FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Financial Circle Pty Ltd [2018] FCA 1644

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| File number(s): | VID 1367 of 2017 |
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| Judge(s): | **O'CALLAGHAN J** |
|  |  |
| Date of judgment: | 2 November 2018 |
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| Catchwords: | **SUPERANNUATION –** application from ASIC for court approval of declarations, injunctions and costs – where defendant company contravened numerous provisions of *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) – where scheme created for “borrowers” to access small amounts of money – where company earned money by transferring “borrowers” to a retail superannuation fund and advising them to obtain insurance, thereby collecting commissions and fees in excess of the “loan” amount – where ASIC and defendant company reached agreement on liability for contravention of the statutory provisions and penalties – application approved by court |
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| Legislation: | *Corporations Act 2001* (Cth), ss 761A, 761G, 766A, 766B, 769C, 912A, 961, 961B, 961G, 961H, 961J, 961L, 1041H, 1101B, 1317E, 1317G, 1324  *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth)  *Australian Securities and Investments Commission Act 2001* (Cth), ss 12BB, 12CB, 12CC, 12DA, 12DB, 12DF, 12GBA, 12GD  *National Consumer Credit Protection Act 2009* (Cth), ss 5, 6, 29, 160D, 166, 167, 177 |
|  |  |
| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330  *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90  *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [1999] FCA 313  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640  *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196  *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73  *Australian Securities Commission v Donovan* (1998) 28 ACSR 583  *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (No 2)* [2015] FCA 527  *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483  *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* (2012) 213 FCR 380  *Australian Securities and Investments Commissions v Camelot Derivatives Pty Limited (in liquidation)* [2012] FCA 414  *Australian Securities and Investments Commission v Channic Pty Ltd (No 5)* [2017] FCA 363  *Australian Securities and Investments Commission v Citrofresh International Ltd* (2007) 164 FCR 333  *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 2  *Australian Securities and Investments Commission v GE Capital Finance Australia* [2014] FCA 701  *Australian Securities and Investments Commission v Golden Financial Group Pty Ltd (No 2)* [2017] FCA 1267  *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* [2014] FCA 1387  *Australian Securities and Investments Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393  *Australian Securities and Investments Commission v Pegasus Leverages Options Group Pty Ltd* (2002) 41 ACSR 561; [2002] NSWSC 310 at 571  *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132  *Australian Securities and Investments Commission v Newcrest Mining Limited* [2014] FCA 698  *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345  *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527  *Australian Securities and Investments Commission v Superannuation Warehouse Australia Pty Ltd* [2015] FCA 1167  *Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liq) (No 2)* [2015] FCA 93  *Australian Securities and Investments Commission v Vines* (2006) 58 ACSR 298; [2006] NSWSC 760  *Australian Securities and Investments Commission v Warrenmang Ltd* [2007] FCA 973  *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592  *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304  *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421  *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82  *Permanent Mortgages Pty Limited v Spartacus Enterprises Pty Limited* [2013] NSWSC 911  *Re Ku-ring-gai Co-operative Building Society (No 12)* (1978) 36 FLR 134; [1978] FCA 50  *Rupert Co Ltd v Imperial One Ltd* (2003) 45 ACSR 18; [2003] NSWSC 217  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20  *Trade Practices Commission v CSR Limited* [1990] FCA 521  *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530  *Weitmann v Katies Ltd* (1977) 29 FLR 336 |
|  |  |
| Date of hearing: | 22 October 2018 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 236 |
|  |  |
| Counsel for the Plaintiff: | Mr L W L Armstrong QC and Ms L Papaelia |
|  |  |
| Counsel for the Defendant: | The Defendant did not appear |

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| **Table of Corrections** |  |
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| 8 November 2018 | In the Catchwords, the word “ self-managed” has been replaced with “retail” |

ORDERS

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|  | | VID 1367 of 2017 |
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| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION  Plaintiff | |
| AND: | FINANCIAL CIRCLE PTY LTD (ACN 106 702 470)  Defendant | |

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| --- | --- |
| JUDGE: | O'CALLAGHAN J |
| DATE OF ORDER: | 22 OCTOBER 2018 |

**THE COURT DECLARES THAT:**

1. Between September 2017 and 22 December 2017, the defendant falsely represented to the public that:
   1. it operated a business of providing investment loans, home loans, plant and equipment loans, car loans and business loans; and
   2. in respect of personal loans provided by it, there were no significant loan requirements, features or fees other than those identified on the “*Good Credit Personal Loans*” and “*Bad Credit Personal Loans*” webpages of its website www.financialcircle.com.au,

and thereby engaged in misleading or deceptive conduct in contravention of:

* + 1. s 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**);
    2. ss 12DA and 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
    3. s 160D of the *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**).

1. Between September 2017 and 22 December 2017, the defendant by:
   1. marketing its personal lending business to members of the public who had bad credit histories, low levels of financial literacy and who were in a weak bargaining position compared with the defendant;
   2. providing to members of the public misleading information as described in Order 1 above; and
   3. engaging in the said conduct for the purpose of deriving financial advice fees from the applicants and commissions from insurance providers,

engaged in conduct in connection with the supply or possible supply of financial services that was in all the circumstances unconscionable, in contravention of s 12CB of the Corporations Act.

1. Between September 2017 and 22 December 2017, the defendant:
   1. typically and in respect of the 10 applicants identified in the Schedule with an ‘X’ in the column headed s 961B(2)(b)(i), made representations without reasonable grounds to the effect that it was in the applicant’s interests to obtain financial advice from a Financial Circle Adviser; and
   2. typically and in respect of the 11 applicants identified in the Schedule with an ‘X’ in the column headed s 961G, made representations without reasonable grounds to the effect that it was in the applicant’s interests to switch superannuation funds, and acquire insurance, in accordance with the advice given by the Financial Circle Adviser,

and thereby engaged in misleading or deceptive conduct directed to the applicant that was in contravention of:

* + 1. s 1041H of the Corporations Act;
    2. ss 12DA, 12DB(1)(h) and 12DF of the ASIC Act; and
    3. s 160D of the National Credit Act.

1. Between September 2017 and 22 December 2017, the defendant typically and in respect of each applicant identified in the Schedule except applicant number 7, by:
   1. attracting people with bad credit histories to its business by making false or misleading representations about the types of loans that were available from the defendant and about the requirements, features and fees of the personal loans offered by the defendant;
   2. making recommendations to applicants without reasonable grounds to the effect that it was in their interests to:
      1. obtain financial advice from a Financial Circle Adviser;
      2. switch superannuation funds, and acquire insurance, in accordance with the advice given by the Financial Circle Adviser,

in order to induce applicants to obtain and implement financial advice to switch their superannuation provider and acquire insurance;

* 1. providing financial advice to applicants;
     1. without acting in their best interests;
     2. in circumstances where it was not reasonable to conclude that the advice was appropriate; and
     3. without giving priority to the applicant’s interests; and
  2. engaging in the conduct described in the preceding subparagraphs:
     1. in circumstances where it knew or ought reasonably to have known that the immediate and long-term financial effect on the applicants would or was likely to be materially adverse to the interests of the applicant; and
     2. for the purpose of obtaining fees from applicant’s new superannuation fund and commissions from new insurance providers,

engaged in conduct in connection with the supply or possible supply of financial services to a person that was in all the circumstances unconscionable, in contravention of s 12CB of the ASIC Act.

1. Between September 2017 and 22 December 2017:
   1. the defendant’s compliance manual failed to provide detailed, practical and specific guidance on how Advisers could ensure that they comply with the law;
   2. the defendant’s conflicts register did not adequately identify conflicts of interest, address the impact of conflicts or give adequate guidance on how conflicts should be managed;
   3. the defendant’s complaints register and incidents register did not facilitate the defendant identifying, remediating or reporting on the underlying causes of the complaints or incidents;
   4. the defendant did not provide formal or substantive training to Advisers on their obligations to comply with financial services laws; and
   5. the defendant’s grading system checklist did not explicitly refer to the Adviser’s obligations to comply with ss 961B, 961G and 961J of the Corporations Act,

and the defendant thereby failed to take reasonable steps to ensure that its authorised representatives complied with ss 961B, 961G and 961J of the Corporations Act in contravention of s 961L of the Corporations Act.

1. Between September 2017 and 22 December 2017, by reason of the matters set out at Order 5 above, the defendant failed to take reasonable steps to ensure that its representatives complied with financial services laws in contravention of s 912A(1)(ca) of the Corporations Act.
2. Between September 2017 and 22 December 2017, by reason of the matters set out at Order 5 above, the defendant failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly and thereby contravened s 912A(1)(a) of the Corporations Act.
3. Between September 2017 and 22 December 2017, by each of its contraventions of:
   1. s 1041H of the Corporations Act as described at Order 1(i) and Order 3(i) above;
   2. s 12DA of the ASIC Act as described at Order 1(ii) and Order 3(ii) above;
   3. s 12DF of the ASIC Act as described at Order 1(ii) and Order 3(ii) above;
   4. s 12CB of the Corporations Act as described at Order 2 and 4 above;
   5. s 12DB(1)(h) of the ASIC Act as described at Order 3(ii) above;
   6. s 961L of the Corporations Act as described at Order 5 above;
   7. s 912A(1)(ca) of the Corporations Act as described at Order 6 above;
   8. s 912A(1)(a) of the Corporations Act as described at Order 7 above;

the defendant failed to comply with the financial services laws in contravention of s 912A(1)(c) of the Corporations Act.

1. Between September 2017 and 22 December 2017, the defendant engaged in a credit activity, namely entering into credit contracts as the provider of credit, without a licence authorising it to engage in that activity and thereby contravened s 29 of the National Credit Act.

**THE COURT ORDERS THAT:**

**Injunctions**

1. The defendant be permanently restrained, whether by itself, its servants, agents or employees, from:
   1. carrying on a financial services business;
   2. carrying on a business related to, concerning or directed to financial products or financial services within the meaning of s 761A of the Corporations Act;
   3. providing any of the following services:
      1. providing financial product advice within the meaning of section 761A of the Corporations Act; or
      2. dealing in financial products within the meaning of section 761A of the Corporations Act;
   4. in any way holding itself out as being involved in the matters referred to in subparagraphs (a) to (c) above.
2. The defendant, whether by itself, its servants, agents or employees, be permanently restrained from providing credit or entering into a credit contract as a credit provider within the meaning of s 6(1) of the National Credit Act or in any way being involved in, or holding itself out as being involved in, the matters referred to in this paragraph.

**Pecuniary penalties**

1. The defendant pay a pecuniary penalty to the Commonwealth in the amount of $2,100,000 in respect of its misleading or deceptive conduct directed to the public described at Order 1 above in contravention of s 1041H of the Corporations Act, ss 12DA and 12DF of the ASIC Act and s 160D of the National Credit Act.
2. The defendant pay a pecuniary penalty to the Commonwealth in the amount of $1,680,000 in respect of its unconscionable conduct directed to the public described at Order 2 above in contravention of s 12CB of the ASIC Act.
3. The defendant pay a pecuniary penalty to the Commonwealth in the amount of $2,100,000 in respect of its misleading or deceptive conduct directed to applicants described at Order 3 above in contravention of s 1041H of the Corporations Act, ss 12DA, 12DB(1)(h) and 12DF of the ASIC Act and s 160D of the National Credit Act.
4. The defendant pay a pecuniary penalty to the Commonwealth in the amount of $1,680,000 in respect of its unconscionable conduct directed to applicants described at Order 4 above in contravention of s 12CB of the ASIC Act.
5. The defendant pay a pecuniary penalty to the Commonwealth in the amount of $1,000,000 in respect of its failure to take reasonable steps to ensure that its authorised representatives complied with ss 961B, 961G and 961J of the Corporations Act in contravention of s 961L of the Corporations Act.
6. The defendant pay a pecuniary penalty to the Commonwealth in the amount of $420,000 for engaging in a credit activity without a licence in contravention of s 29 of the National Credit Act.

**Other**

1. The defendant pay the plaintiff’s costs of and incidental to the proceeding fixed in the amount of $250,000.
2. Pursuant to sections 37AF and 37AG(1)(a) of the *Federal Court of Australia Act 1976* (Cth), and to prevent prejudice to the proper administration of justice, the documents at paragraphs (i) to (vii) below:
   1. be confidential to the parties to this proceeding and to their legal representatives;
   2. be sealed on the Court file in an envelope marked “*Not to be opened except by leave of the Court or a Judge*”; and
   3. not be published or made available to any person (other than a person identified in subparagraph (a) hereof) save by leave of the Court.

*Documents*

* + 1. Exhibit “NDK-3” of the affidavit of Nicholas Damien Klooger.
    2. Affidavit of client A sworn on 27 April 2018.
    3. Affidavit of client B sworn on 3 May 2018.
    4. Affidavit of client C sworn on 22 May 2018.
    5. Affidavit of client D sworn on 31 May 2018.
    6. Expert report of Simon Kerr dated 14 May 2018.
    7. Expert report of Sean Graham dated 14 May 2018.

1. The plaintiff has leave to file and serve by 26 October 2018 for holding on the Court file copies of the following documents redacted to remove the names of clients of the defendant:
   1. Expert report of Simon Kerr dated 14 May 2018; and
   2. Expert report of Sean Graham dated 14 May 2018.

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

REASONS FOR JUDGMENT

O’CALLAGHAN J:

1. By a statement of claim dated 14 May 2018 (the **SOC**), the plaintiff (**ASIC**) alleges that the defendant (**Financial Circle**) contravened provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**), the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**). It seeks declarations, pecuniary penalties, injunctions and costs.
2. On 2 July 2018, ASIC and Financial Circle entered into a settlement agreement. The agreement provides, among other things, that Financial Circle: admitted each and every allegation, and the content of the particulars, contained in the SOC; agreed to file and serve a defence in the proceeding stating that it admits each and every allegation, and the content of the particulars, in the SOC; and consented to the court making orders for declarations, injunctions, civil penalties and costs as set out in the agreement.
3. In its defence dated 12 July 2018, Financial Circle duly admitted each and every allegation, and the content of the particulars, contained in the SOC.
4. It is necessary for the Court to approve such settlements. On 22 October 2018, Mr Armstrong QC, who appeared with Ms Papaelia for ASIC, made oral submissions in support of extensive, thorough and very helpful written submissions, which these reasons largely adopt. Having heard those oral submissions, I made the orders set out above. These are my reasons for having done so.

## Evidence

1. ASIC relies upon the following material:
2. affidavit of Nicholas Damien Klooger (a Senior Lawyer in ASIC’s Financial Services Enforcement team) sworn on 18 December 2017 (**Klooger Affidavit**);
3. affidavit of Katherine Elizabeth Houghton (a Lawyer in ASIC’s Financial Services Enforcement team) sworn on 12 October 2018 (**Houghton Affidavit**);
4. expert report of Simon Kerr (a Senior Analyst in ASIC’s Financial Advisers team) dated 14 May 2018 (**Kerr Report**);
5. expert report of Sean Graham (a financial services compliance consultant) dated 14 May 2018 (**Graham Report**);
6. affidavit of Andrew Lappos (a former Customer Service Officer at Financial Circle) sworn on 19 December 2017 (**Lappos Affidavit**);
7. affidavit of Craig Andrew Hubbard (a former Customer Service Officer at companies related to Financial Circle) sworn on 19 December 2017 (**Hubbard Affidavit**); and
8. affidavits of clients of Financial Circle:
   1. client A sworn on 27 April 2018 (**Client A Affidavit**);
   2. client B affirmed on 3 May 2018 (**Client B Affidavit**);
   3. client C affirmed on 22 May 2018 (**Client C Affidavit**); and
   4. client D affirmed on 31 May 2018 (**Client D Affidavit**).

## Introduction

1. Financial Circle is an Australian financial services licensee authorised to provide financial advice in relation to, among other things, life products including life risk insurance products and superannuation.
2. Financial Circle is also an Australian credit licensee authorised to engage in credit activities other than as a credit provider.
3. Financial Circle carried on a business of providing loans of between $2,000 and $5,000 in conjunction with providing financial advice. It sought to attract to its business persons seeking loans who had a bad credit history and were likely to have low levels of financial literacy and poor financial management skills.
4. Financial Circle provided personal loans only on the conditions that an applicant for a loan:
5. engaged a Financial Circle adviser (**Adviser**) to provide the applicant with financial advice;
6. implemented the Adviser’s financial advice, which:
   1. typically required the applicant to switch their superannuation to another provider (typically a retail superannuation fund); and
   2. always required the applicant to purchase new, or replace their existing, insurance including life, temporary and permanent disability (**TPD**) and income protection insurance;
7. pay a fee for the financial advice of between $3,000 and $5,500, which fee was invariably paid from the applicant’s retail superannuation; and
8. commit to paying annual insurance premiums from the applicant’s superannuation.
9. Financial Circle derived most of its revenue from the financial advice fees paid by applicants from their retail superannuation funds and commissions paid by insurance providers to Advisers in respect of new insurance policies.
10. The Financial Circle business model was developed by senior personnel that managed or worked for Wealth & Risk Management Pty Ltd (**WRM**) and its associated entities. In March 2017 ASIC commenced proceedings against WRM and its associated entities (***WRM Proceeding***). In May 2017, the Federal Court enjoined WRM and its associated entities from operating the “cash rebate scheme” because there was an appreciable risk of contraventions of financial services laws. Financial Circle’s business was substantially the same as the cash rebate scheme that had been operated by WRM and its associated entities.
11. On 22 December 2017, at the conclusion of the hearing of ASIC’s application for an interlocutory injunction, Financial Circle also gave an undertaking to stop carrying on a financial services business and providing credit until 10 January 2018.
12. On 10 January 2018, Moshinsky J delivered judgment granting interlocutory injunctions against Financial Circle restraining it from carrying on a financial services business until the hearing and determination of this proceeding.
13. On 5 February 2018, Moshinky J delivered judgment in the WRM Proceeding. His Honour made declarations of contraventions by WRM and two associated companies. His Honour also granted injunctive relief and ordered civil penalties of $7,800,000, and costs in favour of ASIC.

## The facts

### The marketing of Financial Circle’s services: the website

1. Financial Circle promoted its business on a website at www.financialcircle.com.au. It paid a marketing agency to provide it with online marketing services to attract the target clients to the website. It also paid Google Adwords to direct persons to the website upon entering search terms including “bad credit loans”, “small loans no checks”, “fast cash loans”, “money lenders”, “unsecured loans 20000 bad credit”, “1500 loan no credit check monthly payments” and “1500 loan no credit check monthly payments”.
2. The website contained separate options for persons seeking “Financial Planning” and “Lending Solutions”. The “Lending Solutions” option linked to a webpage with further options being “Investment Loans”, “Home Loans”, “Personal Loans”, “Plant and Equipment”, “Loans”, “Car Loans” and “Business Loans”.
3. Financial Circle did not, however, at any time, provide loans of those types other than “Personal Loans”. Each option on the website other than “Personal Loans” linked to a text box that said “Currently being Updated”.
4. The “Personal Loans” option linked to a webpage with two options: “Good Credit Personal Loans” and “Bad Credit Personal Loans”.
5. The “Good Credit Personal Loans” option linked to a webpage that:
6. stated:

Fixed Rate Loan

* Borrow from $2,000
* Fixed interest rates and fixed repayments allow you to remain in control
* Repayments of up to $1,000 extra per annum without additional fees.

1. included three text boxes as follows:
   1. entitled “What could we do for you?” that stated that Financial Circle may assist the person to obtain a personal loan from a major bank, a secondary tier bank or a specialist financier;
   2. entitled “How could we help?” that explained that personal loans may be secured or unsecured and that an unsecured loan typically attracts a higher interest rate; and
   3. entitled “About the interest rates” that listed various rates for secured and unsecured loans;
2. included three expandable options:
   1. entitled “About the loan” that set out the available loan amounts, the period of the loan, repayment methods and loan types;
   2. entitled “Our requirements” that included a table as follows:

|  |  |
| --- | --- |
| Age | 18 years or over |
| Resident Status | A permanent Australian resident |
| A good credit history | From last 5 years |
| Bankruptcy history | Be free for the last 7 years |

* 1. entitled “Our fees and charges” that set out the amounts payable in respect of an establishment fee, loan service fees, Australia Post payment handling fees, BPay payment handling fees, late payment fees and early termination fees; and

1. included an option to “Apply Now Obligation Free”.
2. The “Bad Credit Personal Loans” option linked to a webpage that:
3. stated:

Variable Rate Loan

* Borrow from $2,000-$5,000
* Variable rates that are amongst the lowest if not the lowest in the market
* Make unlimited additional repayments with any fees additional fees. …

Conventional Credit Checks not required \***Terms and conditions apply**

Financial Circle specialises in assisting you obtaining a personal loan, allowing for a poor credit history and or low credit score. Poor credit histories and or low credit scores are one effective and standardised method of accurately reflecting an individuals [sic] approach and or [sic] ability to satisfy their loan repayment obligations. But we understand that is not the only accurate method.

(Emphasis added.)

1. included under the heading “Here’s what a loan might look like” an example of a loan of $3,500 for a term of one year, disclosing repayments of $79.50 per week, an establishment fee of $400, interest totalling $234 and a statement that “the example … makes no allowance for arrears notice fees, debt recovery call fees, dishonor [sic] fees …”
2. included three text boxes as follows:
   1. entitled “What could we do for you?” that stated:

“Financial Circle specialises in identifying funding sources for applicants with impaired credit histories: private funders\*…”

* 1. entitled “How could we help?” that explained that personal loans may be secured or unsecured and that an unsecured loan typically attracted a higher interest rate;
  2. entitled “Is a sophisticated process for application” [sic] that stated:

“The application processes [sic] is sophisticated and seamless …

Once all the necessary information is collected, our assessment process typically takes no longer than 60 minutes, at which point a conditional loan approval is offered. Once the offer is accepted we will provide the loan to you as soon as possible”; and

1. included an option to “Apply Now Obligation Free”.
2. The words “\*Terms and conditions apply” emphasised in bold above did not link to any terms and conditions and did not indicate, by reference to an asterisk elsewhere on the webpage or otherwise, how a person may access the terms and conditions.
3. The “Good Credit Personal Loans” and “Bad Credit Personal Loans” webpages did not disclose, or make reference to, the conditions that an applicant for a personal loan must:
4. engage an Adviser to provide the applicant with financial advice;
5. implement the Adviser’s financial advice, which:
   1. typically required the applicant to switch their superannuation to another provider; and
   2. always required the applicant to purchase new, or replace their existing, insurance including life, TPD and income protection insurance;
6. pay a fee for the financial advice of between $3,000 and $5,500, which fee may be paid from the applicant’s retail superannuation; and
7. commit to paying annual insurance premiums from the applicant’s superannuation.
8. The “Apply Now Obligation Free” option on both the “Good Credit Personal Loans” and “Bad Credit Personal Loans” webpages linked to an online application form.
9. The form required the applicant to provide personal information including contact details, family status, health conditions, employment information and income, as well as to state the loan amount requested and the purpose of the loan.
10. Before submitting the form, an applicant was required to tick a box acknowledging that the applicant had read and agreed to the “Terms, Conditions and Qualifying Criteria”.
11. The words “Terms, Conditions and Qualifying Criteria” linked to a text box (**Terms textbox**) that stated:

8. Applicants must have adequate personal insurance in place. \*you will be referred to one of our Authorised Representative (AR) of Australian Financial Service License (AFSL) 302 222 for assessment.

**Terms, Conditions and qualifying criteria for financial planning advice. …**

12. For the purposes of these terms, conditions and qualifying criteria the financial planning process requires and includes:

* Applicant must be engaged with the financial adviser (AR)
* Applicant must be able to speak and understand English fluently
* Applicant must be prepared to complete the advice process electronically and over the phone, which means access to a computer/tablet/printer/scanner/ smartphone.

**Click here for detailed Terms, Conditions and qualifying criteria for the personal loan that starts at 6% p.a.**

(Emphasis added in underline.)

1. The words “Click here”, emphasised in underline in the preceding paragraph, linked to a webpage (**Terms webpage**) that, in addition to the terms disclosed in the Terms textbox, described the timeline for the financial planning process as follows (**Website terms**):

**Financial Planning process …**

1. Agree to engage with a financial planner. **Timeframe: 1 day**
2. Financial Advisor will contact you to conduct an information collection meeting. **Timeframe 1 day**
3. and 4. Financial Advisor will analyse and research on what to recommend to put you in a better position. **1 day**
4. Financial adviser will present Statement of Advice and implement advice. **Time Frame 5-7 working days**
5. Ongoing Reviews. **Conducted Quarterly/half yearly/Yearly depending on what agreement was made initially.**

The financial adviser will assess the applicants’ [sic] situation and will quote them on the fee for the work that needs to be done. It’s at the applicant’s discretion if they want to proceed at the very beginning. However, if the fee is quoted and the applicant agrees for the adviser to complete the work they and [sic] wish to withdraw they will only [sic] protected by certain elements of the consumer protection act. Expressed another way it’s difficult just to change your mind and not expect to compensate the adviser for work completed up to that point.

Depending on the scope of the advice fees can potentially be charged out of the applicant’s superannuation. This also includes insurance premiums, which could potentially be a few thousand dollars as the example below shows.

1. The applicant was not required to view the Terms textbox or the Terms webpage before acknowledging that they had read and agreed to the “Terms, Conditions and Qualifying Criteria”.
2. In order for the applicant to view the Website terms, they had to:
3. click on the “Terms, Conditions and Qualifying Criteria” in the acknowledgment referred to above that linked to the Terms textbox; and then
4. click on the words “Click here” in the Terms textbox.
5. Alternatively, an applicant could access the Website terms (which were contained on the Terms webpage) from each page on the website. The link to the Terms webpage, however, was contained in a banner at the very bottom of each webpage and the hyperlinked words “Terms, Conditions and Qualifying Criteria” were in small font placed alongside hyperlinked words “Website Disclaimer” and “Privacy Policy”, which did not relate to Financial Circle’s business.
6. An applicant accessing the website was not referred to the Website terms until after the applicant had viewed information about the loan offering on either the “Good Credit Personal Loans” or “Bad Credit Personal Loans” webpages and after the applicant had completed and was ready to submit the online application form.
7. As a result of these matters, the website did not, or did not adequately, direct or attract persons to the Website terms.
8. As a result, an applicant typically submitted the online application form without any, or any adequate, disclosure by Financial Circle of the conditions that an applicant for a personal loan must:
9. engage an Adviser to provide the applicant with financial advice;
10. implement the Adviser’s financial advice, which:
    1. typically required the applicant to switch their superannuation provider; and
    2. always required the applicant to purchase new, or replace their existing, insurance including life, TPD and income protection insurance;
11. pay a fee for the financial advice of between $3,000 and $5,500, which fee may be paid from the applicant’s retail superannuation; and
12. commit to paying annual insurance premiums from the applicant’s superannuation.

### Initial contact with customer service officers

1. After an applicant submitted an online application form, a Financial Circle customer service officer (**CSO**) typically contacted the applicant over the telephone and informed them that, in order to be eligible for a personal loan the applicant must engage a Financial Circle Adviser to provide the applicant with financial advice, and Financial Circle needed to ensure that the applicant had adequate insurance so that the applicant was protected if the applicant became sick or injured.
2. At this stage the CSO typically sought from the applicant documents including certified identification, bank statements, pay slips and a completed Information Disclosure Authority form authorising Financial Circle to obtain from the applicant’s existing superannuation provider information relating to the applicant’s existing superannuation and insurance arrangements.

### Adviser process

1. Upon receipt of the requested information, an Adviser typically had a conversation with the applicant by telephone and requested information to enable the Adviser to complete a Client Data Collection Form in relation to the applicant. The information related to the applicant’s contact details, family status, employment details, assets, liabilities, expenditure and the scope of the advice sought.
2. During the telephone call, the Adviser typically told the applicant that they must agree to receive advice about superannuation and insurance and advised the applicant of the financial advice fee.
3. After the telephone call, the Adviser typically sent the applicant an email asking the applicant to complete a “risk profile questionnaire” which asked questions relating to the amount of risk the applicant was willing to accept.
4. After the applicant returned the risk profile questionnaire, the Adviser then prepared, and sent to a Financial Circle paraplanner (**paraplanner**), a paraplanning request that typically set out:
5. that the scope of the advice included advice regarding superannuation and insurance;
6. the Adviser’s proposed superannuation and insurance recommendations;
7. budgeting advice;
8. a statement described as the “best interest statement” that purported to set out how the advice recommendation was suitable and how it would put the applicant in a better position than not acting on the advice; and
9. the fact that the advice fee was to be paid from the applicant’s superannuation.
10. Upon receiving the paraplanning request, the paraplanner prepared and sent a statement of advice (**SOA**) to the Adviser. The SOA typically included:
11. a recommendation that the applicant switch their superannuation provider to another provider (typically a retail superannuation fund);
12. a recommendation that the applicant purchase new, or replace their existing, personal insurance including life, TPD and income protection insurance; and
13. an Authority to Proceed form.
14. After the Adviser received the SOA from the paraplanner, the Adviser sent the SOA to the applicant by email.
15. If the applicant agreed to implement the advice, the applicant completed and returned the Authority to Proceed form and Financial Circle implemented the advice on behalf of the applicant.
16. Once the financial advice was implemented:
17. a financial advice fee was deducted from the applicant’s superannuation fund and paid to Financial Circle;
18. initial insurance premiums were deducted from the applicant’s superannuation fund and paid to the applicant’s new insurance provider; and
19. the insurance provider paid to Financial Circle an upfront commission immediately and ongoing commissions annually.

### Outcomes for the applicant

1. Simon Kerr, a Senior Analyst in ASIC’s Financial Advisers team, reviewed Financial Circle’s files for 12 applicants (**Schedule Applicants**) and prepared an expert report (the **Kerr Report**) about whether the Advisers complied with reasonable industry practice in respect of their obligations under the Corporations Act when providing advice to the Schedule Applicants.
2. Mr Kerr concluded that in each case the Financial Circle Adviser did not comply with reasonable industry practice in respect of the Adviser’s obligation to act in the best interests of the applicant as required by s 961B(1) of the Corporations Act. Mr Kerr opined that the failure arose from process deficiencies identified in the following paragraph.
3. Mr Kerr opined that, for each Schedule Applicant, to the extent indicated in the table in his report at paragraph 2.98 (which table is replicated in the Schedule to the SOC), the Adviser failed to comply with reasonable industry practice in respect of the Adviser’s obligations to:
4. identify the objectives, financial situation and needs of the applicant that were disclosed to the Adviser by the applicant through instructions, within the meaning of s 961B(2)(a) of the Corporations Act, as each of the Schedule Applicants was seeking a short-term loan and did not appear to be, at least initially, seeking financial product advice;
5. identify the subject matter of the advice that was sought by the applicant explicitly or implicitly within the meaning of s 961B(2)(b)(i) of the Corporations Act, as superannuation and/or insurance advice was typically imposed on the applicant in situations where it was not evident that it was required;
6. identify the objectives, financial situation and needs of the applicant that would reasonably be considered as relevant to the advice sought on the subject matter within the meaning of s 961B(2)(b)(ii) of the Corporations Act, as Advisers typically orchestrated an applicant’s agreement to switch out of their existing superannuation and/or personal insurances based on erroneous information regarding those products;
7. make reasonable enquiries to obtain complete and accurate information where it was reasonably apparent that information relating to the client’s relevant circumstances was incomplete or inaccurate, in accordance with s 961B(2)(c) of the Corporations Act, as Advisers typically gave applicants inaccurate information regarding group insurance and therefore had inaccurate information regarding the applicant’s need to cancel their group insurance policy and obtain retail insurance;
8. conduct a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the applicant that would reasonably be considered as relevant to advice on that subject matter, in accordance with s 961B(2)(e)(i) of the Corporations Act, as typically an applicant’s existing insurance products were not adequately investigated;
9. assess the information gathered in the investigation within the meaning of s 961B(2)(e)(ii) of the Corporations Act, as Advisers typically did not adequately investigate modifying the applicant’s existing insurance arrangements. Some applicant files also lacked evidence of the Adviser considering whether the applicant’s existing superannuation and investment options aligned with the applicant’s risk tolerance; and
10. base all judgments in advising the applicant on the applicant’s objectives, financial situation and needs within the meaning of s 961B(2)(f) of the Corporations Act, typically as a result of the process deficiencies described above.
11. Based on his review of the files, Mr Kerr concluded that, in relation to each of the Schedule Applicants (except Schedule Applicant 7), the Adviser failed to provide advice to the applicant that it would be reasonable to conclude was appropriate within the meaning of s 961G of the Corporations Act.
12. Mr Kerr also concluded that:
13. the primary reason Advisers failed to provide advice that it would be reasonable to conclude was appropriate was that the superannuation fees charged to applicants did not appear to represent value to the applicants given the size of their respective superannuation balances;
14. the superannuation advice did not represent value as on average the applicant’s current superannuation benefit was reduced by approximately 9%;
15. the advice preparation fees were excessive, particularly considering that the Schedule Applicants were not initially seeking superannuation advice;
16. for 9 of the 12 client files, there was no evidence that the Adviser had considered the applicant’s existing insurance policy, and in fact the policy could have been modified to meet the applicant’s needs on a more cost-effective basis; and
17. based on his research of the applicant’s existing insurance products, many of the applicants could have obtained more cost-effective insurance from their existing insurance product provider, on similar terms offered by the recommended insurance product providers.
18. Mr Kerr concluded that, in relation to each of the Schedule Applicants (except Schedule Applicant 7), the Adviser knew, or reasonably ought to have known, that there was a conflict between the applicant’s and the Adviser’s interests and failed to meet reasonable industry practice in respect of his or her obligation to give priority to the applicant’s interests when giving the advice, within the meaning of s 961J of the Corporations Act.
19. Mr Kerr opined that the Advisers had conflicts of interest when providing advice to the Schedule Applicants because:
20. the provision of insurance advice, specifically to purchase retail insurance products, enabled Financial Circle to receive insurance commissions, whereas group insurance policies would not pay a commission;
21. the provision of superannuation advice enabled the Adviser to levy an advice preparation fee on the applicant’s superannuation benefit, even in instances where the applicant did not request such advice or appear to require it; and
22. Financial Circle Advisers were eligible for a bonus of between 2% and 25% of the fee paid to Financial Circle should they reach certain benchmarks.
23. Mr Kerr concluded that the Advisers failed to give priority to the applicants’ interests when giving the advice because, although the applicants typically had simple needs, they were commonly over-serviced by their Advisers. They were required to accept financial product advice relating to superannuation and insurance to enable their short-term loan applications to proceed. In addition, applicants were commonly in poor financial situations, yet the financial product advice generated large revenues for the Advisers and Financial Circle.
24. ASIC submitted, and I agree, that it can be inferred that the conduct of the Financial Circle Advisers toward the Schedule Applicants was typical of its conduct toward all applicants.

### Loan assessment process

1. After an applicant returned the signed Authority to Proceed form referred to above, a Financial Circle credit assessor (**Credit Assessor**) completed a loan assessment form in respect of the applicant. The loan assessment forms contained fields relating to the purpose of the loan, the applicant’s monthly financial position, details of the recommended loan (including the amount, term, repayments, interest and fees), the suitability of the loan for the applicant, the credit provider’s details, and the applicant’s credit history and expenses.
2. The loan assessment forms typically identified Financial Circle as the credit provider.
3. The Credit Assessor then sent the applicant a loan offer in the form of a consumer loan contract (**Loan Contract**) setting out:
4. the loan amount, typically between $2,000 and $5,000;
5. the interest rate, typically 6%;
6. the frequency of loan repayments, typically fortnightly;
7. the loan term, typically 2 years; and
8. the credit fees and charges including:
   1. an application fee of $400;
   2. a monthly account keeping fee of $5; and
   3. a fortnightly direct debit fee of 60 cents.
9. The Loan Contracts typically referred to Financial Circle as the lender and were on Financial Circle letterhead with the Financial Circle logo.
10. If the applicant was willing to proceed, the applicant was required to sign and return the Loan Contract to Financial Circle. A Financial Circle “Peer Loan Proposal” was then typically completed which set out details of the proposed loan and sought approval from the “Peer” to proceed with the loan. The Peer was, in most cases, Anna McDonald and in some cases, Daniel Clarke, the brother of a Credit Assessor employed by Financial Circle.
11. After the loan was approved, Financial Circle paid the applicant the approved loan amount into the applicant’s nominated bank account.

### Compliance policies, processes and training

1. Sean Graham, a financial services compliance consultant, reviewed Financial Circle’s compliance documents and prepared an expert report (the Graham Report) on whether Financial Circle complied with reasonable industry practice in respect of its obligations as an Australian financial services licensee.
2. Mr Graham concluded that Financial Circle failed to comply with reasonable industry practice in respect of its obligations as an Australian financial services licensee.
3. Mr Graham examined Financial Circle’s compliance documents, including:
4. a compliance manual;
5. a conflicts register;
6. a complaints register;
7. an incident register;
8. training plans; and
9. a grading system checklist.
10. In his report, Mr Graham concluded that Financial Circle’s compliance manual:
11. was a template document produced externally;
12. was poorly customised to Financial Circle’s business;
13. presented an organisational chart that had not been completed to include the names of relevant personnel and their competencies;
14. included generic statements about approved products, without any customisation from the template;
15. did not provide detailed, practical and specific guidance on how Advisers could ensure that they comply with the law;
16. did not adequately address monitoring and supervision, in that it should have, but did not, set out the frequency, methodology, scope and consequences of monitoring and supervising Advisers. Instead the compliance manual referred to “ad hoc spot checks of advisers” and “ongoing training provided to advisers and paraplanners”; and
17. did not adequately address the requirement to report breaches, in that it should have, but did not, identify Financial Circle’s approach to identifying, reporting and appropriately classifying breaches.
18. In relation to Financial Circle’s conflicts register, Mr Graham concluded that it:
19. did not adequately identify conflicts, because it did not identify that there was a potential conflict inherent in Financial Circle relying upon referring loan applicants to Advisers in order to generate its own income;
20. did not adequately address the impact of that conflict, because it did not state that there was a risk that Advisers may recommend unnecessary products and strategies; and
21. did not provide any guidance on how to manage that conflict.
22. Mr Graham considered that Financial Circle’s:
23. complaints register recorded only basic data and did not facilitate Financial Circle identifying, remediating or reporting on the underlying causes of the complaints that they received; and
24. incident register recorded only basic data and did not facilitate Financial Circle identifying, remediating or reporting on the underlying causes of the incidents that occurred.
25. Mr Graham noted that Financial Circle’s training plans disclosed that no formal or substantive training was provided to Advisers about their obligations to:
26. act in the best interests of applicants in relation to the advice, as required by s 961B of the Corporations Act;
27. only provide advice to applicants if it would be reasonable to conclude that the advice was appropriate to the applicant, as required by s 961G of the Corporations Act;
28. give priority to the applicant’s interests where there was a conflict, as required by s 961J of the Corporations Act; or
29. comply with financial services laws generally.
30. Finally, Mr Graham noted that Financial Circle’s grading system checklist did not explicitly refer to the Adviser’s obligations to:
31. act in the best interests of an applicant in relation to the advice as required by s 961B of the Corporations Act;
32. provide advice to the applicant only if it would be reasonable to conclude that the advice was appropriate to the applicant as required by s 961G of the Corporations Act; and
33. give priority to the applicant’s interests where there was a conflict, as required by s 961J of the Corporations Act.
34. As a result, ASIC submitted, and I agree, that Financial Circle did not comply with reasonable industry practice in respect of its obligations to:
35. take reasonable steps to ensure that its representatives complied with ss 961B, 961G and 961J, as required by s 961L of the Corporations Act;
36. do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, as required by s 912A(1)(a) of the Corporations Act; and
37. take reasonable steps to ensure that its representatives complied with the financial services laws, as required by s 912A(1)(ca) of the Corporations Act.

## Contraventions

### Conduct directed to the public: Misleading or deceptive conduct

#### Principles

1. Section 1041H of the Corporations Act, ss 12DA and 12DF of the ASIC Act and s 160D of the National Credit Act each proscribe misleading and deceptive conduct.
2. The sections provide as follows:
3. s 1041H of the Corporations Act provides that a person must not engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or likely to mislead or deceive;
4. s 12DA of the ASIC Act is cast in similar terms and provides that a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive;
5. s 12DF of the ASIC Act provides that a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services; and
6. s 160D of the National Credit Act provides that a person must not, in the course of engaging in a credit activity, give information or a document to another person if the giver knows, or is reckless as to whether, the information or document is false in a material particular or materially misleading.
7. Some distinguishing features of the sections are as follows:
8. the ASIC Act provisions require that the conduct occur in trade or commerce, a phrase which describes “all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprised commercial arrangements” (*Re Ku-ring-gai Co-operative Building Society (No 12)* (1978) 36 FLR 134; [1978] FCA 50 at 139);
9. s 1041H of the Corporations Act and s 12DA of the ASIC Act require that there be a connection between the representations and the financial product or service (*Australian Securities and Investments Commission v Citrofresh International Ltd* (2007) 164 FCR 333 at [61]-[74] per Goldberg J (***Citrofresh***));
10. s 12DF of the ASIC Act requires that the representation relate to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services;
11. s 160D of the National Credit Act requires that the representation be made in the course of engaging in a credit activity; and
12. s 160D of the National Credit Act requires that the giver of the information or document knows or is reckless as to whether the information or document is false in a material particular or materially misleading.
13. Conduct is misleading or deceptive if it has a tendency to lead a person into error: *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [25] per French CJ. Conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87. It is sufficient if the conduct is prone, or has a propensity, or is liable to mislead or deceive, even though there is less than a 50% chance that this will, in fact, happen: *Rupert Co Ltd v Imperial One Ltd* (2003) 45 ACSR 18; [2003] NSWSC 217. Whether conduct is, or is likely to be, misleading or deceptive is determined objectively: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625 per McHugh J. The attributes and knowledge of the person or persons at whom the relevant conduct was directed may be taken into account: *Weitmann v Katies Ltd* (1977) 29 FLR 336 at 340-343 per Franki J.
14. Where a person makes a representation with respect to a future matter and the person does not have reasonable grounds for making the representation, the representation is taken to be misleading: Corporations Act, s 769C; ASIC Act, s 12BB.
15. In assessing whether an advertisement is misleading or deceptive, the “dominant message” of the advertisement is of crucial importance: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***TPG***) at [45]. Conduct may be misleading not only when a contract has been concluded under the influence of a misleading advertisement, but also at the point where members of the target audience have been enticed into “the marketing web” by an erroneous belief engendered by an advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded: *TPG* at [50].

#### Contravention

1. Financial Circle represented on its website that it operated a business of providing investment loans, home loans, plant and equipment loans, car loans and business loans. It made this representation by providing options for selecting each of these kinds of loans on the “Lending Solutions” webpage.
2. Financial Circle also represented on its website that there were no significant loan requirements, features or fees other than those identified on the “Good Credit Personal Loans” and “Bad Credit Personal Loans” webpages. It made this representation by:
3. including on the “Good Credit Personal Loans” and “Bad Credit Personal Loans” webpages a number of key requirements, features and fees of the loan; and
4. not directing, or not adequately directing, persons using the website to the Website terms.
5. The above representations were misleading or deceptive because Financial Circle did not disclose, or did not adequately disclose, on its website that:
6. Financial Circle’s business operations were in practice limited to making personal loans; and that
7. for personal loans provided by Financial Circle, an applicant for a loan would be required to:
   1. engage a Financial Circle Adviser to provide the applicant with financial advice;
   2. implement the Adviser’s financial advice, which typically required the applicant to:
      1. switch their superannuation provider; and
      2. purchase new, or replace their existing, insurance including life, TPD and income protection insurance;
   3. pay a fee for the financial advice of between $3,000 and $5,500, which fee may be paid from the applicant’s retail superannuation; and
   4. commit to paying annual insurance premiums from the applicant’s superannuation.
8. The representations were made:
9. in relation to a financial product or service, being superannuation and insurance products and advice in relation to those products (Corporations Act, ss 766A(1)(a) and 766B(1)) because the representations were made in connection with Financial Circle’s objective of enticing members of the public to engage its Advisers to provide financial advice in relation to superannuation and insurance, in order to earn fees and commission;
10. in relation to the nature and characteristics of financial advice – because, while the representations expressly related to the provision of a loan rather than the financial advice offering, the representations failed to disclose the key requirement that an applicant could not obtain a loan without obtaining and implementing financial advice; and
11. in the course of engaging in a credit activity – being carrying on a business of providing credit, albeit coupled with the principal revenue-earning activity of providing unsuitable superannuation or insurance advice (National Credit Act, s 6, Item 1(b)).
12. The website representations were clearly made in trade or commerce as they were made to members of the public for the purpose of inviting them to apply for a loan, with a view ultimately to generate revenue for Financial Circle.
13. ASIC submitted, and I agree, that it can be inferred that Financial Circle knew, or was reckless as to whether, the website representations were false in a material particular or materially misleading. First, that proposition is admitted. Second, and in any event, Financial Circle knew that the key requirements for an applicant to obtain a loan were those set out above and must be taken to have known that its website did not, or did not adequately, disclose those requirements.
14. By reason of paragraphs [74] to [76] and:
15. paragraph [77](1), Financial Circle engaged in misleading or deceptive conduct in contravention of s 1041H of the Corporations Act;
16. paragraphs [77](1) and [78], Financial Circle engaged in misleading or deceptive conduct in contravention of s 12DA of the ASIC Act;
17. paragraphs [77](2) and [78], Financial Circle engaged in conduct that is liable to mislead in contravention of s 12DF of the ASIC Act; and
18. paragraphs [77](3) and [79], Financial Circle gave misleading information in contravention of s 160D of the National Credit Act.

### Conduct directed to the public: unconscionable conduct

#### Principles

1. Section 12CB of the ASIC Act provides that a person must not, in trade or commerce, in connection with the supply or possible supply of financial services to a person engage in conduct that is, in all the circumstances, unconscionable.
2. Section 12CB is not limited by the unwritten law of the States and Territories relating to unconscionable conduct: ASIC Act, s 12CB(4)(a). There is, therefore, no foundation in its language or purpose to impose limitations from the unwritten law, such as a necessity to identify a specific or particular person: *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132 (***National Exchange***) at [30]. The language in the section must be given its ordinary meaning and must not be qualified by pre-existing constraints on liability: *National Exchange* at [30].
3. For conduct to be characterised as unconscionable, it must demonstrate something more than unfairness, unjustness or a tendency to mislead. Its requirements fall short of a necessity to prove actual dishonesty (although actual dishonesty would presumably suffice).
4. Section 12CC sets out a list of non-exhaustive (*Permanent Mortgages Pty Limited v Spartacus Enterprises Pty Limited* [2013] NSWSC 911 at [40]) factors to which the Court may have regard for the purpose of determining whether a person has contravened s 12CB of the ASIC Act, including:
5. the relative strengths of the bargaining positions of the supplier and the service recipient;
6. whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services;
7. whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient (or a person acting on behalf of the service recipient) by the supplier (or a person acting on behalf of the supplier) in relation to the supply or possible supply of the financial services;
8. the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and
9. the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient.

#### Contravention

1. Financial Circle exploited the vulnerable by using marketing practices that targeted financially desperate persons who were in need of a loan, had bad credit histories, had few options available to them to obtain a loan and had low levels of financial literacy. By reason of these characteristics, the loan applicants were in a weak bargaining position.
2. Financial Circle engaged in subterfuge by advertising that it offered loans, when in fact its offering was materially different. To obtain the advertised personal loan, an applicant had to engage an Adviser to provide financial advice and pay a fee for the advice, which typically did not represent value to the applicant given the size of the applicant’s superannuation balance: SOC at 2.5.8; Kerr Report at 2.168. The applicant also had to implement the Adviser’s typically inappropriate recommendations to switch their superannuation provider and purchase costly insurance: Kerr Report at 2.167.
3. As ASIC, submitted, “[t]hese unfair tactics employed by Financial Circle echo the marketing tactics deployed by the respondent in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 (***Lux***). Just as the respondents in *Lux* inveigled their way into the homes of customers with offers of vacuum-cleaner checks, but intending to make new sales, so too Financial Circle inveigled customers by offering loans, but intending to channel applicants into the insurance-purchasing and superannuation-switching system that comprised its business model. The tactic was even more expressly targeted than in *Lux*, but with an equivalent misleading element.”
4. The implementation of the Adviser’s recommendations imposed financial hardship on the applicants as a result of substantial immediate and ongoing reductions to their personal superannuation funds: Kerr Report at [2.188].
5. All this was done for the base commercial purpose of generating financial rewards for Financial Circle via advice fees from applicants and commissions from insurance providers.
6. By reason of the above, Financial Circle engaged in conduct, in trade or commerce, in connection with the supply or possible supply of financial services to a person that was, in all the circumstances, unconscionable in contravention of s 12CB of the ASIC Act.

### Conduct directed to applicants: Misleading or deceptive conduct

1. Financial Circle engaged in misleading or deceptive conduct directed to applicants for loans in contravention of each of s 1041H of the Corporations Act, ss 12DA, 12DB(1)(h) and 12DF of the ASIC Act and s 160D of the National Credit Act.
2. In addition to the provisions relied upon in respect of conduct directed to the public, ASIC relies upon s 12DB(1)(h) of the ASIC Act. It provides that a person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services, make a false or misleading representation concerning the need for any services.
3. In the course of processing loan applications, Financial Circle typically represented to applicants, and represented to each of the Schedule Applicants that, or to the effect that:
4. it was in the applicant’s interests to obtain financial advice from a Financial Circle Adviser;
5. it was in the applicant’s interests to switch superannuation funds, and acquire insurance, in accordance with the advice given by the Adviser; and
6. it had reasonable grounds for the representations referred to in paragraphs (1) and (2) above.
7. Financial Circle made the representations by the conduct of its Advisers in recommending to applicants that the applicant should obtain financial advice, and should switch their superannuation and acquire insurance.
8. The representations were misleading or deceptive because Financial Circle did not have reasonable grounds for making them. At all times while making the recommendations, Financial Circle:
9. knew or ought reasonably to have expected that the advice given by its Advisers would be to switch superannuation funds, and acquire insurance, regardless of the applicant’s requirements and circumstances because those were the mechanisms by which Financial Circle obtained its remuneration;
10. knew or ought reasonably to have known that its Advisers had failed, or were likely to fail, to comply with reasonable industry practice with respect to their obligations under s 961B of the Corporations Act to act in the best interests of applicants because Financial Circle did not have adequate compliance policies and procedures in place to ensure compliance;
11. knew or ought reasonably to have known that it was not in the applicant’s best interests to switch superannuation funds, and acquire insurance, as advised by Financial Circle – this is to be inferred from the matters set out at paragraph [96] below; and
12. was reckless or did not care about the accuracy of the Adviser’s recommendations – this is also to be inferred from the matters set out at paragraph [96] below.
13. Financial Circle’s knowledge or recklessness as to the matters at subparagraphs [95](3) and (4) above is to be inferred from the following:
14. applicants were typically seeking short-term, small amount, loans and, at least initially, were not seeking financial product advice: Kerr Report at 2.102;
15. superannuation and/or insurance advice was typically urged on applicants in situations where it was not evident that it was required: Kerr Report at 2.108;
16. the Advisers typically orchestrated an applicant’s agreement to switch out of their existing superannuation and/or personal insurances, based on erroneous information regarding those products: Kerr Report at 2.118;
17. the Advisers typically gave applicants inaccurate information regarding group insurance, and applicants therefore had inaccurate information regarding the need to cancel their group insurance policy and obtain retail insurance: Kerr Report at 2.148-2.149;
18. typically an applicant’s existing insurance products were not adequately investigated: Kerr Report at 2.152;
19. the Advisers typically did not adequately investigate modifying the applicant’s existing insurance arrangements. Some applicant files also lacked evidence of the Adviser considering whether the applicant’s existing superannuation had investment options that aligned with the applicant’s risk tolerance: Kerr Report at 2.158 and 2.160.
20. The representations were made (*Citrofresh* at [61]-[74] per Goldberg J):
21. in relation to a financial product or service, being superannuation and insurance products and advice in relation to those products: Corporations Act, ss 766A(1)(a) and 766B(1);
22. in relation to the suitability for purpose of the financial advice, and the need for the financial advice;
23. in the course of engaging in a credit activity, being carrying on a business of providing credit: National Credit Act, s 6, Item 1(b); and
24. concerning the need for services, being financial advice.
25. The representations were made in trade or commerce as they were made to applicants for the purpose of persuading them to engage an Adviser to provide financial advice (*W & A McArthur Ltd v Queensland* (1920) 28 CLR 530) with a view ultimately to generate revenue for Financial Circle.
26. ASIC submitted, and I agree, that it can be inferred that Financial Circle knew, or was reckless as to whether, the representations were false in a material particular or materially misleading for the reasons set out above.
27. It follows that Financial Circle:
28. engaged in misleading or deceptive conduct in contravention of s 1041H of the Corporations Act;
29. engaged in misleading or deceptive conduct in contravention of s 12DA of the ASIC Act;
30. engaged in conduct that is liable to mislead in contravention of s 12DF of the ASIC Act;
31. engaged in conduct that was false or misleading concerning the need for services, in contravention of s 12DB(1)(h) of the ASIC Act; and
32. gave misleading information, in contravention of s 160D of the National Credit Act.

### Conducted directed to applicants: Unconscionable conduct

1. In providing loans to applicants, Financial Circle typically (and specifically in relation to each of the Schedule Applicants) engaged in unconscionable conduct.
2. Financial Circle acted with subterfuge by offering loans on its website without disclosing critical information that, in order to obtain a loan, an applicant had to engage a Financial Circle Adviser to provide financial advice and then implement the advice (which typically required the applicant to switch their superannuation provider and purchase new insurance).
3. Financial Circle intentionally exploited vulnerable persons. Financial Circle knew or ought reasonably to have known that the applicants were desperate for money, had bad credit histories, had few options available to them to obtain a loan, and had low levels of financial literacy. Indeed, these were Financial Circle’s target clients. Financial Circle therefore knew or ought reasonably to have known that the applicants were in a weak bargaining position.
4. Financial Circle informed applicants that they had been “conditionally approved” for the loan sought, or for a loan in excess of the amount sought, in order to induce applicants to agree to engage an Adviser to provide financial advice. This conditional approval was given before the applicant had received any financial advice from an Adviser and, therefore, before there was any certainty as to whether Financial Circle would offer an applicant a loan.
5. Financial Circle failed to act honestly when its Advisers made recommendations to applicants to switch their superannuation provider and acquire insurances without having reasonable grounds to make those representations. Their base objective was to induce the applicant to implement the advice, so that Financial Circle could claim fees payable from the applicant’s new superannuation provider and commissions from the new insurance provider.
6. Advisers provided advice to applicants without complying with reasonable industry practice in respect of the Adviser’s obligations to act in the best interests of the applicants, give appropriate advice and give priority to the applicant’s interests.
7. Not only was the financial advice typically not appropriate to the applicant’s needs, but Financial Circle imposed hardship on applicants because the effect of implementing the advice was:
8. the deduction of a substantial portion of the applicant’s existing superannuation savings, to be paid as financial advice fees to Financial Circle;
9. the deduction of a substantial portion of the applicant’s future superannuation contributions, to be paid as insurance premiums; and
10. an immediate, substantial and long-term detriment to the applicant’s superannuation balance and financial wellbeing.
11. Financial Circle knew or ought reasonably to have known that the immediate and long-term financial effect on the applicant would or was likely to be materially adverse to their interests.
12. ASIC submitted that having regard to the list of factors set out at s 12CC of the ASIC Act it cannot be doubted that Financial Circle acted unconscionably.
13. First, as to the relative strengths of the bargaining positions of the supplier and service recipient (ASIC Act, s 12CC(1)(a)). ASIC submitted that the clients were in a very weak bargaining position, because they were generally in urgent need of money and had no other avenues available to them to obtain cash.
14. Secondly, as to whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services, the evidence demonstrates that Financial Circle’s documents were confusing to applicants. For example:
15. “Client A” stated “The impression I was given by Bahrami during our initial telephone conversation earlier that day, together with my interpretation of this email, was that the requested documents were for the loan and not for financial advice”. In fact, the requested documents were required to enable the provision of financial advice.
16. “Client C” stated “I emailed back the signed ATP [Authority to Proceed]. I understood that completing and returning the ATP would mean that Financial Circle would charge an advice fee of $3,300 to my superannuation and put the insurances in place, and I would be funded the agreed loan amount”. In fact, signing and returning the Authority to Proceed did not necessarily mean that an applicant would receive a loan.
17. “Client D” stated “I remember reading through the document and wondering why I had to pay $5,500 for an advice fee and why they were recommending changes to my superannuation and life insurance”.
18. Thirdly, as to whether any unfair tactics were used against the service recipient (Corporations Act, s 12CC(1)(d)), unfair tactics were clearly used by Financial Circle. In particular:
19. Applicants were induced to make applications to Financial Circle based on advertisements for loans¸ which is what applicants were looking for. In fact, the offering was substantially different. To obtain a loan, applicants had to engage Advisers and implement the Adviser’s recommendations in relation to superannuation and insurance.
20. Financial Circle induced applicants to agree to engage an Adviser to provide financial advice by informing them that they had been “conditionally approved” for the loan sought or for a loan in excess of the amount sought.
21. Before an applicant had been unconditionally approved for a cash payment, the applicant had to sign an Authority to Proceed agreeing to implement the advice. This meant that an applicant, who had approached Financial Circle seeking a loan, might ultimately not be approved for a loan, but would still have an advice fee deducted from their superannuation. This happened to Client C, who had an advice fee and insurance premiums paid out of his superannuation in the amount of around $6,000 to $7,000, (although ultimately the loan was not approved prior to the interlocutory injunction).
22. The financial advice provided by the Advisers was typically not appropriate for the applicant. It is doubtful whether, absent an applicant’s financial difficulty or need or desire for cash, the applicant would have agreed to implement the Adviser’s recommendations or receive financial advice at all:
    1. “Client A” stated “I accepted the advice and proceeded with the process because Zaidi lead me to believe that if I didn’t, I wouldn’t get the loan. … The loan, [and] helping my mum financially, was my key motivation for accepting and proceeding with the financial advice in the SOA”.
    2. “Client B” stated “I agreed to the fee as Dilan explained that I had to get financial advice to get a loan. I felt like I had to do what was needed to get a loan because I needed the money and didn’t have many other alternatives due to my bad credit history”.
    3. “Client C” stated “Sen told me that it was a requirement of taking out the loan that I get insurance and roll over my super so I felt like I needed to accept their advice to get the loan”.
    4. “Client D” stated “At this stage I was desperate for the money, as I had the other credit providers wanting to be paid out, so I just completed the insurance forms and sent them back to Financial Circle in an email”.
23. Fourthly, as to the amount for which the service recipient could have acquired identical or equivalent financial services from a person other than the supplier, applicants were obliged to pay a fee for the financial advice that typically did not represent value to the applicants given the size of their superannuation balances: SOC at 2.5.8; Kerr Report at 2.168.
24. Fifth, as to the extent to which the supplier was willing to negotiate the terms and conditions of its arrangements with the service recipient (ASIC Act, s 12CC(1)(j).), there is no evidence of applicants being able to negotiate or alter the terms and conditions of the loan offerings.
25. By reason of the above, ASIC submitted, and I agree, that Financial Circle engaged in conduct, in trade or commerce, in connection with the supply or possible supply of financial services to a person that was, in all the circumstances, unconscionable in contravention of s 12CB of the ASIC Act.

### Contravention of financial services laws: Failing to take reasonable steps to ensure compliance by Advisers

#### Principles

1. Both ss 961L and 912A(1)(ca) of the Corporations Act relate to the steps a financial services licensee must take to take to ensure that its representatives comply with financial services laws:
2. s 961L of the Corporations Act provides that a financial services licensee must take reasonable steps to ensure that representatives of the licensee comply with ss 961B, 961G and 961J.
3. s 912A(1)(ca) provides that a financial services licensee must take reasonable steps to ensure that its representatives comply with financial services laws. Financial services laws relevantly include any provision of Chapter 7 of the Corporations Act: Corporations Act, s 761A.
4. The obligation in s 961L mirrors that in s 912A(1)(ca) of the Corporations Act: *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345 (***NSG Liability Judgment***) at [31]. Unlike s 961L, however, s 912A(1)(ca) is not a civil penalty provision.
5. Section 961L falls within Division 2 of Part 7.7A of the Corporations Act. Part 7.7A was introduced into the Corporations Act in 2012 as part of the “Future of Financial Advice Reforms” (**FOFA reforms**) by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth). The FOFA reforms were 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.
6. Division 2 of Part 7.7A is titled “Best interests obligations” and applies to the provision of personal advice to a person as a retail client: Corporations Act, s 961. A person who is given advice in relation to an investment of less than $500,000 is usually a retail client: Corporations Act, s 761G and *NSG Liability Judgment* at [15]. The division provides that individuals who provide advice (Corporations Act, ss 961(2)-(4)) must:
7. act in the best interests of the client in relation to the advice (s 961B);
8. only provide advice if it would be reasonable to conclude that the advice is appropriate to the client (s 961G);
9. if it is reasonably apparent that information relating to the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate – warn the client (s 961H); and
10. if the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of the provider or licensee or associate – give priority to the client’s interests (s 961J).
11. In the *NSG Liability Judgment* at [36]-[39], the court considered whether, in order to establish a contravention of s 961L, it was necessary to show that:
12. an individual providing advice contravened one of ss 961B, 961G, 961H or 961J;
13. the licensee failed to take reasonable steps to prevent the contravention; and
14. there was a causal nexus between the two.
15. The Court was not required to reach a concluded view on the issue in the NSG Liability Judgment because breaches of ss 961B and 961G were established in that case.

#### Contravention: Compliance Policies and Procedures

1. ASIC submits, and I agree, that Financial Circle contravened ss 961L and 912A(1)(ca) of the Corporations Act because:
2. it failed to have adequate policies and processes in place to ensure that its Advisers complied with the provisions of the Corporations Act, in particular the FOFA reforms; and
3. its Advisers failed to comply with ss 961B, 961G and 961J of the Corporations Act.
4. ASIC submits, and I agree, that while contraventions of ss 961B, 961G, 961H or 961J provide persuasive evidence of a licensee failing to take reasonable steps (*Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 2 at [94]) as a matter of statutory construction, there is nothing in the language of s 961L (or s 912A(1)(ca) of the Corporations Act) that make actual (or proven) contraventions of the anterior provisions a precondition to a finding of contravention of s 961L in itself. In other words, there can be a failure to take reasonable steps to procure compliance, even without proof that that failure led to an actual contravention of the other provisions.
5. While ASIC has not joined any Financial Circle Advisers as defendants, it does allege that they contravened ss 961B, 961G and 961J of the Corporations Act: SOC at 3.3.1 to 3.3.3.
6. In the Graham Report, Mr Graham opines that the reasonable steps that a licensee should take to ensure effective compliance with ss 961B, 961G and 961J will depend upon the nature, scale and complexity of their business: Graham Report at [12].
7. Mr Graham contrasts Financial Circle’s procedures to those which, in his experience, reflect reasonable industry practice. He identifies reasonable practice as requiring at a minimum (Graham Report at [12]):
8. policies and procedures addressing ss 961B, 961G and 961J;
9. a definition of, and commitment to, best interests, client priority and appropriateness;
10. pre-vetting or peer-review and escalation;
11. regular and targeted risk-based monitoring and supervision of Advisers;
12. effective ongoing training;
13. effective record keeping;
14. training on identifying and managing conflicts of interest;
15. no-fault breach reporting; and
16. regular review of its measures, processes and procedures.
17. Mr Graham identifies serious deficiencies in Financial Circle’s compliance documents. He concluded that Financial Circle did not and does not comply with reasonable industry practice in respect of its obligations under s 961L of the Corporations Act: Graham Report at [44]. In his opinion, Financial Circle’s compliance arrangements were “fundamentally flawed” and appeared to be “designed to minimise regulatory risk rather than guide activities of the business”: Graham Report at [45].
18. Mr Graham’s conclusion persuasively supports ASIC’s submission that Financial Circle failed to take reasonable steps to ensure that its Advisers complied with financial services laws in contravention of ss 961L and 912A(1)(ca) of the Corporations Act.

#### Contravention of s 961B – “best interests”

1. Section 961B(1) of the Corporations Act provides that the individual advice provider must act in the best interests of the client in relation to the advice. This obligation relates to the conduct of the advice provider, not the advice ultimately given.
2. In the *NSG Liability Judgment* at [17], the court noted that the expression “the best interests of the client” was not defined and that s 961B(2) may be treated as providing a “safe harbour” for providers accused of breaching the best interests duty. The court held that if the provider can prove that he or she has done each of the things in that subparagraph, he or she will have satisfied the best interests duty.
3. As noted above, Mr Kerr reviewed 12 applicant files and concluded that, in every case, the Financial Circle Adviser did not act in the client’s best interests: Kerr Report at 2.98-2.99. Mr Kerr’s consideration of the safe harbour requirements also overwhelmingly supports this conclusion.

#### Contravention of s 961G – “appropriate advice”

1. Section 961G of the Corporations Act provides that a provider must only provide advice to the client if it would be reasonable to conclude that the advice is appropriate. This section concerns the content or substance of the advice given by an adviser: *NSG Liability Judgment* at [21].
2. Mr Kerr concluded that, in relation to each of the Schedule Applicants except Schedule Applicant 7, the Adviser failed to provide advice to the applicant that it would be reasonable to conclude was appropriate within the meaning of s 961G of the Corporations Act: Kerr Report at 2.167. The reasons for Mr Kerr’s conclusion are set out at paragraph [48] above.

#### Contravention of s 961J – “conflicts of interest”

1. Section 961J of the Corporations Act provides that if the provider knows or reasonably ought to know that there is a conflict between the interests of the client and the interests of the licensee, advice provider or an associate, the advice provider must give priority to the client’s interests when giving the advice.
2. Mr Kerr concluded that, in relation to each of the Schedule Applicants except Schedule Applicant 7, the Advisers failed to meet reasonable industry practice in respect of their obligations to give priority to the applicant’s interests when giving the advice, in circumstances where the Advisers knew, or reasonably ought to have known, that there was a conflict within the meaning of s 961J of the Corporations Act: Kerr Report at 2.179. The reasons for Mr Kerr’s conclusion are set out at paragraphs [50]-[51] above.

### Failing to ensure advice provided efficiently, honestly and fairly

#### Principles

1. Section 912A(1)(a) of the Corporations Act provides that a financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.
2. In *Australian Securities and Investments Commissions v Camelot Derivatives Pty Limited (in liquidation)* [2012] FCA 414 at [69], the Court accepted ASIC’s submissions in relation to the meaning of s 912A(1)(a) as follows:
3. the words “efficiently, honestly and fairly” must be read as a compendium describing a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 (**Story**) at 672;
4. the words “efficiently, honestly and fairly” connote a requirement of competence in providing advice and in complying with relevant statutory obligations: *Re Hres and Australian Securities and Investments Commission* [2008] AATA 707 at [237];
5. the word “efficient” refers to a person who performs his duties efficiently, meaning the person produces the desired effect, and is capable and competent: *Story* at 672. Inefficiency may be established by demonstrating that the performance of a licensee’s functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect: *Story* at 679;
6. it is not necessary to establish dishonesty in the criminal sense*: R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 (**Elrington**) at 110. The word “honestly” may comprehend conduct which is not criminal but which is morally wrong in the commercial sense: *Elrington* at 110; and
7. the word “honestly” when used in conjunction with the word “fairly” tends to give the flavour of a person who not only is not dishonest, but also is ethically sound: *Story* at 672.

#### Contraventions

1. ASIC submits that, by reason of each of the matters relied upon in support of the contraventions of ss 961L and 912A(1)(ca) of the Corporations Act, Financial Circle also contravened s 912A(1)(a) of the Corporations Act by failing to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly.

### Failing to comply with financial services laws

1. Section 912A(1)(c) of the Corporations Act provides that a financial services licensee must comply with the financial services laws.
2. The term “financial services laws” is defined at s 761A of the Corporations Act as including a provision of Chapter 7 and a provision of Division 2 of Part 2 of the ASIC Act:
3. sections 961L and 1041H are provisions of Chapter 7 of the Corporations Act; and
4. sections 12CB, 12DA, 12DB(1)(f) and 12DF are provisions of Division 2 of Part 2 of the ASIC Act.
5. ASIC submitted, and I agree, that Financial Circle contravened s 912A(1)(c) of the Corporations Act by reason of each of its contraventions of ss 961L and 1041H of the Corporations Act and ss 12CB, 12DA, 12DB(1)(f) and 12DF of the ASIC Act.

### Credit contravention – engaging in a credit activity without a licence

1. The National Credit Act was introduced to:

prescribe conduct of relevant participants where: ‘credit products in the market [have] made it much less straightforward for consumers to determine whether a product is suitable for their needs and [has] increased their dependence on intermediaries” and “[a]s a result there are considerable information asymmetries that justify regulatory intervention” [*Australian Securities and Investments Commission v Channic Pty Ltd & Ors (No 4)* [2016] FCA 1174 at [13] (Greenwood J, quoting from the Revised Explanatory Memorandum)]

1. Section 29 of the National Credit Act provides that a person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.
2. The licensing scheme aims to protect consumers by ensuring that only fit and proper persons are authorised to provide credit, and by imposing responsible lending obligations on holders of an Australian credit licence: see National Credit Act, chapters 2 and 3.
3. Financial Circle holds an Australian credit licence that authorises it to engage in credit activities other than as a credit provider; that is, other than as a person who provides credit: National Credit Act, s 5(1) “credit provider”; *National Credit Code*, s 204(1) “credit provider”.
4. Despite this, it is named as the “lender” on the loan contracts. There is no evidence that any other party, holding an appropriate licence, is providing the credit.
5. Financial Circle therefore contravened s 29 of the National Credit Act by engaging in a credit activity, namely entering into credit contracts as a provider of credit without a licence authorising it to do so.

## Relief

### Principles applicable to orders sought by agreement

1. Financial Circle has consented to orders being made against it. But the Court is not constrained by the parties’ agreements and remains obliged independently to exercise its discretion in determining whether the proposed orders are appropriate: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [149] (***CFMEU***).
2. In *Australian Securities and Investments Commission v Newcrest Mining Limited* [2014] FCA 698 at [9] Middleton J held that:

As is clear from the authorities, the Court *itself* must determine the appropriate penalty in all the circumstances. This is not a process of ‘approving’ a settlement reached between the regulator and defendant. It may be convenient for parties to inform the public that for their part they have agreed upon what they consider [to] be an appropriate outcome; but [it] is by no means a ‘settlement’ that is being placed before the Court for its ‘approval’.

(Emphasis in original.)

1. A degree of restraint when scrutinising a proposal is nonetheless to be exercised. In *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 Gordon J held at [70]-[72] and [75] that:

The applicable principles are well established. First, there is a well-recognised public interest in the settlement of cases under the Act: .... Second, the orders proposed by agreement of the parties must not be contrary to the public interest and at least consistent with it…

Third, when deciding whether to make orders that are consented to by the parties, the Court must be satisfied that it has the power to make the orders proposed and that the orders are appropriate … Parties cannot by consent confer power to make orders that the Court otherwise lacks the power to make…

Fourth, once the Court is satisfied that orders are within power and appropriate, it should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where both parties are legally represented and able to understand and evaluate the desirability of the settlement.

…

Where a declaration is sought with the consent of the parties, the Court’s discretion is not supplanted, but nor will the Court refuse to give effect to terms of settlement by refusing to make orders where they are within the Court’s jurisdiction and are otherwise unobjectionable…”

(Citations omitted.)

1. With those principles in mind, I turn to the specific relief sought.

### Declarations

1. ASIC seeks declarations in respect of each of Financial Circle’s contraventions. The declarations are sought pursuant to:
2. s 1317E of the Corporations Act in respect of the contraventions of s 961L of the Corporations Act;
3. s 166(1) of the National Credit Act in respect of the contraventions of s 29 of the National Credit Act; and
4. s 21 of the Federal Court of Australia Act 1976 (Cth) (the **Federal Court Act**) or s 1101B(1)(a) of the Corporations Act in respect of each of the other contraventions of the Corporations Act and ASIC Act.

### Mandatory declarations

1. Section 961L is a civil penalty provision: Corporations Act, s 1317E, Item 19. Section 1317E provides that if a Court is satisfied that a person has contravened a civil penalty provision, “it must make a declaration of contravention”. See generally *Australian Securities and Investments Commission v Warrenmang Ltd* [2007] FCA 973 (per Gordon J).
2. Section 29 of the National Credit Act is also a civil penalty provision. Similarly s 166(2) of that National Credit Act provides in respect of civil penalty provisions that the Court “must make the declaration if it is satisfied that the person has contravened the provision”. It is therefore mandatory for the Court to make a declaration of contravention of s 29 of the National Credit Act, if it is satisfied that there has been a contravention.

### Discretionary declarations

1. It is not mandatory for the Court to make the other declarations sought in the Originating Process. The Court has a wide discretionary power to make declarations under s 21 of the Federal Court Act (*Australian Securities and Investments Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 at [50]). Further, s 1101B(1)(a)(i) of the Corporations Act provides that the Court “may make such order, or orders, as it thinks fit if on the application of ASIC, it appears to the Court that a person has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services…”. This power may also be used to make declarations: *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [478].
2. Before making a declaration under either provision (*Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* [2014] FCA 1387 (***Monarch****)* at [62]-[64]) however, three requirements should be satisfied (*Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at [437]-[438]):
3. the question must be real and not a hypothetical or theoretical one;
4. the applicant must have a real interest in raising it; and
5. there must be a proper contradictor.
6. In relation to each of the contraventions, the three requirements are satisfied:
7. The proposed declarations relate to conduct that contravenes the Corporations Act, the ASIC Act and the National Credit Act, and the allegations have been identified and particularised by ASIC with precision. The proposed declarations contain a sufficient indication of how and why the relevant conduct is a contravention of legislation.
8. ASIC, as the regulator exercising a statutory function, has a real interest in obtaining the declarations. It is in the public interest for ASIC to seek to have the declarations made and for the declarations to be made.
9. Financial Circle is a proper contradictor because it has a true interest in the outcome of the matter. The fact that Financial Circle has admitted the allegations and consents to the relief sought does not mean there is no proper contradictor.
10. Other factors relevant to the exercise of the discretion include:
11. whether the declaration will have any utility: *Australian Securities and Investments Commission v Pegasus Leverages Options Group Pty Ltd* (2002) 41 ACSR 561; [2002] NSWSC 310 at 571;
12. whether the proceeding involves a matter of public interest: *Australian Securities and Investments Commission v Pegasus Leverages Options Group Pty Ltd* (2002) 41 ACSR 561; [2002] NSWSC 310 at 571; and
13. whether the circumstances call for the marking of the Court’s disapproval of the contravening conduct: *Monarch* at [63].
14. Each of the above factors also supports the granting of declarations:
15. The declarations will have utility because they:
    1. will spell out precisely how Financial Circle contravened the financial services laws;
    2. may assist in clarifying the law: *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* (2012) 213 FCR 380 at [272]; and
    3. will serve to warn others of the danger of engaging in, or being involved in, similar contraventions: *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [1999] FCA 313 at [21].
16. The proceeding involves a matter of public interest as it relates to contraventions of the Corporations Act, the ASIC Act and the National Credit Act, which are concerned primarily with the protection of the public interest in the prevention of particular conduct: *Monarch* at [99].
17. The circumstances of the case call for the marking of the Court’s disapproval of the contravening conduct, as Financial Circle deliberately set out to take unfair advantage of financially vulnerable members of the public for its own gain.

### Injunctions

1. ASIC seeks permanent injunctions against Financial Circle restraining it from:
2. carrying on, among other things, a financial services business and providing financial product advice (**financial services injunction**); and
3. providing credit, or otherwise entering into a credit contract as a credit provider (**credit injunction**).
4. The form of the credit injunction sought (referred to in the preceding paragraph) differs from that agreed with Financial Circle. The agreed form provided that Financial Circle be restrained from providing credit or otherwise entering into a credit contract as a provider of credit unless and until it holds an Australian credit licence which authorises that credit activity. ASIC submits, and I agree, that the agreed form of the injunction is not appropriate because it only mandates compliance with the law.

#### Principles

1. The financial services injunction is sought pursuant to ss 1324(1) and 1101B(1)(a) of the Corporations Act and s 12GD(1) of the ASIC Act. Section 1324(1) of the Corporations Act and s 12GD(1) of the ASIC Act provide that the Court may grant an injunction against a person where the person has engaged in a contravention. Section 1101B(1)(a)(i) provides that the Court may make such order as it thinks fit on the application of ASIC if it appears to the Court that a person has contravened a provision of Chapter 7 of the Corporations Act or any other law relating to dealing in financial products or providing financial services. Section 1101B(4) expressly provides that the power in s 1101B(1)(a) extends to making injunctions of the kind sought in this case.
2. The credit injunction is sought pursuant to s 177(1) of the National Credit Act which is substantially in the same terms as s 1324(1) of the Corporations Act and s 12GD(1) of the ASIC Act.
3. In *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (No 2)* [2015] FCA 527 at [23], the Court identified that financial services injunctions are designed to protect the public, have a denunciatory and deterrent purpose, but are not punitive in nature.
4. In *Monarch*, Gordon J held at [98]-[99]:

In considering whether, and if so, for what period, financial services disqualification orders are to be made, it is appropriate and permissible to have regard to the factors [relevant to disqualification from managing corporations] summarised in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483 at [56], which operate as guidelines for consideration of the circumstances of a particular case: see also *Re Idylic Solutions* at [92]-[106] (and [54]-[56]).

As the Corporations Act is concerned primarily with the protection of the public interest in the prevention of particular conduct, considerations of public policy are relevant in the exercise of the discretion to grant an injunction under s 1324: *Re Idylic Solutions* at [69].

1. In *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 at [56] (***Adler***), the Court identified the following propositions (omitting citations):

Factors that have led to the imposition of the longest periods of disqualification (that is, disqualifications of 25 years or more) include:

* large financial losses;
* high propensity that the defendant may engage in similar activities or conduct;
* activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy;
* the defendant’s lack of contrition or remorse;
* disregard for the law and compliance with corporate regulations;
* dishonesty and intent to defraud; and
* previous convictions and contraventions for similar activities.

In cases in which the period of disqualification ranged from 7 years to 12 years, the factors that led to the conclusion that these cases were serious though not the ‘worst cases’, included:

* serious incompetence and irresponsibility;
* substantial loss;
* the fact that the defendant has engaged in deliberate courses of conduct to enrich himself or herself at others’ expense, but with lesser degrees of dishonesty;
* continued, knowing and wilful contraventions of the law and disregard for legal obligations; and
* lack of contrition or acceptance of responsibility, although that must be weighed against the prospect that the defendant may reform.

The factors leading to the shortest disqualification (that is, disqualifications for up to 3 years) were:

* although the defendant had personally gained from the conduct, he or she had endeavoured to repay or partially repay the amounts misappropriated;
* the defendant had no immediate or discernible future intention to hold a position as manager of a company; and
* the defendant had expressed remorse and contrition, acted on advice of professionals and had not contested the proceeding against him or her.

1. While the above cases relate expressly to granting financial services injunctions pursuant to s 1324(1) of the Corporations Act, ASIC submits, and I agree, that the same considerations apply to the granting of financial services injunctions pursuant to s 12GD(1) of the ASIC Act and credit injunctions pursuant to s 177(1) of the National Credit Act because:
2. the language of both s 12GD(1) of the ASIC Act and s 177(1) of the National Credit Act are substantially similar to s 1324(1) of the Corporations Act; and
3. like the Corporations Act, the ASIC Act and National Credit Act are concerned with the protection of the public.

#### Application of principles

1. ASIC submitted, and I agree, that the following factors support Financial Circle being disqualified permanently.
2. First, Financial Circle’s contraventions are a particularly egregious example of the kind of conduct that the statutory provisions are designed not merely to prevent, but to dissuade and sanction in the strongest terms. That is, Financial Circle:
3. marketed its personal lending business to members of the public who had bad credit histories, low levels of financial literacy and who were in a weak bargaining position compared with it;
4. made misleading representations to the public relating to the nature and cost of the services that it offered, including failing to disclose that, in order to obtain a personal loan, an applicant was required to engage a Financial Circle Adviser to provide financial advice and implement that advice;
5. having ensnared clients, gave them substantially pre-determined advice to switch their superannuation provider and purchase or replace their insurance;
6. engaged in the above conduct to claim advice fees and commissions from insurance providers; and
7. caused applicants immediate and long-term financial detriment, via reductions to their personal superannuation funds.
8. Secondly, Financial Circle knew or ought reasonably to have known that its conduct was not compliant with financial services laws, thus indicating a disregard for the law and its obligations to comply with corporate regulations, as:
9. Financial Circle’s business was substantially the same as the cash rebate scheme that had been operated by WRM and associated entities;
10. the Federal Court had imposed an interlocutory injunction against WRM and associated entities preventing them from operating the cash rebate scheme on the basis that there was an appreciable risk of contraventions of financial services laws; and
11. many of the senior personnel that managed or worked for Financial Circle had previously managed or worked for WRM and associated entities.
12. Thirdly, there is a reasonably high likelihood that Financial Circle will engage in similar conduct if not prevented by the Court from doing so. This is evident from the fact that, for the reasons set out in the preceding paragraph, Financial Circle engaged in the contravening conduct in circumstances where it knew or ought reasonably to have known that it was not compliant with financial services laws. Further, it appears that Financial Circle’s management ignored the Court’s concerns about the WRM business model as articulated in the judgment delivered at the time interlocutory injunctions were ordered against WRM and its associated entities, and set up a similar business regardless.
13. Fourthly, Financial Circle’s conduct has occurred in the financial services field, in which there is potential to do great financial damage to persons engaging its services.
14. Fifthly, Financial Circle’s clients have suffered immediate and long-term financial detriment via reductions to their personal superannuation funds. Mr Kerr’s review of 12 clients serviced by Financial Circle discloses that:
15. upon implementation of the advice, the clients’ superannuation balances were immediately reduced by between 5% to 30%, and by between $5,000 and $10,000; and
16. in five years’ time, the applicants’ superannuation balances were likely to reduce by an average of $11,550 due to implementation of the advice.
17. Sixthly, Financial Circle is not of good character. Its loan offering is not only non-compliant with financial services laws, but Financial Circle knew or ought reasonably to have known that it was non-compliant. In addition, Financial Circle’s business model involves targeting and exploiting financially disadvantaged people in circumstances where its senior management knew or ought to have known of the injunction issued against WRM for very similar conduct.
18. Seventhly, it is likely that harm will be caused to the public if Financial Circle is not prohibited from providing financial services because of the matters set out in the preceding paragraph and because Financial Circle, in its four months of operation, had already serviced 51 clients. Given that Financial Circle had only just started operating, we can infer that the number of clients serviced each month would only increase with time.

### Pecuniary penalties

1. The court may impose a pecuniary penalty in addition to a period of disqualification: *Australian Securities and Investments Commission v Vines* (2006) 58 ACSR 298; [2006] NSWSC 760 (***Vines****)* at [51].
2. The principal purpose of a pecuniary penalty is to act as a personal and general deterrent (*Adler* at [125]-[126]), and the penalty should be no greater than is necessary to achieve that objective (*Australian Securities Commission v Donovan* (1998) 28 ACSR 583). Unlike disqualification orders, a pecuniary penalty has a punitive character (*Adler* at [126]). The penalty should be fixed with a view to ensuring that the amount is not such as to be regarded by the offender or others as an acceptable cost of doing business:

… those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention. [*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249;[2012] FCAFC 20 (***Optus***) at [63]].

1. The size of the penalty is a matter of discretion (*Adler* at [126]) and the process of fixing the quantum is not an exact science (*Australian Securities and Investments Commission v GE Capital Finance Australia* [2014] FCA 701 (***GE Capital***) at [75]). All of the circumstances must be weighed and the approach which should be adopted is one of “instinctive synthesis” (*GE Capital* at [75]). Attention should be paid to the maximum penalty fixed by the statute, so as to compare the worst possible case with the one before the court (*GE Capital* at [75]).
2. Factors for consideration in determining an appropriate penalty are (*Adler* at [126]):
3. the seriousness of the conduct;
4. whether the conduct was dishonest;
5. whether further contraventions are likely;
6. the character of the defendant;
7. whether the defendant intended to deprive persons of funds;
8. the quantum of any losses;
9. whether the defendant has shown remorse;
10. the defendant’s conduct in the proceedings;
11. the capacity of the defendant to pay;
12. whether the penalty will prejudice the rehabilitation of the defendant; and
13. whether a disqualification order has been made that has significant consequences.
14. Further factors for consideration include (*Trade Practices Commission v CSR Limited* [1990] FCA 521 at [42] per French J:
15. the size of the contravening company;
16. the deliberateness of the contravention and the period over which it extended;
17. whether the contravention arose out of the conduct of senior management or at some lower level;
18. whether the contravener has a corporate culture conducive to compliance as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention;
19. whether the contravenor has shown a disposition to co-operate with the authorities responsible for the enforcement of the legislation in relation to the contravention;
20. whether the contravenor has engaged in similar conduct in the past;
21. the financial position of the contravenor; and
22. whether the contravening conduct was systemic, deliberate or covert.
23. The assessment of an appropriate penalty is a discretionary judgment for the court, to be based on all relevant factors, and the objective is always to determine a penalty that matches the seriousness of the conduct.
24. The Court must also take into account the totality principle, which requires that the aggregate be just and appropriate.

### Penalty amount sought

1. By agreement, ASIC and Financial Circle seek orders that Financial Circle pay civil penalties to the Commonwealth of Australia in the total amount of $8,980,000 comprising:
2. $2,100,000 for misleading or deceptive conduct directed to the public;
3. $1,680,000 for unconscionable conduct directed to the public;
4. $2,100,000 for misleading or deceptive conduct directed to applicants;
5. $1,680,000 for unconscionable conduct directed to applicants;
6. $1,000,000 for failing to take reasonable steps to ensure compliance with financial services laws; and
7. $420,000 for engaging in a credit activity without a licence.
8. ASIC submits that the penalties proposed are appropriate in light of the maximum penalties available for a single contravention and the number of contraventions engaged in by Financial Circle. ASIC does not propose that a separate penalty be fixed for each contravention established, but instead proposes that a single penalty be ordered for each separate course of conduct, and submits that the evidence of the very numerous actual contraventions indicates that the proposed penalties are appropriate: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330 at [18].
9. The table below sets out, for each of the contraventions in respect of which ASIC seeks a pecuniary penalty, the maximum penalty available for a single contravention, the maximum potential number of contraventions and the proposed penalty amount. The basis for each figure included in the table is explained below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Maximum penalty | Number of contraventions |  | Proposed penalty |
| 1 | Misleading or deceptive conduct directed to the public | | | |
|  | $2,100,000 (s 12DF ASIC Act)  $420,000 (s 160D National Credit Act) | ~25,000 |  | $2,100,000 |
| 2 | Unconscionable conduct directed to members of the public | | | |
|  | $2,100,000 (s 12CB ASIC Act) | ~25,000 |  | $1,680,000 |
| 3 | Misleading or deceptive conduct directed to applicants | | | |
|  | $2,100,000 (ss 12DF, 12DB(1)(h) ASIC Act)  $420,000 (s 160D National Credit Act) | 89 |  | $2,100,000 |
| 4 | Unconscionable conduct directed to applicants | | | |
|  | $2,100,000 (s 12CB ASIC Act) | 89 |  | $1,680,000 |
| 5 | Failure to take reasonable steps to ensure compliance with financial services law | | | |
|  | $1,000,000 (s 961L Corporations Act) | 144 |  | $1,000,000 |
| 6 | Engaging in a credit activity without a licence authorising it to engage in a credit activity | | | |
|  | $420,000 (s 29(1) National Credit Act) | 51 |  | $420,000 |
|  | TOTAL | | | $8,980,000 |

### Maximum penalties

1. The maximum penalty for a contravention by a corporation of s 961L of the Corporations Act is $1,000,000.
2. The maximum penalty for a contravention by a corporation of ss 12CB, 12DB(1)(h) and 12DF of the ASIC Act is $2,100,000 as:
3. the maximum penalty that the Court can order in respect of each act or omission is 10,000 penalty units for a body corporate; and
4. for the period September 2017 to 22 December 2017, being the period in which the contraventions occurred, the Commonwealth penalty unit amount was $210.
5. The maximum penalty for contraventions of ss 29(1) and 160D(1) of the National Credit Act is $420,000 as:
6. the maximum penalty that the Court can order is 2,000 penalty units; and
7. for the period September 2017 to 22 December 2017, being the period in which the contraventions occurred, the Commonwealth penalty unit amount was $210.

### Factors

1. ASIC submitted, and I agree, that the following factors support the imposition of significant pecuniary penalties.
2. First, the contraventions are very serious in nature.
3. Secondly, Financial Circle knew or ought reasonably to have known that its conduct was not compliant with financial services laws, thus indicating a disregard for the law and its obligations to comply with corporate regulations.
4. Thirdly, there is a reasonably high likelihood that Financial Circle would engage in similar conduct if not prevented by the Court from doing so.
5. Fourthly, Financial Circle had already generated substantial revenue of around $412,284:
6. in its period of operation it serviced 51 clients; and
7. it received on average $8,084 per client by way of an advice fee and upfront commissions.
8. Fifthly, Financial Circle’s conduct has occurred in the financial services field in which there is potential to do great financial damage to persons engaging its services.
9. Sixthly, Financial Circle’s clients have suffered immediate and long-term financial detriment via reductions to their personal superannuation funds.
10. Seventhly, Financial Circle is not of good character.
11. Eighthly, the contraventions arose out of deliberate strategies formulated at the highest level of management. After the injunction was granted against WRM and associated entities, individuals associated with WRM discussed the further development of the cash rebate scheme into the model offered by Financial Circle – the only significant difference being that loans were offered instead of cash rebates.
12. Ninthly, Financial Circle has a systemic culture of non-compliance. This is apparent from the nature of its offering and from the wholly deficient processes, policies and training available to staff to ensure compliance with financial services law.
13. There are also moderating factors that ASIC submitted, as follows:
14. Firstly, Financial Circle only operated for 4 months before it ceased operations when the Federal Court issued its injunction (however, this occurred due to ASIC’s intervention and there is no evidence to suggest that it would otherwise have ceased operating).
15. Secondly, Financial Circle has admitted the allegations made against it and agreed to a penalty.
16. Thirdly, it is not clear whether Financial Circle has the capacity to pay.
17. Fourthly, assuming that permanent injunctions are obtained, the pecuniary penalty should be reduced in light of the totality principle which requires that the aggregate penalty, (that is, including both any injunctions and pecuniary penalties) is just and appropriate: *Vines* at [52].

### Number of contraventions

1. The Corporations Act provisions contemplate a penalty for “contravening” a penalty provision: Corporations Act, s 1317G(1E). The National Credit Act also contemplates a penalty for contravening a penalty provision: National Credit Act, s 167. The ASIC Act provisions contemplate a penalty “in respect of each act or omission” that constitutes a contravention: ASIC Act, s 12GBA.
2. While the language in the ASIC Act is most explicit, the Corporations Act and the National Credit Act also authorise separate penalties for each act or omission constituting a contravention of a relevant provision. They require the same exercise of assessing whether the circumstances of the case in fact disclose one or several contraventions.
3. A number of principles can be discerned from the authorities to guide the assessment as to whether ongoing conduct affecting multiple customers ought be regarded as one contravention or multiple contraventions for the purpose of determining an appropriate penalty:
4. it is important to ensure that a respondent is not sanctioned more than once for what is, in substance, one episode of contravention: *Optus* at [53];
5. it is appropriate to consider whether, and the extent to which, the contravening conduct should be regarded as a single course of conduct and penalised as one offence in relation to each category of contravention, on the principle that a contravener should not be penalised more than once for the same conduct: *Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liq) (No 2)* [2015] FCA 93 (***The Cash Store***) at [21].
6. where there is an interrelationship between the legal and factual elements of a contravention, the “course of conduct” principle can be applied to group contraventions together to ensure that a person is not “doubly punished”, however it represents a “tool of analysis” only which a court is not necessarily compelled to use: *Australian Securities and Investments Commission v Channic Pty Ltd (No 5)* [2017] FCA 363 at [81];
7. a single strategy implemented via different media, or that went through different episodes or iterations, is more likely to comprise different contraventions: *Optus* at [54];
8. where there have been discrete episodes each involving deliberation then there is more likely to be a separate contravention in each episode, even if they reflected a common theme, strategy or model;
9. even a single strategy involving a single (or substantially consistent) form of conduct might give rise to numerous contraventions where the conduct is directed toward and received by numerous recipients: *Optus* at [54];
10. even where there are different strategies or courses of conduct, or instances of impact on consumers, the overall penalty must still be gauged against the Court’s assessment of the seriousness of the conduct – the “totality principle”; and
11. it is inappropriate and impermissible to treat multiple contraventions (including a course of conduct) as just one contravention for the purpose of determining the maximum monetary limit dictated by the relevant legislation: *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73 at [227].
12. In relation to misleading or deceptive conduct claims, consistent with the reasoning by the Full Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 at [141] and [157], a separate contravention occurs each time a misleading representation is made. Therefore, each time the relevant pages of the website were viewed, a contravention occurred.
13. In relation to Financial Circle’s misleading or deceptive conduct directed to the public, there is a separate contravention each time a person accesses Financial Circle’s website: *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 at [181] per Edelmen J. While it is not possible to establish the precise number of contraventions that occurred, there is evidence that in a one-week period, the website was visited 1,543 times. Assuming that to have been an average number of visitors for the four months the website was live, then by extrapolating that figure, there were arguably over 25,000 visitors to the website, and therefore that many contraventions. It would follow that there is, for practical purposes, no maximum penalty.
14. In relation to Financial Circle’s misleading or deceptive conduct directed to actual loan applicants, there is a separate contravention on each occasion a representation was made to an applicant, without reasonable grounds, that:
15. it was in their interests to obtain financial advice; and
16. it was in their interests to switch superannuation funds and to purchase new or replace their existing insurance.
17. In the Kerr Report, Mr Kerr opines that, in 10 out of the 12 client files reviewed, it was not evident that the applicant required superannuation or insurance advice. ASIC submits that, from this, it can be inferred first that Financial Circle represented to those applicants that it was in their interests to obtain financial advice on superannuation or insurance, and second that it did not have reasonable grounds to do so.
18. Mr Kerr also opines that it was not reasonable to conclude that the advice was appropriate to the client in 11 out of the 12 files reviewed. Again, therefore, it can be inferred from the fact that the advice was provided, that Financial Circle represented to the Applicant that the advice was appropriate. Given Mr Kerr’s conclusions, in these 11 instances, the representation was misleading because the advice was not in fact appropriate.
19. ASIC submits, and I agree, that there are therefore at least 21 contraventions of the misleading or deceptive conduct provisions in respect of actual applicants.
20. Further, ASIC submits that since the sample of 12 clients assessed by Mr Kerr was randomly selected, the Court should infer that the sample is representative of all 51 clients serviced by Financial Circle. The figures can therefore be extrapolated across the whole applicant cohort with the result that there are around 89 contraventions. ASIC does not seek declarations from the Court of 89 contraventions, but refers to the number of potential contraventions to demonstrate the seriousness of Financial Circle’s conduct: see *The Cash Store* at [10].
21. As Financial Circle’s unconscionable conduct directed to actual loan applicants relies upon the same representations made to applicants, in ASIC’s submission the same number of contraventions and courses of conduct arise.
22. In relation to s 961L of the Corporations Act, a separate contravention arises on each occasion that an Adviser, in respect of each client, contravenes ss 961B, 961G and 961J in circumstances where Financial Circle failed to take reasonable steps to ensure its Advisors compliance with those provisions: *Australian Securities and Investments Commission v Golden Financial Group Pty Ltd (No 2)* [2017] FCA 1267 (***NSG Penalty Judgment***).
23. In the present case, the evidence discloses that, of the 12 client files reviewed by Mr Kerr in all cases the Adviser failed to comply with s 961B(1) and in 11 out of 12 cases the Adviser failed to comply with ss 961G and 961J. There are, therefore, at least 34 contraventions of s 961L by Financial Circle.
24. Again, ASIC submits, and I agree, that the Court should infer that the sample of 12 client files is representative of the whole. The figures can therefore be extrapolated across the whole applicant cohort, with the result that there is a total of 144 contraventions.
25. Financial Circle contravened s 29 of the National Credit Act by engaging in a credit activity as a provider of credit on 51 occasions, that is, each time it entered into a loan contract with an applicant.

### Application of course of conduct principle

1. Given the overlapping nature of the conduct in respect of each of the different groups of contraventions by Financial Circle, and the large number of contraventions, ASIC submits, and I agree, that in this case, for the purpose of determining penalties, it is appropriate to apply the course of conduct principle. This principle is particularly applicable in this case given the nature of the business model, specifically Financial Circle’s process-driven engagement with each client and the formulaic financial advice provided to applicants in every instance.
2. Accordingly, ASIC submits that each of the six categories listed at the table above represents a separate course of conduct, and that the Court should apply this principle in determining the appropriate penalties payable.

### Fixing penalties for multiple contraventions

1. The starting point in determining appropriate civil penalties is that a penalty should be ordered in respect of each established contravention (*CFMEU* at [128]-[129]) unless the relevant legislation provides otherwise (*CFMEU* at [122]). In *CFMEU*, however, the Full Court held at [149] that in appropriate cases the Court may impose a single penalty for multiple contraventions where that course is agreed or accepted as being appropriate by the parties. Their Honours went to say:

… It may be appropriate for the Court to impose a single penalty in such circumstances, **for example**, where the pleadings and facts reveal that the contraventions arose from a course of conduct and the precise number of contraventions cannot be ascertained, or the number of contraventions is so large that the fixing of separate penalties is not feasible, or there are a large number of relatively minor related contraventions that are most sensibly considered compendiously.

(Emphasis added.)

1. While noting that the Full Court did not provide an exhaustive list of the circumstances in which it is appropriate to impose a single penalty for multiple contraventions, ASIC submits, and I agree, that the imposition of single penalties for each of the courses of conduct identified above is appropriate in this case because:
2. there is agreement between the parties as to penalties to be imposed;
3. in respect of the conduct directed to the public, it is not possible to ascertain with the precision the number of contraventions; and
4. in respect of the remaining contraventions, while the contraventions are not “minor” in nature and their number is ascertainable albeit numerous, within each course of conduct the conduct is interrelated and, for that reason, the contraventions are sensibly considered together.

### Analogous cases

1. The penalty imposed in other cases, especially under other legislative schemes, can only be of limited analogical value, and must even then be treated with caution: *Optus* at [60] (per Keane CJ, Finn and Gilmour JJ).
2. ASIC submits, however, that the WRM Proceeding has significant analogical value because the cash rebate scheme offered by WRM is in many respects similar to Financial Circle’s loan offering. In the WRM Proceeding the defendants together were ordered to pay total penalties of $7,800,000. The separate penalties making up that total are explained below.
3. In the WRM Proceeding, the first defendant was ordered to pay a pecuniary penalty in respect of its contraventions of s 961L of the Corporations Act in the amount of $1,000,000. The same penalty is sought here for Financial Circle.
4. In the WRM Proceeding, the second defendant was ordered to pay a pecuniary penalty in the amount of $750,000, in respect of its misleading or deceptive representation that it was affiliated with Outsource Financial in contravention of s 12DB(1)(f) of the ASIC. In the present case, ASIC submits, and I agree, that a higher penalty than ordered in the WRM Proceeding is justified because:
5. in the WRM Proceeding, the allegation of misleading or deceptive conduct entitling ASIC to a pecuniary penalty was quite discrete (namely that WRM was affiliated with Outsource Financial). In the present case, the allegations of misleading or deceptive conduct are at the heart of Financial Circle’s business model and non-compliant conduct; and
6. in the WRM Proceeding, only one allegation of misleading or deceptive conduct entitled ASIC to a pecuniary penalty pursuant to s 12DB(1)(f) of the ASIC Act. In the present case, each contravention of s 12DF of the ASIC Act entitles ASIC to a pecuniary penalty.
7. The first to third defendants in the WRM Proceeding were ordered to pay a pecuniary penalty in respect of their contraventions of s 12CB of the ASIC Act in the amount of $1,800,000 each. In the present case, ASIC seeks that Financial Circle pay a lesser amount on the bases that:
8. in the WRM Proceeding, penalties were sought against each of the first, second and third defendants, not just against one entity;
9. in the WRM Proceeding, one allegation of unconscionable conduct was made against each of the first to third defendants, whereas in this case, two allegations of unconscionable conduct are made (one in respect of conduct directed to the public and the other in respect of conduct directed to applicants); and
10. in this case, the unconscionable conduct contraventions rely in part upon the misleading or deceptive conduct contraventions, and a lower penalty is proposed to take account of that overlap.
11. In *NSG Penalty Judgment*, the Court ordered that NSG pay pecuniary penalties in the amount of $750,000 in respect of 16 contraventions of s 961L of the Corporations Act (as proposed by the parties). The contraventions were related and arose from certain deficiencies in NSG’s practices and policies: *NSG Penalty Judgment* at [24].
12. The contraventions in the present case are substantially worse than in NSG and warrant the imposition of higher penalties for the following reasons:
13. NSG’s contraventions arose from a poor advice process and inadequate policies and systems. In the present case, the contraventions arise from a scheme that was inherently flawed, as it relied upon Advisers giving generic, untailored advice to applicants, in order to generate profit.
14. The training provided by Financial Circle was seriously inferior to that provided by NSG. In the *NSG Liability Judgment*, the Court concluded that NSG:
    1. provided a considerable amount of training to its representatives; and
    2. conducted three training sessions on the implementation of the FOFA reforms: *NSG Liability Judgment* at [49].

In the present case, among other things, Financial Circle’s:

* 1. compliance manual was a template document that was poorly customised to Financial Circle’s business;
  2. conflicts register did not adequately identify conflicts, address the impact of conflicts or give adequate guidance on how conflicts should be managed;
  3. complaints and incidents registers recorded only basic data and did not facilitate Financial Circle identifying, remediating or reporting on the underlying causes of the complaints they received or the incidents that occurred; and
  4. training plans disclosed that no formal or substantial training was provided on complying with financial services laws.

1. NSG’s senior management was substantially impaired during the critical 12 months leading up to the compulsory implementation of the FOFA reforms as its sole director and shareholder suffered a traumatic personal tragedy at around that time: *NSG Penalty Judgment* at [31]. There are no such mitigating factors here.
2. In *The Cash Store* at [29], the Court imposed on The Cash Store the maximum penalty available for a single contravention for engaging in unconscionable conduct in contravention of s 12CB of the ASIC Act. The Court held that The Cash Store had acted unconscionably by selling consumer credit insurance to more than two thirds of its payday loan customers despite the fact that those customers were unlikely ever to receive a benefit from the insurance, which fact the Court concluded must have been known to The Cash Store (*The Cash Store* at [29]).
3. Similarly, in the present case, the contraventions arise from a scheme that depends upon Advisers recommending and implementing changes to an applicant’s superannuation and insurance arrangements that are typically inappropriate and typically disadvantage the applicant.
4. In *Australian Securities and Investments Commission v Superannuation Warehouse Australia Pty Ltd* [2015] FCA 1167 (***SWA***), the Court imposed a penalty of $25,000 against Superannuation Warehouse Australia (SWA) for representing, in contravention of s 12DB of the ASIC Act, that it would set up a self-managed superannuation fund at no cost, in circumstances where it charged a fee. The Court imposed a penalty at the lower end of the scale for reasons including that:
5. information concerning the cost of setup with a corporate trustee was available to the SWA clientele, but not in a clear and prominent manner: *SWA* at [76].;
6. the sole director and shareholder of SWA did not intend to mislead prospective clients: *SWA* at [79];
7. the Court was not satisfied that any person suffered or was likely to have suffered significant loss or damage arising from the contravening conduct: *SWA* at [85];
8. SWA was a small company: *SWA* at [87];
9. SWA’s sole director and shareholder was remorseful for the contraventions: *SWA* at [103];
10. the penalty was close to the maximum that SWA had the capacity to pay: *SWA* at [109];
11. the conduct was unlikely to be repeated: *SWA* at [109]; and
12. SWA had agreed to a compliance plan: *SWA* at [109].
13. The present case is at the opposite end of the spectrum: the misleading or deceptive conduct was intended to target financially vulnerable persons, Financial Circle’s conduct did not comply with financial services law, its clients suffered immediate and long-term financial detriment via reductions to their personal superannuation funds, and Financial Circle knew or should have known of each of these elements.

### Totality principle

1. Financial Circle’s unconscionable conduct directed to the public relies in part upon its misleading or deceptive conduct directed to the public. Similarly, Financial Circle’s unconscionable conduct directed to the applicants also relies in part upon its misleading or deceptive conduct directed to applicants. To take account of this overlap, ASIC has proposed a lower penalty for the unconscionable conduct allegations.
2. Finally, as stated above, ASIC does not propose that a separate penalty be fixed for each contravention established. Rather, ASIC seeks that one penalty be imposed for each course of conduct. The evidence of the very numerous actual contraventions and the egregious nature of Financial Circle’s conduct support the submission that the proposed penalties are appropriate.
3. Accordingly, I made the orders sought.

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| --- |
| I certify that the preceding two hundred and thirty-six (236) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan. |

Associate:

Dated: 2 November 2018