respect of a Member as the Employer may from time to time determine and the Trustee may accept. Without limiting the generality of this clause, the Employer may make:
 - (i) contributions over and above the minimum contribution level provided for in sub-clause 2.2(a) or 2.2(c); or
 - (ii) salary sacrifice contributions in respect of a Member.
- (e) **The Trustee will, at all times, make all reasonable endeavours to obtain payment of contributions by Employers in accordance with their obligations under this Deed.**
- (f) The Trustee may accept contributions in respect of a Member if the Trustee is reasonably satisfied that the contribution is in respect of a period for which the Trustee may accept the contribution in respect of that Member, even though the contribution is actually made after that period.
- (g) **Any liability imposed upon an Employer by reason of the operation of the SGA Act and the Superannuation Guarantee Charge Act 1992 does not affect an Employer's obligation to contribute to the Fund in such amounts and at such times as specified by this clause 2.2.**

⁵⁰ See clause 2.1 of the Trust Deed, Atkin MFI-1, 23/10/14, tab 1. See also Atkin MFI-1, 3/10/14, tab 4.

⁵¹ Emphasis added.

29. In applying to become participating employers of Cbus:
- (1) Lis-Con Concrete Pty Ltd executed an application form in which it expressly agreed to “be bound by the terms and conditions of the Trust Deed as explained in the Employer Handbook”. The form also stated that “Employer contributions are due and payable on the last day of the month”;⁵² and
 - (2) Lis-Con Services Pty Ltd executed an application form in which it “agree[d] to pay **monthly** contributions ... in accordance with the ... Trust Deed” (emphasis in the original).⁵³
30. While clause 2.2(d) of the Trust Deed permits Cbus to agree with an employer the terms and timing of payment, the evidence does not establish that any agreement was reached between Lis-Con and Cbus for payment outside the monthly terms. As set out in Counsel Assisting’s Submissions, IFCC agreed to give Lis-Con until 27 June 2014 to make payment of the superannuation payments up to March 2013,⁵⁴ but this exhibit shows that IFCC also “asked for April 2013 and May 2013” by the same date.⁵⁵ In a contemporaneous email from IFCC which sets out the conversation in more detail, it is said that Mr O’Neill “refused to commit to payment for April 2013 & May 2013 stating that they pay quarterly”, to which IFCC replied that “It was explained CBUS is monthly as per the deed signed and if payments up to May 2013 are not received legal action may be taken then”.⁵⁶

D. ACTIONS OF MARIA BUTERA AND LISA ZANATTA

31. The evidence uncovered by this Commission discloses that Ms Butera’s and Ms Zanatta’s actions in providing to Mr Parker the spreadsheets with Lis-Con member information, including members’ phone numbers (**Lis-Con Spreadsheet Leak**), were obviously highly inappropriate. It was in breach of their duties to Cbus and the terms of their contracts of employment. For example:

⁵² Atkin MFI-1, 3/10/14, tab 4.

⁵³ Ibid.

⁵⁴ Counsel Assisting’s Submissions at [29], referring to Atkin MFI-1, 3/10/14, tab 5, p 5.

⁵⁵ In fact, Counsel Assisting’s Submissions at [34] refer to Mr O’Neill’s telephone call on 27 June 2013, and quote him saying that Lis-Con “would not commit to monthly superannuation payments and that payments for April 2013 and May 2013 would be paid by 27 June 2013 as per the guidelines from the Australian Tax Office (sic; emphasis

- (1) both Ms Butera and Ms Zanatta were in breach of their undertaking to keep confidential Confidential Information (as defined) subject to limited permitted disclosures;⁵⁷
 - (2) Ms Butera acted contrary to the Code of Conduct, which included to “ensure that the Fund complies with all legal requirements” and “to maintain confidential information of the Fund”;⁵⁸
 - (3) each has breached her implied duty of fidelity to Cbus “not to engage in conduct which impedes the faithful performance of [her] obligations, or is destructive of the necessary confidence between employer and employee”;⁵⁹ and
 - (4) Ms Butera has also breached her duty, as a senior employee, to disclose acts of misconduct by fellow employees.⁶⁰
32. The available evidence discloses that Ms Butera and Ms Zanatta each knew what she was doing was wrong and would lead to significant consequences if found out by Cbus. Mr Fitzpatrick’s evidence was that Mr Parker had arranged for two Cbus “women” to “secretly give him private information”, that the more senior woman “had not told her own boss about what she was doing because it was illegal”, and that Mr Parker had said that they had “to be very careful” not to “tell anyone” about it, because if it came out “the girls are dead and they’ll be sacked”.⁶¹ A text message infers that Ms Butera even warned Mr Parker that the information was very sensitive, and that he was to commit to using it very carefully.⁶²

added)”. However, payments of April and May 2013 by 27 June 2013 would be more in compliance with monthly rather than quarterly payments.

⁵⁶ Zanatta MF1-1, 7/7/14, tab 5.

⁵⁷ Clause 3 of the Cbus Confidentiality Agreement between United Super Pty Ltd as trustee for Cbus and Maria Butera dated October 2012, produced to the Commission in response to Notice to Produce 244; Clause 3 of the Cbus Confidentiality Agreement between United Super Pty Ltd as trustee for Cbus and Lisa Zanatta dated October 2012, produced to the Commission in response to Notice to Produce 244.

⁵⁸ Cbus Manual (26 August 2014), Butera MFI-4, 28/10/14, p 6.

⁵⁹ *Commonwealth Bank of Australia v Barker* (2014) 312 ALR 356 at [30] (French CJ, Bell and Keane JJ), citing *Blyth Chemical Ltd v Bushnell* (1933) 49 CLR 66 at 81 (Dixon and McTiernan JJ).

⁶⁰ *Swain v West (Butchers) Ltd* [1936] 3 All ER 261 (CA); *Sybron Corp v Rochem* [1984] Ch 112; [1983] 3 WLR 713 (CA).

⁶¹ Brian Fitzpatrick, witness statement, 15/7/14, at [107].

⁶² Counsel Assisting’s Submissions at [94]-[95]; Butera MFI-3, 28/10/14, p 2, item 27.

33. The available evidence discloses that Ms Butera and Ms Zanatta went to great lengths to avoid detection. They continued to deceive Cbus and lie about their role in the Lis-Con Spreadsheet Leak. Counsel Assisting's Submissions outline the extent of the fictional accounts given by Ms Butera and Ms Zanatta in an attempt to deceive Cbus and the Commission.⁶³ This was preceded by months of deception of, and concealment from, Cbus and KPMG, who also sought to investigate the Lis-Con Spreadsheet Leak (discussed below).

E. CBUS TOOK IMMEDIATE STEPS IN RESPONSE TO THE LEAK

34. When Cbus received a complaint from Lis-Con's solicitors in July 2013 about a release of information by Steve Gaske, it immediately launched an internal investigation into the release.⁶⁴
35. Cbus became aware of the Lis-Con Spreadsheet Leak in May 2014 by way of media coverage.⁶⁵ It considers the leak to be "unacceptable" and "concerning"⁶⁶ and, since learning of the breach, has taken significant steps to investigate the incident, ensure the security of its members' accounts, and remedy any weaknesses in its privacy policy:
- (1) Cbus immediately took steps to add higher levels of security to members' accounts, and satisfied itself that members' accounts had remained secure and no wrongful or fraudulent activity had occurred;⁶⁷
 - (2) Cbus commissioned KPMG to conduct an investigation into the leak. Initially, this involved:
 - (a) reviewing all electronic email data of 24 Cbus employees over a 16 month period,⁶⁸ and identifying all instances of an external release of

⁶³ Counsel Assisting's Submissions, pp 649-655.

⁶⁴ David Atkin, 23/10/14, T:878.7-11.

⁶⁵ David Atkin, 23/10/14, T:885.5-7.

⁶⁶ "Cbus Board backs Independent Governance Review, privacy reform" (Cbus Media Release, 29 October 2014), available at <http://www.cbussuper.com.au/about-cbus/news/latest-news/cbus-media-release2>.

⁶⁷ Atkin MFI-5, 23/10/14.

⁶⁸ 1 January 2013 to 12 May 2014. KPMG Preliminary Findings Report dated 25 June 2014, Zanatta MFI-2, 7/7/14, tab 60 at [2.3].

member information (or where there was potential for the information to be sent externally) during this period;

- (b) Cbus and KPMG interviewing 11 people, including Ms Butera and Ms Zanatta, regarding the release of information. Ms Butera and Ms Zanatta continued to cover up and mislead Cbus and KPMG as to their involvement in the Lis-Con Spreadsheet Leak.⁶⁹ During these interviews KPMG also sought comment as to Cbus' privacy arrangements and coordinators' interpretation of the privacy provisions;⁷⁰ and
 - (c) preparing the "Preliminary Report" referred to by Counsel Assisting as a result of this initial investigation.
- (3) KPMG conducted a further investigation⁷¹ of the Cbus computer equipment of Ms Zanatta, Ms Butera and Mr McWhinney, the recipients of the Lis-Con Spreadsheet, as well as Ms Doherty, who works closely within the Workplace Distributions Team and with Ms Butera.⁷² This included a review of the forensic images of each employees' computer;⁷³ a review of copies of each employees' personal network storage file;⁷⁴ applying key word searches to the computer information to determine whether any copies of the Lis-Con lists had been made; and determining whether any of the employees had printed, transferred through the use of internet-based email, or transferred through personal memory devices, the Lis-Con Member Lists. KPMG was unable to identify any evidence of distribution by these means.⁷⁵
- (4) While these two KPMG investigations were inconclusive, it is worth bearing in mind that:

⁶⁹ Ibid at [3.4.2].

⁷⁰ Ibid at [3.2].

⁷¹ KPMG Report dated 7 August 2014 entitled 'Cbus Super – Forensic Examination of desktop and laptop computers – Lis-Con member lists'. This report, which was produced to the Royal Commission voluntarily on 7 August 2014 and tendered into evidence by Cbus (see Atkin MFI-4, 3/10/14), has been ignored by Counsel Assisting in its submissions: see further paragraph 36(1) below.

⁷² Ibid at [1.2].

⁷³ Ibid at [1.3.2].

⁷⁴ Ibid at [1.3.3].

⁷⁵ Ibid at [3.3].

- (a) KPMG and Cbus do not have the coercive powers that the Commission has available to it;⁷⁶
 - (b) based on the evidence provided to the Commission Ms Butera and Ms Zanatta misled KPMG and Cbus during its investigations, in a manner similar to the way in which they have misled the Commission; and
 - (c) one of the recipients of the Lis-Con Spreadsheet email has been on leave from Cbus and unavailable for interview since Cbus became aware of the Lis-Con Spreadsheet Leak;⁷⁷
- (5) Cbus has instructed KPMG to widen the scope of its investigations following evidence given to this Commission on 3 October 2014, and has undertaken to provide a copy of this further report to the Commission;⁷⁸
- (6) Once it became clear that the leak had come from an employee of the fund,⁷⁹ a letter of apology was sent to Cbus members who were employed by Lis-Con;⁸⁰
- (7) Cbus has been keeping APRA apprised of events during this time;⁸¹ and
- (8) David Atkin, CEO of Cbus, recommended that the Board undertake an independent governance review.⁸² Since Mr Atkin completed his evidence to the Commission, the Board of Cbus has accepted Mr Atkin's recommendation, and resolved to appoint Graeme Samuel AC and Robert Van Woerkom to undertake the Samuel Governance Review, covering:⁸³
- (a) governance arrangements relating to the Cbus privacy policy, oversight and review mechanisms that may have led to privacy breaches;

⁷⁶ For example, to subpoena credit card company and taxi company records.

⁷⁷ David Atkin, 23/10/14, T:916.36-46.

⁷⁸ David Atkin, 23/10/14, T:906.3.

⁷⁹ Rather than having come from the administrator of the fund, Superpartners: David Atkin, 23/10/14, T:879.47-880.20.

⁸⁰ Atkin MFI-5, 23 October 2014; David Atkin, 23/10/14, T:883.13-18.

⁸¹ Atkin MFI-3, 23/10/14.

⁸² David Atkin, 23/10/14, T:931.20-21.

⁸³ "Cbus Board backs Independent Governance Review, privacy reform" (Cbus Media Release, 29 October 2014), above n 67. .

- (b) the organisational and management practices and other structural arrangements that underpin the holding and release of member information to ensure the proper collection of Cbus members' superannuation entitlements;
 - (c) clarifying the accountability and responsibilities of persons employed by Cbus and its agents who, in their roles, collect and manage member information;
 - (d) consideration of the findings from the KPMG review;
 - (e) the adequacy of the Conflicts of Interest framework; and
 - (f) legal issues relevant to privacy compliance and breaches.
36. Cbus takes issue with Counsel Assisting's criticisms of the steps taken by Cbus to investigate the leak.
- (1) Counsel Assisting's submission that "[s]urprisingly, the final KPMG report has yet to be finalised"⁸⁴ overlooks the evidence given by Mr Atkin that the initial scope of the KPMG report was "further extended, particularly in light of what transpired on 3 October".⁸⁵ The KPMG investigation is also, to an extent, limited by this Commission, in that Cbus does not wish to interfere with the Commission's processes and investigations.⁸⁶ Counsel Assisting's Submissions also overlook⁸⁷ the further work undertaken by KPMG following the Preliminary Report, including the investigation described above at paragraph 35(3).
 - (2) Counsel Assisting's Submissions note that in its Preliminary Report, KPMG identified 59 incidents where Cbus members' personal information was emailed externally, but that "the report does not identify whether Cbus had

⁸⁴ Counsel Assisting's Submissions at [238].

⁸⁵ David Atkin, 23/10/14, T:905.33-47.

⁸⁶ For example, Mr Atkin gave evidence that Cbus had discussed directly interviewing Brian Fitzpatrick for further information, but "[u]ltimately we took the view that these were matters that were before the Commission and ... we did not seek to interfere with that": David Atkin, 23/10/14, T:885.31-40.

⁸⁷ See Counsel Assisting's Submissions, particularly at [237], where Counsel Assisting refers to the KPMG report limitation that "it had not conducted further procedures to determine if the information was leaked through other means such as hard-copy printouts or the transfer of data using portable memory devices", work which was addressed in the KPMG report tendered as Atkin MFI-4, 23/10/14.

any defence or justification for making any of the disclosure".⁸⁸ It would be outside the scope of their work as forensic accountants to comment on any "defence" to the disclosures. However, KPMG has provided a break-down of the disclosures into categories, with 42 of the incidents falling into the category of "names, dates of birth and contribution information" of Cbus members transmitted via email to trade union email addresses.⁸⁹ Mr Atkin gave evidence that "the Lis-Con list is a clear outlier in the volume of the number of members, and the type of information that's been provided";⁹⁰ that he understood only a "handful" of members to be affected by the release of personal tax file numbers⁹¹ and that "the true majority [of the releases] are within the scope of the privacy policy of the fund".⁹² Each of the releases was also provided to this Commission in response to Notice to Produce 375.

37. It is worth emphasising that all of the investigations demonstrate that the Lis-Con Spreadsheet was a clear outlier, and the release of information of the kind contained in it was a once-off. Mr Fitzpatrick gave evidence that to his knowledge "we [ie the CFMEU] had never previously got this sort of information off Cbus".⁹³ KPMG's work has also only identified one such spreadsheet, with such extensive member information, in existence. The Cbus administrator, Superpartners, keeps an "audit trail of the reports it generates for its clients",⁹⁴ including recording the "parameters"⁹⁵ of the queries raised. This Commission has sought evidence of the number of reports, containing extensive personal member information, that have been generated by Superpartners on behalf of Cbus. The evidence has established that only one such spreadsheet was created.⁹⁶

⁸⁸ Counsel Assisting's Submissions at [236].

⁸⁹ The report further notes that such disclosures were for the purposes of following up with employees on arrear super contributions; establishing the accuracy of member applications and superannuation status; and reconciling membership details retained by employers against Cbus records for completeness: Zanatta MFI-2, 7/7/14, tab 60 at [3.4.3].

⁹⁰ David Atkin, 23/10/14, T:910.17-20.

⁹¹ David Atkin, 23/10/14, T:910.44-46.

⁹² David Atkin, 23/10/14, T:910.24-38.

⁹³ Brian Fitzpatrick, witness statement, 15/7/14 at [110].

⁹⁴ Patricia Harper, 7/7/14, T:119.4-8.

⁹⁵ Patricia Harper, 7/7/14, T:119.29-30.

⁹⁶ Butera MFI-2, 23/10/14.

F. CULTURAL PROBLEMS AT CBUS?

38. Counsel Assisting's Submissions assert in over 14 paragraphs that there is an "unhealthy culture in play within at least the Workplace Distribution team at Cbus", without any reference to evidence or other probative reason in support of this assertion.⁹⁷ The assertion draws upon an isolated incident conducted by two of Cbus' 120 employees,⁹⁸ who have since been, respectively, dismissed⁹⁹ and directed not to perform any duties and placed on leave. Based on the evidence provided, each was acting outside the scope of their employment, and knew that their actions were so improper and contrary to the policies, ethos and culture¹⁰⁰ of Cbus that each went so far as to commit perjury at this Commission to try to evade detection. Counsel Assisting suggests that Ms Butera's leadership would "rub off on the staff they are supposed to be leading".¹⁰¹ Yet there is no evidence before the Commission that anyone at Cbus, other than Ms Zanatta, was involved in or aware of any of the covert conduct. To the contrary, the measures that Ms Zanatta and Ms Butera were prepared to take demonstrates that their conduct was utterly antithetical to the culture of Cbus.
39. Counsel Assisting also suggests cultural issues arise because some Cbus staff are former employees or members of the CFMEU¹⁰² and because Cbus is "at least to a degree, commercially dependent upon the CFMEU".¹⁰³ This submission sits uncomfortably with equal opportunity and freedom of association laws which prohibit discriminating against anyone in the workplace (including during the recruitment process¹⁰⁴) because of their actual or assumed political beliefs or activities, union membership or industrial activities.¹⁰⁵ It also overlooks the

⁹⁷ Counsel Assisting's Submissions, Section T.

⁹⁸ Cbus Annual Report 2013/4, above n 7, p 64.

⁹⁹ David Atkin, 23/10/14, T:917.43-45.

¹⁰⁰ For example, the culture as set out in the Cbus Manual: Cbus has identified as "essential" that it conducts its affairs with a high degree of integrity, and with a culture that promotes and supports good governance, benefits all stakeholders and helps to maintain the public confidence in the Fund: Cbus Manual (26 August 2014), Butera MFI-4, 28/10/14, p 2.

¹⁰¹ Counsel Assisting's Submissions at [309].

¹⁰² There is no evidence before the Commission of the proportion of Cbus staff who are CFMEU-affiliated. According to Cbus' human resources records, 9 out of 120 Cbus staff are former CFMEU employees. This evidence is not before this Commission (and has not been sought by way of Notice to Produce), but can be provided on request.

¹⁰³ Counsel Assisting's Submissions at [311]. Again, no evidence is cited in support of this submission.

¹⁰⁴ Cf Counsel Assisting's Submissions at [314].

¹⁰⁵ These protections are contained in, for example, Part 3-1 of the *Fair Work Act 2009* (Cth).

historical role played by the unions in promoting superannuation entitlements for employees and monitoring employer compliance.

40. Counsel Assisting submits that it makes no comment on the board of Cbus “other than to note its composition, so divided in its interests and agendas, poses particular challenges in a modern corporate governance environment”.¹⁰⁶ There is no apparent basis for this observation, and the following matters are also noted:

- (1) Each of the directors approach their tasks as “trustee-directors” under the *SIS Act*;
- (2) Decisions of the board require a two-thirds majority;¹⁰⁷
- (3) While governance frameworks will be examined as part of the Samuel Governance Review, to at least some extent, the Cbus Board composition – a chair nominated by the ACTU; seven directors nominated by the employer sponsor organisation (Master Builders Association); seven directors nominated by the five member sponsor organisations (ACTU, AMWU, AWU, CEPU and CFMEU); one independent director – is required to be an “employer-sponsored fund” for the purposes of the *SIS Act*;¹⁰⁸ and
- (4) There is no evidence before this Commission to suggest the board is not cohesive and fully functional.¹⁰⁹ In any event, these matters were not the subject of any real analysis by this Commission.

41. Mr Atkin noted that culture was an issue that should be reviewed by Cbus as part of its review, but he did not agree there was a widespread cultural issue.¹¹⁰ It was not put to Mr Atkin that there were systemic cultural issues at Cbus. Mr Atkin did not agree that there was a “cultural difficulty ... because of their background with a particular union”. Rather, Mr Atkin said that “the fact that they come from a union background assists their understanding of the environment that they work

¹⁰⁶ Counsel Assisting’s Submissions at [305].

¹⁰⁷ Articles of Association of United Super Pty Ltd dated 26 October 2006, article 46, available at <http://www.cbussuper.com.au/about-cbus/fund-governance>.

¹⁰⁸ See discussion above at Section A.

¹⁰⁹ The Commission has examined the following directors of the Cbus Trustee board, yet has not asked any to comment on the Board’s composition or ability to function: Rita Mallia gave evidence on 2 October 2014; Earl Setches gave evidence on 15 September 2014; Cesar Melhem gave evidence on 15 September 2014 (Mr Melhem retired as a Cbus director in June 2013).

¹¹⁰ David Atkin, 23/10/14, T.908.31-34; T:908.32-44.

within and I've got confidence in the work that they do".¹¹¹ Cbus' results in the Great Place to Work Institute's 50 Best Workplaces study also suggest that there are no systemic cultural issues, with 95% of staff surveyed this year indicating that they are "proud to tell others I work at Cbus", and where credibility, respect and fairness all rated above 80.¹¹²

42. In light of these matters, it is respectfully submitted that no adverse finding in relation to "cultural corruption"¹¹³ at Cbus should be made.

G. RESPONSE TO COUNSEL ASSISTING ON BREACHES OF THE LAW BY CBUS

43. Cbus accepts Counsel Assisting's submission that "[o]n no sensible consideration of the facts could it be said that members of a superannuation fund would reasonably have expected their private telephone numbers to be handed out by the trustee of their superannuation funds to a trade union so that trade union officials could contact them directly, and out of the blue, to discuss their superannuation position".¹¹⁴
44. Cbus has apologised to the relevant members for the conduct and is undertaking the Samuel Governance Review in light of the events. It obviously does not seek to defend any part of those actions.
45. In relation to Counsel Assisting's submission¹¹⁵ with respect to breaches of the *Privacy Act 1988* (Cth) and the National Privacy Principles (NPP) 2.1 and 4.1:
- (1) it needs to be recalled that based on the evidence put before the Commission the acts of Ms Butera and Ms Zanatta with respect to the Lis-Con Spreadsheet Leak were in breach of their employment duties,¹¹⁶ were not authorised by Cbus, and Ms Butera and Ms Zanatta went to great lengths

¹¹¹ David Atkin, 23/10/14, T:907.36-40.

¹¹² Cbus Annual Report 2013/4, above n 7, p 65, cf Counsel Assisting's bald assertion at [308].

¹¹³ Counsel Assisting's Submissions at [308]-[309].

¹¹⁴ Counsel Assisting's Submissions at [275].

¹¹⁵ Counsel Assisting's Submissions at [263].

¹¹⁶ See above at Section D.

both during and after the acts to conceal their breaches from Cbus, and later this Commission;¹¹⁷ and

- (2) NPP 4.1 provides that an organisation holding personal information must take such steps as are “reasonable in the circumstances” to protect the information from misuse, unauthorised access or disclosure. Counsel Assisting’s Submissions contain no analysis of why the steps which Cbus had in place were not “reasonable in the circumstances”, albeit insufficient.¹¹⁸ Nonetheless, Cbus acknowledges that as a leading industry super fund, and in order to maintain the confidence of its members (and employers), it must take further steps to protect its members’ information from misuse, unauthorised access or disclosure. As set out above, part of the Samuel Governance Review will be to review the governance arrangements relating to the Cbus privacy policy, oversight and review mechanisms that may have led to privacy breaches, as well as the organisational and management practices and other structural arrangements that underpin the holding and release of member information, to prevent further *Privacy Act* breaches.

46. Cbus accepts that the provision of the Lis-Con Spreadsheets to Mr Parker was in breach of clause 6.4 of the Trust Deed, because in contrast to the *Privacy Act*, the Trust Deed imposes an absolute obligation on Cbus to maintain confidentiality of member information (subject to certain disclosures).¹¹⁹ While Cbus does not seek to excuse this breach of the Trust Deed, and has initiated a review of its procedures in light of the offending conduct, it is perhaps worth noting that at no stage were Cbus members’ accounts or funds in any jeopardy.

H. CONCLUSION

47. The Lis-Con Spreadsheet Leak was obviously a concerning breach of members’ privacy. Cbus has taken the matters before this Commission extremely seriously.

¹¹⁷ For the purposes of establishing a breach by Cbus of NPP 2.1, Counsel Assisting’s Submissions are also missing any analysis linking Ms Butera and Ms Zanatta’s acts to Cbus, as required by s 8(1)(a) of the *Privacy Act 1988*.

¹¹⁸ This is particularly so in light of the relevant disclosure being by two employees willing to break the law as well as Counsel Assisting’s submission that their conduct “cannot be attributed to a mere failure of corporate governance by virtue of Cbus’ deficient privacy policies and procedures”: Counsel Assisting’s Submissions at [302].

This has included the implementation of the Samuel Governance Review to restore confidence in Cbus as a leading industry superannuation fund.

48. The wrongful conduct also needs to be placed in its proper context. While acknowledging the wrongful conduct is serious, there has been no pecuniary damage to any member's retirement income as a result of this wrongful conduct. At all times, Cbus members' funds and accounts have remained secure, and the Cbus Trustee has fulfilled its duties to members to be prompt and diligent in obtaining outstanding portions of the trust estate, being overdue superannuation entitlements.

Dated: 14 November 2014

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¹¹⁹ Likewise, it accepts it has breached what Counsel Assisting refers to as "its contracts with members": Counsel Assisting's Submissions at [259].