FEDERAL COURT OF AUSTRALIA

Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2) [2020] FCA 69

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| File number: |  |
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| Judge: | **LEE J** |
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| Date of judgment: | 5 February 2020 |
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| Catchwords: | **CORPORATIONS** – financial advice – “best interests obligations” – ss 961B, 961G and 961J of the *Corporations Act 2001* (Cth) where six representatives of defendant licensee breached ss 961B, 961G and 961J (part of the best interests obligations) by providing advice to 40 clients to generate higher commissions (“churning”) – where some contravening conduct by representatives belatedly admitted by defendant licensee**CORPORATIONS** – financial advice – obligation of financial services licensee under s 961L of *Corporations Act 2001* (Cth) to take reasonable steps to ensure that its representatives comply with ss 961B, 961G and 961J – whether defendant licensee committed two, six, 18 or 120 contraventions of s 961L**PRACTICE AND PROCEDURE** – pleadings – procedural fairness – whether it is open to Court to find number of contraventions not contended for until time of hearing**PRACTICE AND PROCEDURE** – declarations – sufficient utility – where declarations of contraventions of s 912A(1) will not form basis for pecuniary penalties – whether there is a public interest in declaring that a person who has engaged in certain conduct has contravened the law – importance of the Court’s reasons in indicating Court’s disapprobation**PRACTICE AND PROCEDURE** – contravening companies selecting large accounting firms to conduct remediation programmes – presentation of *fait accompli* to Court – dangers of subconscious partisanship and selection bias |
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| Legislation: | *Corporations Act 2001* (Cth) ss 912A, 912D, 961B, 961G, 961H, 961J, 961L, 1101B, 1317G, 1317E*Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth)*Evidence Act 1995* (Cth) s 140*Federal Court of Australia Act 1976* (Cth) s 21  |
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| Cases cited: | *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201*Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564*Athens v Randwick City Council* [2005] NSWCA 317;(2005) 64 NSWLR 58*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68*Australian Competition and Consumer Commission v ACM Group Limited (No 3)* [2018] FCA 2059*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540*Australian Competition & Consumer Commission v Francis* [2004] FCA 487; (2004) 142 FCR 1*Australian Competition and Consumer Commission v Goldy Motors Pty Ltd* [2000] FCA 1885*Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd (No 2)* [2018] FCA 112*Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44*Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* [2012] FCA 43; (2012) 213 FCR 380*Australian Securities and Investments Commission v* *Cassimatis* (No 8) [2016] FCA 1023*Australian Securities and Investments Commission* *v Dover Financial Advisers Pty Ltd* [2019] FCA 1932*Australian Securities and Investments Commission v Financial Circle* [2018] FCA 1644; (2018) 131 ACSR 484*Australian Securities and Investments Commission v Golden Financial Group Pty Ltd (No 2)* [2017] FCA 1267*Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345*Australian Securities and Investments Commission* v *Maxwell* [2006] NSWSC 1052*Australian Securities and Investments Commission v McDougall* [2006] FCA 427; (2006) 229 ALR 158*Australian Securities and Investments Commission v NSG* *Services Pty Ltd* [2017] FCA 345; (2017) 122 ACSR 47*Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd (No 2)* [2018] FCA 59; (2018) 124 ACSR 351*Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; (2018) 131 ACSR 585*Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147*Australian Securities and Investments Commission* *v Westpac Securities Administration Limited* [2019] FCAFC 187*Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279*Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138*Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482*Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39*Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited (No 3)* [2018] FCA 1395*CSR Ltd v Eddy* [2005] HCA 64; (2005) 226 CLR 1*Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658*Director of Public Prosecutions v Merriman* [1973] AC 584*Gjergja & Atco Controls Pty Ltd v Cooper* [1987] VR 167*Ibeneweka v Egbuna* [1964] 1 WLR 219*Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Limited* [2006] VSC 112; (2006) 15 VR 87*Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285*Panganiban and Australian Securities and Investments Commission* [2017] AATA 1026*Precision Plastics Pty Limited v Demir* [1975] HCA 27; (1975) 132 CLR 362*R v Industrial Appeals Court; Ex parte Barelli’s Bakeries Pty Ltd* [1965] VR 615*Vines v Australian Securities and Investments Commission* [2007] NSWCA 75; (2007) 73 NSWLR 45Revised explanatory memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (Cth)Victorian Law Reform Commission, Civil Justice Review: Report, 2008   |
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| Date of hearing: | 19, 20 June, 26 July, 1 October 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
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| Category: | Catchwords |
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| Counsel for the Defendant: | Ms E A Collins SC with Mr I J M Ahmed & Ms K N Pham |
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| Solicitor for the Defendant  | Clayton Utz |

ORDERS

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|  | NSD 1124 of 2018 |
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| BETWEEN: | AUSTRALIAN SECURITIES & INVESTMENTS COMMISSIONPlaintiff |
| AND: | AMP FINANCIAL PLANNING PTY LTDDefendant |

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| JUDGE: | LEE J |
| DATE OF ORDER: | 5 FEBRUARY 2020 |

THE COURT ORDERS THAT:

1. On or by 12 February 2020, the parties provide to the Court an agreed minute of order reflecting these reasons for judgment or, in the absence of agreement, competing minutes of order identifying the orders for which the parties contend.

2. In the event orders cannot be agreed, the proceeding is to be listed on a date to be notified by the Associate to Justice Lee for the purposes of the Court receiving the submissions of the parties as to the competing orders.

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

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# A PRELIMINARY OBSERVATIONS: A FAILURE OF COMPLIANCE

1 During the course of oral submissions, the defendant, AMP Financial Planning Pty Ltd (**AMPFP**), contended that there was insufficient evidence for the Court to find that there was a deficient “culture of compliance” within AMPFP at material times. Despite this submission, AMPFP was chary in contending “positively” that an adequate compliance culture existed. For reasons that will become obvious, AMPFP was right to be hesitant.

2 A “culture of compliance” is an amorphous concept. But whatever it actually means, it must transcend simply putting in place expensive “systems”; or it must be more than persons, whose titles include terms such as “governance” and “compliance”, declaiming platitudes. One might question the point of such structures and roles in a company, if the corporate will to do the right thing is absent. For generations, many successful financial institutions did not need “values statements” setting out bromides; nor was it thought necessary to have an array of compliance executives with highfalutin titles; those responsible simply ensured their employees or representatives dealt with customers in a manner reflecting an instinctive institutional commitment to playing with a straight bat. At bottom, as I will explain, this penalty proceeding reflects a lamentable failure of corporate will to take the necessary steps to prevent greedy and unlawful conduct taking place, and a further failure to adopt a swift and proper remedial response.

3 By September 2014, Rommel Panganiban had been providing financial product advice as an authorised representative of AMPFP for some time. During at least some of that period, he engaged in conduct which, to any right-thinking person, was morally indefensible. Persons within AMPFP knew about the conduct and yet did not take, or even attempt to take, immediate steps to stop it. This occurred notwithstanding that some within AMPFP had a sufficient moral compass to recognise the conduct was wrong and, as AMPFP now accepts, the conduct amounted to a serious breach of the law.

4 What Panganiban was doing, repeatedly, was engaging in a form of “churning”. He was advising his clients to apply for new insurance products issued by AMP Life Limited (**AMP Life**). With one apparent exception, his conduct involved a practice of cancelling the client’s existing insurance. Hence, rather than advising his clients to transfer their existing cover (or, for existing AMP Life insureds, advising them to retain their existing cover), he arranged for his clients to sign cancellation letters and then, some days later, arranged for an application for new insurance to be submitted to AMP Life, which stated that the client did not have other AMP Life insurance in force or was not eligible for insurance transfer. In these reasons, I refer to this delinquency as **Rewriting Conduct**.

5 The motivation for this conduct is as obvious as it is unworthy: by exposing his clients to the attendant risks and other disadvantages of his conduct, Panganiban was entitled to a substantially higher commission.

6 AMPFP has admitted that at all material times during the period from July 2013 to September 2014, it ought reasonably to have known that Panganiban had engaged in this wrongful conduct. Given the evidence canvassed below, such an admission was inevitable. But let us presently leave to one side laggardly recognition of lapses made in the wake of regulatory scrutiny. To adapt a quotation often misattributed to C S Lewis: governance is taking steps to ensure the right thing is done, even when no one else is watching. What actually happened contemporaneously? How did the powers-that-be within AMPFP react when they first became aware something was amiss?

7 The evidence discloses the following timeline leading up to AMPFP eventually taking steps to prevent the conduct of Panganiban continuing:

(1) In December 2012, a Senior Underwriter for AMP Life, Mr Todd Traynor, who had been dealing with an application for insurance submitted on behalf of one of Panganiban’s clients, sent an email to a Product Manager for AMP Life, in which Mr Traynor recounted a conversation with Panganiban and requested advice as to whether Panganiban would be entitled to full commission because the client was cancelling rather than transferring cover; in response, the Product Manager (after stating that she had spoken with her manager) said that “unfortunately we have no way to stop” the conduct occurring and confirmed that full commission was payable to Panganiban, although admitted that there was “no reason to do this” and offered to notify the “dealer group” of the practice.

(2) In February 2013, AMP’s Planner Supervision team (responsible for investigating adviser issues) was forwarded details of 11 randomly selected applications for insurance made by Panganiban on behalf of his clients; the email from Mr Matthew Buckler (Team Manager, New Business) indicated that the applications were “very suspicious”.

(3) In around February 2013, Ms Jane Gregory, a Planner Supervision consultant within the Planner Risk and Compliance area, commenced an investigation into Panganiban’s conduct and forwarded information to Fraud Risk, AMP; shortly thereafter, in March 2013, Ms Gregory had a conversation with Mr Traynor which was recorded in Ms Gregory’s contemporaneous note as follows:

[Mr Traynor] advised that a planner is able to transfer the insurance from the FLS to FS on a like for like or decrease basis without any underwriting however no commission is paid.

However there is nothing stopping a planner cancelling the client’s insurance in the FLS and submitting a new insurance application within the FS, however this would be fully underwritten but the planner would receive 100% commission.

**He commented that this seems to be a common scenario and one that he has questioned** – i.e. why cancel the existing insurance & underwrite if a straight transfer would avoid the underwriting. However the product team have confirmed that a planner is able to do this as long as the client is happy to be underwritten again.

(emphasis added)

(4) On 13 March 2013, Ms Gregory sent an email to those undertaking the fraud investigation recounting her call with Mr Traynor and noting there “is a motivator for a planner to do the cancellation” but subsequently the fraud investigation was completed with a finding that no element of fraud had been identified: but a further review by the Planner Supervision team was recommended, which was then conducted by Ms Gregory who spoke to Mr Murray Fogarty (AMPFP’s Head of Financial Planning), updating him on the investigation.

(5) During the same period, Panganiban was audited as “part of AMPFP’s regular program[me] of conducting audits of its Authorised Representatives”; and he was given – remarkable as it seems – “a green 4” rating (the second highest rating possible).

(6) By mid-June 2013, Ms Gregory had informed Mr Peter Bennett (Enterprise Risk Manager, AMP Advice) that: (a) “[w]e seem to be encouraging this behaviour with our current commission model i.e. 100% on commencement of a new plan but 0% on an internal insurance transfer”; (b) her inquiries to date confirmed “that this is acceptable” and she had not been able to provide a policy “which outlines that this is not acceptable”; (c) she had been told by New Business “that this practice is wide spread”; and she sought Mr Bennett’s opinion “on whether this should be raised further as a licensee incident”.

(7) Ms Gregory, who had at least shown some degree of diligence, was then moved to a different role within AMP but, on 19 June 2013, Mr Bennett forwarded the communications from her to Ms Robyn West (Manager Policy, Professional Standards and Strategy) noting Mr Bennett’s concern as to “churning” and then, following a number of emails and discussions, nothing really happened (notwithstanding Panganiban was continuing his activities).

(8) Then, in October 2013, Mr Buckler (who it will be recalled had been raising his concerns about Panganiban since February that year) emailed Mr David Pearson (Head of New Business & Underwriting) noting that he had an issue with Panganiban “always cancel[ling] existing insurance before he applies for new insurance” and getting paid 100% commission; he repeated these concerns to other higher-ups at AMPFP (including Ms Natalie Gatley, Manager Retail Risk Product Operations) later in the month, and in November 2013; in one such email, he extracted an earlier email he had received from Mr Traynor *as early as late 2012* alerting him to Panganiban’s behaviour, which contained the following statement “[t]hey should NOT be allowed to do this as it is not right by the client BUT as per below unfortunately nothing we can do”; one of the higher-ups responded by requesting the name of the advisor and further information, both which Mr Buckler provided, but there is no evidence of any substantive or prompt response.

(9) Fast forwarding to mid-June 2014, concerns were again raised about Panganiban; notwithstanding this, bizarrely, in August 2014, the regularly-scheduled audit of Panganiban gave him a “B” rating (the second highest of the five possible). One might interrupt the narrative to remark that the mind boggles to envisage what one needed to do to get an “E”.

(10) Eventually, Mr James Coroneos, an “Advice Governance Manager”, became involved in the investigation, and on 12 September 2014 he met with Mr Sam Naddaf, the principal of Panganiban’s employer, and Panganiban (together with Mr Fogarty and Ms Anjum Singh, a “Business Partnership Manager”); a file note recorded Panganiban’s attempts to justify his conduct, his fears about losing his job and how this would impact upon his family; in the course of discussions, on at least two occasions, Panganiban showed sufficient self-awareness to admit that “stupidity and greed” was an apt description of his behaviour.

(11) Finally, well after two-and-a-half years after Mr Traynor first remarked the conduct of Panganiban was contrary to the interests of clients and ought not to be tolerated, on 15 September 2014, Panganiban’s Authorised Representative status was formally revoked by AMPFP.

8 Enter the “Issues Panel”. This Panel was made up of what were described by the parties as “a number of key voting stakeholders” (sic) including, among others, the Head of Advice Compliance; the Director, Client Solutions and Advice Services; and the National Manager Advice Governance. It also had “non-voting Business Advisory members” that included the “Head of Legal”.

9 On 30 September 2014, a “Special Issues Panel Meeting” was convened for the purpose of considering issues arising from Panganiban’s conduct. The attendees were: Ms Ann Turner (Head of Advice and Bank Legal – an obscure title, but I assume it refers to AMPFP’s most senior in-house solicitor), Ms Claudia Firmansjah (AMP’s National Advice Governance Manager), Ms Singh (Business Partnership Manager), Mr Chris Scott (National Manager Advisory Services and Quality Advice), Mr Gerard Mithen (Senior Manager ERM) and Mr Coroneos. The minutes of that meeting reveal Mr Scott noting there was “evidence of churning within the one product” with Mr Mithen asking: “are we satisfied in the audit programme”? After the participants agreed “there would be more time required to assess significance”, Mr Scott asked if there were “any obvious learnings from this” and added that it was “positive that the sales areas were consistent in their response”.

10 On 1 October 2014, a second meeting was held “to discuss if the matter [of Panganiban] was reportable to [the Australian Securities & Investment Commission (**ASIC**)] as a significant breach”. The minutes record one attendee observing that the issue of Panganiban’s conduct in cancelling insurance had been raised with the licensee (that is, AMPFP) in the past, and another observed that Panganiban was “clearly writing a bucket load of business and it was possible there was a reluctance (on the Licensee’s behalf) to reprimand a productive adviser” and that AMPFP had failed to get to the heart of the matter. Another attendee expressed the view that “[t]here are too many clients not to report”, and that all attendees agreed that the matter should be reported to ASIC “due to the length of time taken to get here (issue identified and adviser behaviour stopped)”.

11 The following day, Ms Firmansjah sent an email to Mr Simon Wallace, who was AMP’s Director of Client Solutions and Advice Services. In that email, Ms Firmansjah set out a summary of the “matter” relating to Panganiban, and the recommendation of the Panel. Ms Firmansjah set out a history of events concerning Panganiban in 2013 and 2014. Then, under the heading “Recommendation”, she stated that the Panel “is of the view that the matter is reportable” to ASIC because, in summary: (a) the response to the issue being raised in February 2013 was not “timely, effective and thorough”; (b) there was a “gap in effectiveness” in being able to “identify and bring to an end any undesirable actions by an adviser”, and the implications from the large volume of cancelled policies “was overlooked until recently”; and (c) there was a high volume of transactions where clients were not covered during cancellation and there was no continuity of cover, and in some instances clients had “lesser terms”, in the form of loadings and exclusions, compared to their original policy, with the result that there “may” be cases where clients are disadvantaged and the number of policies involved is “quite high”. This email was copied to Mr Coroneos, Ms Turner, Mr Scott and Mr Mithen.

12 Belatedly, but at least insofar as the Issues Panel is concerned, so far, so good. Leaving aside questions of legal obligation, although tardy, the proposed course now fastened upon was part of an appropriate and responsible remedial response and should have prompted a thorough investigation as to the real extent of wrongdoing that was necessary to report. But the story was not over.

13 What then happened is unexplained on the evidence. Notwithstanding the recommendation of the Issues Panel, it met again on 16 October 2014. But this time the attendees changed. Indeed, Mr Michael Guggenheimer, the Managing Director of AMPFP, attended, as did a number of other senior persons being: Mr Helmich (Director Financial Planning, Advice & Service), Mr Simon Wallace (Director, Client Solutions and Advice Services), Mr Murray Fogarty (Head of Financial Planning) and Ms Marilena Cozzolino (Executive Legal Counsel). How this last attendee’s role related to that of Ms Turner was not explained. Ms Firmansjah, (who had sent the email to Mr Wallace and others referring to the recommendations of the earlier Panel) was also present.

14 All or most of the participants in the further meeting were persons at the very top of the organisation – they had important responsibilities. What did this reconstituted Issues Panel do?

15 Draft minutes of this meeting record that the purpose of the meeting was to again consider, in relation to Panganiban’s conduct, if there were a “licensee breach” and if so whether the breach was “significant”. This was important because s 912D of the *Corporations Act 2001* (*Cth)* (**Act**) obliged an Australian financial services licensee to report to ASIC significant breaches (or likely breaches) of its obligations under the financial services laws. The term “significant” was not defined in the Act, but Regulatory Guide 78 *Breach Reporting by AFS Licensees*, published in February 2014 provided examples of breaches which might be regarded as being significant.

16 What the minutes of the reconstituted Issues Panel record is that it was agreed that “the matter is not a breach” and hence was not reportable, and that the recorded reasons for this position were as follows: (a) “due process” was followed in the 2013 “investigation” and the matter was closed in 2013 based on the “assessment and findings at that time”; (b) the 2014 investigation had resulted in Panganiban being terminated; and (c) he would be reported to ASIC as a “bad apple”.

17 This “bad apple” reporting then occurred. On 3 November 2014, AMPFP provided a “bad apple” letter to ASIC. Curiously, it did not mention Panganiban by name. Also, tellingly, the letter omitted to mention the approximated scale of Panganiban’s conduct, which in an internal email from Mr Coroneos sent a few days prior was estimated to affect 161 clients. It was addressed to Mr Trevor Clarke of ASIC and was sent by Mr Wallace (who, it will be recalled, had received Ms Firmansjah’s summary of the recommendation of the first Issues Panel and attended the reconstituted Issues Panel meeting). There may have been some prior dealings or communications between Mr Wallace and Mr Clarke but there was no evidence adduced of them and it probably does not matter: all that is apparent from the letter is that Mr Wallace was sufficiently familiar with Mr Clarke to adopt the salutation “Dear Trevor”. In any event, he wrote to him in the following terms:

**Re: Issue of concern with a former authorised representative**

[AMPFP] has identified a matter of concern in relation to a former authorised representative. We consider the matter serious and wish to bring the details to the attention of [ASIC] as to how we are resolving this identified matter and whether the individual should be able to represent a licensee in the future to provide financial services.

The individual concerned was terminated as an authorised representative of AMPFP in September 2014 for cancelling in-force AMP insurance cover for a number of clients and replacing it within a fortnight via a new application for AMP insurance cover.

AMPFP is in the process of undertaking an analysis on identified clients. On completion of this analysis, we intend to contact impacted clients to highlight any areas of concern found as a result of the analysis. AMPFP will also provide an invitation for the impacted clients to come for a review of their circumstances at no cost to them. The clients’ current circumstances will guide the most appropriate remedial actions.

The seriousness of this matter leads AMPFP to be concerned that this former authorised representative should not be in a position to continue to advise clients on their personal financial situation.

For this reason, we will report this authorised representative’s conduct to ASIC as per its guidance on ‘tip offs information of concern and reports of misconduct’.

Please contact me directly on [… ] or email [… ] if you have further questions.

Yours sincerely,

**Simon Wallace**

Director, Client Solutions and Advice Services

18 The use of the idiom “bad apple” by the reconstituted Issues Panel to describe this letter seems to me significant. When adopted, idioms, derived from proverbs, convey a concise idea graphically, and the idea is given force by the use of metaphorical figure of speech. What the reconstituted Issues Panel was seeking to do was to convey to ASIC the notion that having recognised an isolated problem (the bad apple), action was being taken to ensure it did not pollute or spread more widely (to the barrel of otherwise good apples). The letter was aptly named and was sent to convey the notion settled upon by the reconstituted Issues Panel. On the evidence before me, in the absence of a proper and thorough investigation, there was no basis, let alone a reasonable basis, for the idea to be conveyed to ASIC that there was an isolated “bad apple”.

19 Returning to the conduct of AMPFP back in October 2014, senior counsel for AMPFP submitted that the reconstituted Issues Panel that met on 16 October 2014 simply “missed the point”. As I observed during the course of the hearing, a more realistic conclusion is that they understood the point, and they understood it with a crystal-clear clarity. This was not “missing the point”; it was evidently an exercise in damage control.

20 It was evidently obvious to the first Issues Panel that there was a “gap in effectiveness” in being able to “identify and bring to an end any undesirable actions by an adviser”. In these circumstances, and given the first Issues Panel was of the view “that the matter [was] reportable” to ASIC under s 912D and recommended accordingly, and yet it was apparently thought, by those at the top of the organisation, that it was appropriate to revisit this course, it might be said that this incident raises some important questions.

21 But I must not go beyond the issues as framed by the parties. It is important to stress that ASIC does not ask me to make findings that this conduct amounted to any breach of s 912D. Given the possible consequences that can flow from a breach of this statutory norm, it is inappropriate for me to draw a legal conclusion as to whether there was, in fact, an obligation to report in accordance with the section in all the circumstances. In fairness to all concerned, there may be additional evidence that bears upon the conduct of those concerned that was not adduced because it was thought by the parties to this proceeding as being irrelevant to the facts in issue in this case. But two things are pellucid: *first*, far from minimising the conduct of Panganiban as a “bad apple”, as AMPFP now accepts, it should have taken steps (indeed at a stage far earlier than at the stage of the first Issues Panel) to determine the extent and seriousness of the Rewriting Conduct with a view to identifying evidence of such behaviour in the wider representative network and assessed what changes were needed to improve existing controls to prevent and detect such conduct.

22 *Secondly*, given the state of the evidence, the submission of AMPFP that I should be satisfied that this conduct of the reconstituted Issues Panel is explicable as simply “missing the point” is one I emphatically reject. As it is, these singular circumstances are relevant to the submission made by ASIC that during this period AMPFP did not have an adequate “culture of compliance”, which is a submission that should be accepted. It is also relevant to note that even when senior management at the highest level became involved, the necessary steps were not undertaken by AMPFP, and there remained a failure to take reasonable steps to ensure Rewriting Conduct did not continue to occur in the broader network.

# B ENFORCEMENT ACTION BY ASIC

## B.1 ASIC investigation

23 There was no direct evidence of what ASIC immediately did or did not do with the “bad apple” letter. Despite this, it is possible to infer there were some relevant communications between AMPFP and ASIC shortly after the dispatch of the letter, because in evidence is a later internal email from Mr Coroneos dated 14 November 2014:

As mentioned, the time frame will not be as tight given we now have a definitive number for our initial response to ASIC. It would be appreciated if you could please provide the additional client information by the end of the month. As soon as I know what ASIC has requested, I will let you know as this may influence the timeframe and ease the pressure on your team.

24 However, leaving aside this Delphic communication, and despite AMPFP calling Mr Coroneos and Ms Firmansjah, the extent of any immediate investigation by ASIC to follow up the “bad apple” letter directly is not entirely clear. That said, the following can be gleaned by piecing together what is in evidence as to subsequent events.

25 From about early February 2015, AMPFP received a number of statutory notices from ASIC seeking information about Panganiban’s conduct and whether any other advisors had engaged in the same conduct. Between 2015 and 2016, Mr Coroneos was tasked by Ms Firmansjah with responding to the notices, including gathering the relevant information and drafting the responses.

26 Importantly, in August 2015, it seems that ASIC considered the possibility that the Rewriting Conduct at AMPFP may go beyond Panganiban, as it issued a notice seeking, among other things, the names and details of all representatives who had engaged in what it described as “the conduct,” namely “the provision of financial services to retail clients which resulted in insurance benefits held within an AMP superannuation product being cancelled and ‘rewritten’ rather than an internal insurance transfer occurring”.

27 In its responses to the August 2015 notice, AMPFP held fast to its position (purportedly based on its internal investigations supervised by Mr Coroneos) that there was no evidence that other advisers had engaged in Rewriting Conduct. In doubling-down on the “bad apple” assertion, to quote from the conclusion of AMPFP’s 1 October 2015 response letter: “[AMPFP] concluded that Rommel Panganiban’s behaviour was an isolated and unique case”.

28 In August 2016, ASIC made a banning order which prohibited Panganiban from providing financial services. Just under a year later, in July 2017, that banning order was affirmed by the Administrative Appeals Tribunal: *Panganiban and Australian Securities and Investments Commission* [2017] AATA 1026. It was also about this time that AMPFP provided its response to what would appear to be the final statutory notice issued by ASIC in June 2017.

## B.2 Commencement of the proceeding

29 Despite AMPFP’s “conclusion”, commendably, ASIC appears to have shown some persistence and by June 2018, when this proceeding was commenced, ASIC had reached a different view to that held by AMPFP as to whether the Rewriting Conduct was isolated to Panganiban: its statement of claim (**SOC**) alleged that five other authorised representatives engaged in Rewriting Conduct in contravention of ss 961B, 961G and 961J (**relevant best interests obligations**) in relation to advice provided to 10 clients (**Clients 31-40**). These authorised representatives were Mr James McCarthy, Mr Darron Mink, Mr Geoffrey Needs, Mr David Fong and Mr Calvin Barlow.

30 ASIC further alleged contraventions by AMPFP of s 961L of the Act: in relation to its failures to take reasonable steps to ensure Panganiban’s compliant behaviour, the contravening conduct is said to occur between 1 July 2013 and prior to September 2014; and in relation to its failures to take reasonable steps to ensure that authorised representatives other than Panganiban (**Other Authorised Representatives**) engaged in compliant behaviour, these failures occurred during the period 1 July 2013 to 30 June 2015 (**Relevant Period**). The s 961L norm, set out in Section D.1 below, required AMPFP to take reasonable steps to ensure that authorised representatives complied with the relevant best interests obligations in relation to insurance products (**AMP Life Products**) issued by AMP Life, including insurance products with death cover, total and permanent disablement cover, trauma cover and income protection cover. ASIC also alleged AMPFP contravened s 912A(1) of the Act, being set out in Section D.2 below.

31 A range of relief is sought by ASIC. This includes declarations pursuant to s 1317E(1) of the Act in respect of AMPFP’s contraventions of s 961L of the Act and declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) in respect of AMPFP’s contraventions of s 912A of the Act. The imposition of pecuniary penalties pursuant to s 1317G(1E) of the Act and orders pursuant to s 1101B(1) of the Act are also sought.

32 AMPFP filed its defence on 18 September 2018. It admitted the contravention alleged in the SOC at [24], namely that during the Relevant Period prior to September 2014, in contravention of s 961L of the Act, AMPFP failed to take reasonable steps to ensure that Panganiban complied with ss 961B, 961G and 961J of the Act. It further admitted the contraventions alleged in the SOC at [27], [28] and [29], insofar as those paragraphs alleged that AMPFP had contravened ss 912A(1)(a), 912A(1)(c), and 912A(1)(ca) in relation to Panganiban. What AMPFP disputed, however, was that it had failed to take reasonable steps to ensure that the Other Authorised Representatives, complied with ss 961B, 961G and 961J of the Act.

33 As late as March 2019, when AMPFP filed and served its evidence, AMPFP’s position had not changed. Ms Firmansjah’s sworn evidence was that she was not aware of anything to suggest that the Rewriting Conduct was widespread, nor did she see or become aware of any cases of other advisers engaging in Rewriting Conduct. Similarly, Mr Coroneos said that, since the investigation, he had not come across any advisers that engaged in Rewriting Conduct.

34 By a letter from its solicitors, Clayton Utz, dated 16 May 2019 and marked as Exhibit A, AMPFP advised ASIC that all of the alleged contraventions of the Act are admitted. In particular, AMPFP admitted that it contravened, inter alia, s 961L of the Act during the Relevant Period in that it failed to take reasonable steps to ensure that Other Authorised Representatives complied with ss 961B, 961G and 961J of the Act. This volte-face took place after service of a Joint Expert Report (**JER**), discussed at Section E below; indeed, in Exhibit A, AMPFP’s solicitors made plain that the further admissions were made “(i)n the light of the conclusions expressed in the [JER]”.

35 Based on the admissions made in May 2019 by AMPFP in relation to Clients 31-40 and its conduct in relation to the Other Authorised Representatives, AMPPF’s initial and repeated assertion as to the ambit of the impugned conduct was shown to be wrong. In an affidavit filed in June 2019, the evidence of Ms Sarah Britt, Head of Advice Compliance, was now that she had not seen any evidence of Rewriting Conduct other than by Panganiban *and in respect of Clients 31-40*, by a subset of five of the Other Authorised Representatives identified at [29] above. She further stated that she accepted that there may be instances of yet to be detected Rewriting Conduct across AMPFP’s network.

36 I confess to being perturbed by the doggedness of AMPFP in maintaining that the Rewriting Conduct was isolated to the “bad apple” Panganiban in circumstances when insufficient investigation had been undertaken to provide a secure (and hence reasonable) foundation to do so. In part, this position of “holding the line” may have been a consequence of the fact that the investigatory efforts which AMPFP relied on in support of its position were beset with flaws that impeded their effectiveness (see [63(2)] below), and will only be completed thoroughly pursuant to s 1101B orders to be made by this Court.

37 I will address the questions that remain in the proceeding under the following headings:

 **Section C AGREED FACTUAL BACKGROUND**

 **Section D RELEVANT STATUTORY NORMS**

 **Section E AGREED OPINIONS OF THE EXPERTS**

 **Section F SCOPE OF DISPUTES**

 **Section G FINDINGS AS TO THE REMAINING DISPUTED ISSUES**

 **Section H PENALTIES**

 **Section I CONCLUSION AND ORDERS**

# C AGREED FACTUAL BACKGROUND

38 While I have summarised some of the agreed factual background in my preliminary observations, it is useful to turn initially to findings as to uncontroversial factual matters that should be recorded.

## C.1 AMPFP’s Business and the AMP Group

39 In 2011, AMP and AXA Asia Pacific Holdings Ltd (**AXA**) merged by way of a scheme of arrangement under which AXA was acquired by AMP. After the merger between AMP and AXA, there was a “harmonisation” process to bring the two parts of the organisation together. For the years 2012 and 2013, AMP had two major divisions reporting to the CEO. These were AMP Financial Services and AMP Capital. All of the activities relating to both the issuance of products (life insurance, superannuation, retail investment, wrap products and the like) and licensees, planners and advice were under the AMP Financial Services division. For the year ended 31 December 2014, the major divisions of AMP that reported to the CEO were Insurance and Superannuation, Advice and Banking and AMP Capital. By this restructure (from 2013 to 2014), AMP separated “product” activities from “advice” activities.

40 AMPFP is part of the AMP Group which includes AMP Life. During the Relevant Period, AMPFP held an Australian Financial Services Licence (**AFSL**) granted pursuant to s 913B of the Act and authorised representatives provided personal advice to retail clients on behalf of AMPFP. Division 2 of Pt 7.7A of the Act (which includes the relevant best interests obligations) applied to the advice as of 1 July 2013. As noted above, the authorised representatives provided advice to clients in relation to AMP Life Products.

41 AMPFP had a network of 1,600 authorised representatives at material times and “AMP aligned” advisers made applications to AMP Life for approximately 20,000 insurance policies in each year.

42 As would by now be clear, AMPFP does not issue insurance or other products. The products that AMPFP’s authorised representatives could recommend to clients are from a number of product issuers, and are not limited to AMP products. The Planner Supervision team (subsequently called Advice Governance, and more recently, Advice Compliance) is within the same division of the group as AMPFP, Wealth Management.

43 AMP Life, however, provides wealth management products and life insurance products to clients. It does so by designing and issuing those products itself. It is AMP Life (not AMPFP) which is responsible for setting the transfer rules in relation to products that it issues. The Product, New Business and Underwriting teams are part of AMP Life. AMP Life was responsible for setting the commissions that are payable in respect of its products, and does so on an industry-wide basis (that is, without regard to whether the person recommending its product is an AMPFP authorised representative or an authorised representative of some other financial adviser).

44 The relationship between AMPFP and AMP Life, insofar as it concerns the sale of AMP Life products, is governed by contract. AMPFP in turn contracts with its authorised representatives, and also corporate authorised representatives (such as Benidion Financial Services Pty Ltd (**Benidion**), Panganiban’s employer).

## C.2 Rewriting Conduct

45 I have provided (at [4] above) a concise definition of Rewriting Conduct, but a more complete definition was agreed by the parties. It was the provision of advice by an authorised representative of AMPFP to a client in circumstances where:

(a) the client had insurance cover in the form of an existing AMP Life Product (**existing cover**);

(b) the client replaced or sought to replace the existing cover by applying for insurance cover in the form of a replacement AMP Life Product;

(c) there was a requirement for underwriting in respect of the replacement AMP Life Product;

(d) either:

(i) the existing cover was cancelled or lapsed; or

(ii) the existing cover was ultimately neither cancelled nor lapsed but it was recommended that the client replace or seek to replace the existing cover;

(e) transfer from the existing cover to the new cover was available; and

(f) the authorised representative failed to advise the client to undergo transfer in circumstances where transfer was available.

# D RELEVANT STATUTORY NORMS

46 As noted above, the contravening conduct is now agreed; however, the number of contraventions is hotly disputed. The determination of the number of contraventions requires close analysis of the relevant statutory norms; I will turn to this task later in this judgment, but it is useful for me at this point to set out the relevant (and interrelating) provisions*.*

## D.1 Section 961L

47 Section 961L of the Act is in the following terms:

A financial services licensee must take reasonable steps to ensure that representatives of the licensee comply with sections 961B, 961G, 961H and 961J.

48 Section 961L is in Pt 7.7A of the Act which was introduced by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

49 I note that a “representative” of the financial services licensee is, for the purposes of Pt 7.7A, defined by s 960 as having the same meaning as in Pt 7.6, defined in s 910A as follows:

“representative” of a person means:

(a) if the person is a financial services licensee:

(i) an authorised representative of the licensee; or

(ii) an employee or director of the licensee; or

(iii) an employee or director of a related body corporate of the licensee; or

(iv) any other person acting on behalf of the licensee; or

(b) in any other case:

(i) an employee or director of the person; or

(ii) an employee or director of a related body corporate of the person; or

(iii) any other person acting on behalf of the person.

50 As authorised representatives of AMPFP, Panganiban and the Other Authorised Representatives are “representatives” of the financial services licensee by combined operation of ss 960 and 910A of the Act.

## D.2 Section 912A(1)

51 Section 912A(1) of the Act is in the following terms:

(1) A financial services licensee must:

(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and

(aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and

(b) comply with the conditions on the licence; and

(c) comply with the financial services laws; and

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and

(cb) if the licensee is the operator of an Australian passport fund, or a person with responsibilities in relation to an Australian passport fund, comply with the law of each host economy for the fund; and

(d) subject to subsection (4)--have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

(e) maintain the competence to provide those financial services; and

(f) ensure that its representatives are adequately trained (including by complying with section 921D), and are competent, to provide those financial services; and

(g) if those financial services are provided to persons as retail clients:

(i) have a dispute resolution system complying with subsection (2); and

(ii) give ASIC the information specified in any instrument under subsection (2A); and

(h) subject to subsection (5)--have adequate risk management systems; and

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

## D.3 Section 961B

52 Section 961B of the Act is in the following terms:

(1) The provider must act in the best interests of the client in relation to the advice.

(2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:

(a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

(b) identified:

(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and

(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client’s relevant circumstances);

(c) where it was reasonably apparent that information relating to the client’s relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;

(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;

(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and

(ii) assessed the information gathered in the investigation;

(f) based all judgements in advising the client on the client’s relevant circumstances;

(g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.

Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client’s relevant circumstances). That subject matter and the client’s relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

*Advice given by Australian ADIs—best interests duty satisfied if certain steps are taken*

(3) If:

(a) the provider is:

(i) an agent or employee of an Australian ADI; or

(ii) otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and

(b) the subject matter of the advice sought by the client relates only to the following:

(i) a basic banking product;

(ii) a general insurance product;

(iii) consumer credit insurance;

(iv) a combination of any of those products;

the provider satisfies the duty in subsection (1) in relation to the advice given in relation to the basic banking product and the general insurance product if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

*General insurance products—best interests duty satisfied if certain steps are taken*

(4) To the extent that the subject matter of the advice sought by the client is a general insurance product, the provider satisfies the duty in subsection (1) if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

*Regulations*

(5) The regulations may prescribe:

(a) a step, in addition to or substitution for the steps mentioned in subsection (2), that the provider must, in prescribed circumstances, prove that the provider has taken, to satisfy the duty in subsection (1); or

(b) that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1); or

(c) circumstances in which the duty in subsection (1) does not apply.

## D.4 Section 961G

53 Section 961G of the Act is in the following terms:

The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client.

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

## D.5 Section 961J

54 Section 961J of the Act is in the following terms:

(1) If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:

(a) the provider; or

(b) an associate of the provider; or

(c) a financial services licensee of whom the provider is a representative; or

(d) an associate of a financial services licensee of whom the provider is a representative; or

(e) an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee; or

(f) an associate of an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee;

the provider must give priority to the client’s interests when giving the advice.

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

(2) If:

(a) the provider is:

(i) an agent or employee of an Australian ADI; or

(ii) otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and

(b) the subject matter of the advice sought by the client relates only to the following:

(i) a basic banking product;

(ii) a general insurance product;

(iii) consumer credit insurance;

(iv) a combination of any of those products;

subsection (1) does not apply to the extent that the advice relates to a basic banking product or a general insurance product or a combination of those 2 products.

(3) Subsection (1) does not apply to the extent that the subject matter of the advice sought by the client is a general insurance product.

# E AGREED OPINIONS OF THE EXPERTS

## E.1 The Questions

55 Following the service of competing opinion evidence of experts, which in some respects did not engage with one another, the JER was prepared pursuant to orders of the Court by reference to questions settled by the Court. The authors of the JER provided their opinions on the following questions: *first*, what steps was it reasonable to expect AMPFP to have taken in the Relevant Period to ensure that its representatives complied with ss 961B, 961G, and 961J of the Act? *Secondly*, were the steps that AMPFP took in the Relevant Period reasonable steps for AMPFP to have taken in that time period to ensure compliance by its representatives with ss 961B, 961G and 961J?

## E.2 Steps in relation to Panganiban

56 In relation to Panganiban, AMPFP agreed with the following summary of the JER contained in ASIC’s written submissions.

57 There is agreement between the experts as to the steps AMPFP should have taken in the Relevant Period to ensure that Panganiban did not engage in Rewriting Conduct in contravention of the relevant best interests obligations:

(1) at and from 1 July 2013, AMPFP should have temporarily suspended Panganiban’s authorisation until such time as “a more fulsome” investigation could be undertaken; in suspending the authorisation, AMPFP should have placed weight on addressing the potentially significant risks to Panganiban’s clients of any conduct in which he may have engaged;

(2) in line with an effective issue management and escalation process for an advice licensee, AMPFP should have ensured that the Rewriting Conduct concerns were escalated to a sufficient level of seniority within AMP and/or AMPFP in a timely manner, so that the issues were appropriately considered and actions taken to ensure Rewriting Conduct that was non-compliant with the relevant best interests obligations ceased;

(3) AMPFP should have undertaken “a fulsome investigation” involving file reviews to determine the extent of Panganiban’s Rewriting Conduct and non-compliance with the relevant best interests obligations; it would have been reasonable at the time for AMPFP to have conducted an initial investigation of a sample of files (in the order of six files) related to the provision of insurance advice; had an issue been identified in one or more of the sample a more extensive “deep dive” (involving between 20 and 30 files) should have been conducted;

(4) based on the outcome of the investigation, a subsequent decision regarding his future as a representative of AMPFP should have been made; AMPFP should have ensured that any findings of the investigation were formally communicated to Panganiban and Mr Naddaf, the principal of Benidion, to ensure there was no misunderstanding of the facts, the conclusions and the actions to be taken;

(5) if, subsequent to the investigation and consideration of the outcomes of the investigation by appropriate AMPFP personnel, AMPFP decided to maintain Panganiban as a representative, AMPFP should have ensured his commitment to ongoing compliance was obtained in writing and that Panganiban was aware of, and accepted, the consequences of any further Rewriting Conduct being identified;

(6) if AMPFP decided to maintain Panganiban as a representative, AMPFP should have had processes in place to support Panganiban’s remediation and minimise the likelihood of any future non-compliance; AMPFP should have ensured that Panganiban was appropriately re-trained with training targeted at addressing advice concerns identified, and appropriately monitored and supervised (such as through regular, tailored vetting and auditing targeted at addressing advice concerns identified) commensurate with the risk that existed in relation to his Rewriting Conduct; and

(7) in line with an effective issues management and escalation process for an advice licensee, the fact of the investigation into Panganiban’s conduct and its outcomes should have been entered into AMPFP’s incident management database.

58 There is also agreement between the experts that AMPFP failed to take the necessary steps to ensure that Panganiban did not engage in Rewriting Conduct and complied with the relevant best interests obligations:

(1) AMPFP did not suspend Panganiban’s authorisation temporarily on and after 1 July 2013; it should have temporarily suspended Panganiban’s authorisation until such time as “a more fulsome investigation” could be undertaken; Panganiban’s authorisation was only revoked on 15 September 2014 after the investigation of his conduct undertaken between June and early September 2014; no such action was taken in 2013, after the Gregory investigation;

(2) AMPFP did not, by July 2013, escalate Panganiban’s conduct to an appropriate level of seniority within AMPFP to ensure that appropriate action was taken and his non-compliant Rewriting Conduct ceased; the concerns were only escalated to appropriate senior management in September 2014 after which Panganiban’s Rewriting Conduct was referred to a special meeting of the Issues Panel in accordance with the Advice Issues Management and Escalation Process;

(3) AMPFP did not undertake the staged review of files to determine the extent of Panganiban’s Rewriting Conduct and non-compliance with the relevant best interests obligations; in 2013, no review other than the review of six files by Ms Gregory was undertaken; a review of six files was undertaken by Mr Nathan Vo only in early September 2014 and a more extensive review was only undertaken in late 2014 after Panganiban’s authorisation had been revoked; and

(4) as a result of AMPFP’s failure to undertake (3) above, AMPFP did not take adequate steps; this is because those steps are consequential to and dependent on the conclusions formed from the undertaking of step (3) above.

59 In addition, AMPFP failed to take the following action to prevent Panganiban engaging in Rewriting Conduct:

(1) AMPFP failed to communicate appropriately with Panganiban or impose any consequences on Panganiban as and from 1 July 2013 or subsequently until September 2014 and there was no other direct warning or caution given to Panganiban until September 2014;

(2) AMPFP failed to act in a timely way and acted with a lack of urgency in the 2013 Investigation in addressing Panganiban’s Rewriting Conduct; once a suspicion was raised in September 2014 that Panganiban was continuing to engage in Rewriting Conduct, timely steps were then taken but until that time, Panganiban continued to engage in Rewriting Conduct, subjecting his clients to the Rewriting Risks, such risks being defined at [14] of the statement of claim as:

(a) the risk of being left uninsured for a period of time, or of otherwise not being paid for an insurable event when prior to the Rewriting the client had existing cover for the insurable event (**Event Risk**);

(b) the inconvenience of going through the insurance underwriting process in respect of the replacement AMP Life Product, and the risks of going through that process which included the following:

(i) the risk that replacement insurance cover might be refused; and

(ii) the risk that the replacement AMP Life Product might be offered on terms less favourable to the insured than those of the existing insurance cover (including, for example, new loadings or exclusions),

(**Underwriting Risk**);

(c) the risk that a 13 month exclusion period for suicide might recommence upon the commencement of the replacement AMP Life Product (**13 Month Suicide Exclusion Risk**);

(d) the risk that the three-year period for avoidance of an insurance policy by an insurer by reason of innocent misrepresentation by the insured (pursuant to s 29(3) of the *Insurance Contracts Act 1984* (Cth)) recommenced upon the commencement of the replacement AMP Life Product (**3-year Non-Fraudulent Non-Disclosure Risk**);

(3) AMPFP failed to put in place any specific monitoring and supervision of Panganiban’s advice to clients that would have detected his ongoing Rewriting Conduct; during 2013 and 2014 Panganiban had been the subject of regular annual audits and in both instances, he was awarded the second highest rating; the lack of tailoring of the audit programme to specifically identify Rewriting Conduct was deficient.

60 Before going further, I should make two observations.

61 *First*, as can be seen, there are several uses of the word “fulsome” (or the phrase “more fulsome”) throughout the JER. The word fulsome, properly used, has pejorative connotations meaning overabundant or excessively lavish. The experts did not use the word in this sense but rather were using it in the sense of “fully developed” or “complete”, and were therefore expressing the view that the steps taken were inchoate or incomplete.

62 *Secondly,* and more importantly, although there is agreement between the experts (and now the parties) as to the steps AMPFP should have taken in the Relevant Period to ensure that Panganiban did not engage in Rewriting Conduct in contravention of the relevant best interests obligations, I must confess I find aspects of the agreement to be somewhat troublesome. It strikes me as particularly odd that following a proper investigation as suggested, in the counterfactual, AMPFP could rationally have decided to maintain Panganiban as a representative (and hence put “processes in place to support Panganiban’s remediation and minimise the likelihood of any future non-compliance”). Uninstructed by expert opinion, I would have thought it was obvious that any organisation anxious to ensure compliance by its representatives with ss 961B, 961G and 961J, would not have touched Panganiban with a punt pole once it was apprised fully of his conduct. He was evidently a man unsuited to hold a position of trust. This belated recognition came even to AMPFP by the time of the despatch of the “bad apple” letter. Redemption is a wonderful thing, but surely preceding redemption should be the visiting of consequences proportionate to the nature and scale of the wrongdoing. My view in this regard does not, however, accord with the joint expert opinion and although I will generally accept the expert evidence, I cannot accept the implicit (and surprising) submission of ASIC, by its unqualified embrace of the findings of the JER, that “retraining” and “monitoring” someone like Panganiban *could* have been an appropriate remedial response following a proper investigation which revealed the true facts. The rejection of this aspect of the expert evidence is not, however, determinative of any of the remaining contested issues; nor is it material to the fixing of an appropriate penalty.

## E.3 Steps in relation to Other Authorised Representatives

63 ASIC submits, and I accept, that there was agreement between the experts as to the steps AMPFP should have taken in the Relevant Period to ensure that Other Authorised Representatives did not engage in Rewriting Conduct in contravention of the relevant best interests obligations. The JER states that those steps were as follows:

(1) concurrently with the further investigation of the conduct of Panganiban, AMPFP should have:

(a) issued a policy (or other communication) to its representative network requiring a representative to process a transaction as a transfer where a transfer was possible, unless the representative could clearly demonstrate that the Rewriting Conduct would have been in the client’s best interests and would meet the relevant best interests obligations;

(b) revised training to representatives to reflect these policy changes or communications; and

(c) reviewed and revised its monitoring and supervision programme to ensure that it was designed to detect Rewriting Conduct that did not comply with the relevant best interests obligations;

(2) in addition, AMPFP should have made reasonable efforts to brief an Internal Supervisory/Compliance function to take the following steps to determine the extent and seriousness of Rewriting Conduct:

(a) analysed available data, with a view to identifying whether there was evidence of possible Rewriting Conduct in the wider representative network; this should have been supplemented by discussions with the Internal Supervisory/Compliance function and audit staff about any Rewriting Conduct which may have been identified through other monitoring and assurance activity;

(b) if the analysis identified a number of clients of a number of representatives who may have been the subject of Rewriting Conduct, conducted an in-depth review of relevant client files to assess whether conduct was not compliant with the relevant best interests obligations, the seriousness of that conduct and to confirm the root causes of the conduct; and

(c) assessed the effectiveness of existing controls to prevent and detect non- compliant Rewriting Conduct and the outcomes of this assessment should have informed the need for any changes to improve existing controls to prevent and detect future non-compliant Rewriting Conduct.

(3) AMPFP should then have escalated the outcomes of the investigation described above to an appropriately accountable Committee with recommendations about steps to address the issues identified; the Committee should have been apprised of the number of representatives found to have engaged in the conduct and the seriousness of any conduct identified and, based on the recommendations made, the Committee should then have directed appropriate action to be taken;

(4) appropriate action should have reflected both the extent and seriousness of any Rewriting Conduct identified across the representative network, the risks to the licensee, and the root cause of the Rewriting Conduct; a range of appropriate actions could have been considered including:

(a) reviewing the incentives framework to address the differences in omissions;

(b) developing plans and implementing any changes required to improve existing controls to prevent and detect non-compliant Rewriting Conduct based on the outcomes of the assessment; and

(c) discussing with the product provider (AMP Life) possible changes to its Transfer Policies and underwriting/new business application processes to detect Rewriting Conduct and performing further checks to assess whether those transactions should be processed as transfers instead; and

(d) taking appropriate actions in relation to any other representatives guided by a consideration of the root cause of the Rewriting Conduct such that:

(i) had the root cause of the conduct been the opportunity to engage in Rewriting Conduct (facilitated by the Insurance Transfer Policies and processes) and the incentive to do so (facilitated by the lower commissions paid in relation to insurance transfers), remedial action should have addressed both the Transfer Policy and the incentive framework;

(ii) had the root cause of the conduct been the Transfer Policy alone, action would have not addressed the incentive framework, and focussed on the other actions described above.

64 The experts agree that AMPFP took none of the steps set out in the previous paragraph, to address the risk of non-compliant Rewriting Conduct by other AMPFP representatives. In particular, AMPFP failed to take the following steps:

(1) issue a policy or communication to its network of representatives in relation to Rewriting Conduct;

(2) revise and provide training to its representatives in relation to Rewriting Conduct;

(3) review and revise its monitoring and supervision programme to address Rewriting Conduct; or

(4) conduct further investigation and analysis of rewriting conduct across its network of representatives, and assessed existing controls.

65 Again, I have reservations about an aspect of this evidence, as I would have thought it ought to have been plain that once informed of conduct as obviously inappropriate as the Rewriting Conduct, efforts should have been made to stamp it out with celerity without the necessity to go through all the bureaucratic processes envisaged by the experts. But, subject to this reservation, I generally accept the evidence contained in the JER.

# F SCOPE OF DISPUTES

66 I do not propose to dilate further upon factual or legal matters that are agreed. The remaining issues fall broadly into four categories: *first*,some factual matters advanced by AMPFP, most importantly the question of whether, as at 1 July 2013, AMPFP had reason to believe that the Rewriting Conduct was common or widespread (but extending to other issues I will deal with separately such as evidence as to its systems, an investigation into Rewriting Conduct it conducted in 2015-2016, and the difficulties of identifying Rewriting Conduct); *secondly,* alegal issue as to the proper construction of s 961L and the number of contraventions that arise; *thirdly*, the appropriate pecuniary penalty; and *fourthly,* the appropriateness of some aspects of the compliance plan that ASIC seeks pursuant to s 1101B of the Act (although AMPFP now consents to most of the compliance orders sought by ASIC).

67 I will deal with each of these four topics in turn.

# G FINDINGS AS TO THE REMAINING DISPUTED ISSUES

## G.1 Did AMPFP have reason to believe that the Rewriting Conduct was “common”?

68 A matter I raised at the first day of hearing was whether, as at 1 July 2013, AMPFP had reason to believe that the Rewriting Conduct was common or widespread. Although connected, this is a question logically separate to that of whether the Rewriting Conduct was, *as a matter of fact*, widespread as at 1 July 2013 (which latter fact ASIC did not seek to prove, notwithstanding consideration as to whether the conduct was systematic might be regarded as a factor relevant to the objective seriousness of the contraventions).

### I ASIC submissions

69 ASIC contended that as at 1 July 2013, AMPFP had reason to believe that the Rewriting Conduct was “common” or “widespread”. Prior to 1 July 2013, the conversation between Mr Traynor and Mr Gregory took place (as evidenced by the file note of 7 March 2013). Read literally, Mr Traynor’s comments were not confined only to his views of Panganiban’s conduct, as Ms Gregory’s note of the conversation records Mr Traynor advising what “a planner” is able to do in order to obtain 100% commission and notes his comment that this is “a common scenario”. This is consistent with the use of the plural “planners” in Ms Gregory’s later email to Emma Lawson, and when, on 17 June 2013, Ms Gregory emailed Mr Bennett, after describing her investigation of a planner (presumably Panganiban) she wrote that “New Business have told me that this practice is wide spread” (**Gregory Email**). This was a somewhat unusually phrased comment if she had meant to confine her comments to Panganiban. I will return to the Gregory Email later, when I consider the issue of whether the contraventions were the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness.

70 With respect to AMPFP’s submission that Ms Firmansjah, Mr Coroneos and Ms Britt had never seen Rewriting Conduct (outside the advisers named in this proceeding), ASIC’s submission is that the evidence of Ms Firmansjah and Mr Coroneos is confined to conduct which is “similar to the Panganiban conduct” and does not address Rewriting Conduct similar to the conduct in relation to Clients 31-40, and that the evidence of Ms Britt addresses only her understanding as to the present prevalence of Rewriting Conduct and does not address the prevalence of Rewriting Conduct as at 1 July 2013 or at any other time during the period from 1 July 2013 to 30 June 2015.

71 Further, ASIC submits the evidence of Ms Britt (including at [33] of her affidavit, where Ms Britt gives evidence that her understanding is that “Non-Compliant Rewriting Conduct is not common, or widespread”) addresses only her understanding as to the present prevalence of Rewriting Conduct and does not address the prevalence of Rewriting Conduct as at 1 July 2013 or at any other time during the period from 1 July 2013 to 30 June 2015. Ms Britt’s evidence (at [33]) is that “there may be instances of yet to be detected Non-Compliant Rewriting Conduct … across AMPFP’s network”.

### II AMPFP submissions

72 As might be expected, AMPFP submitted that given ASIC has not attempted to prove that Rewriting Conduct was in fact “common” or “widespread”, there could be no basis for finding AMPFP had reason to believe that such conduct was “common” or “widespread”. In this regard a number of submissions were made.

73 *First*, AMPFP contends that any finding of knowledge would be inconsistent with the JER at [40], which AISC embraced, the premise of which was that it was necessary to carry out a further investigation *to see* whether Rewriting Conduct was more widespread. This necessarily presupposes that it was not known whether Rewriting Conduct was widespread.

74 *Secondly*, any notion that Rewriting Conduct may have been widespread is alleged to stem from an exchange between Ms Gregory and Mr Traynor in early 2013, in which Mr Traynor referred to a “common scenario” in respect of the conduct in which Panganiban engaged. Mr Traynor was alleged to be unavailable to give evidence as to what he meant, but it is contended that it is likely that these comments related only to Panganiban’s conduct because: (a) Mr Traynor was Panganiban’s dedicated underwriter (of the 29 clients of Panganiban (Clients 1-30) in respect of whom it is possible to identify the relevant underwriter, Mr Traynor was the underwriter for 26 of those clients); (b) there is nothing in any document to suggest that Mr Traynor ever saw any adviser other than Panganiban engaging in Rewriting Conduct; and (c) in the conversation he had with Ms Gregory, Mr Traynor referred to the fact that he had questioned this “common scenario” and this was a reference to an email Mr Traynor sent to the AMP Life Product team in December 2012 in which he raised an issue as to *Panganiban’s* conduct, not the conduct of any other adviser.

75 *Thirdly*, Ms Firmansjah, Mr Coroneos and Ms Britt (all of whom are within Advice Governance) gave unchallenged evidence that they have never seen conduct like that engaged in by Panganiban outside of the advisers named in this proceeding; further, Ms Britt gave unchallenged evidence that based on her understanding of the data analytic techniques that had been deployed and her role in Advice Compliance, her understanding was that Rewriting Conduct (whether of the kind in which Panganiban engaged or not) was not widespread.

76 *Fourthly*, in 2015 and 2016, it is submitted that AMPFP undertook an exercise which was alleged by AMPFP to constitute an attempt to identify those clients who may have been subject to systemic Rewriting Conduct. The conclusion from that exercise was that systemic Rewriting Conduct of the kind in which Panganiban engaged was not widespread. It was from that exercise that all of the instances of Rewriting Conduct in this case outside Panganiban were identified, in circumstances where during the Relevant Period there were approximately 20,000 applications by AMPFP advisers for insurance each year. The fact that only limited examples of such conduct were identified is submitted to be an indication that such conduct was not widespread.

77 *Fifthly*, it is an agreed fact that the nature of Panganiban’s Rewriting Conduct involved a practice of active cancellation of existing insurance, which was different to the Rewriting Conduct of the Other Authorised Representatives. The relevance of this matter is that to the extent that ASIC relies on Mr Traynor’s description of Panganiban’s conduct as a common scenario (and Ms Gregory’s repetition of it), that was said to be a reference only to Panganiban’s conduct, not Rewriting Conduct generally.

### III Conclusions as to commonality of conduct and knowledge

78 I have a feeling of disquiet in relation to this contested issue of knowledge.

79 On this topic, as both parties recognised, Mr Traynor’s emails were of signal importance. He was not called. There was a supposed explanation, being second-hand hearsay evidence from a solicitor for AMPFP, Mr Slater, which noted:

During the course of these proceedings, I made inquiries of Ms Larissa Baker Cook (General Counsel, Dispute Resolution and Regulatory Engagement at AMP) as to the availability of Mr Traynor to give evidence in these proceedings. In response to those inquiries, I was informed that it has not been possible to contact Mr Traynor about the subject matter of these proceedings and that Mr Traynor was not in a sufficient state of health to give evidence.

80 It was further said, again by way of second-hand hearsay, that Mr Traynor:

… was not required to attend any interview due to his absence from work, which was due to a medical condition and that ASIC had been advised of this condition during the course of that investigation.

81 Despite its deficiencies, there was no objection to this evidence maintained by ASIC and notwithstanding what I consider to be its less than compelling nature, there was no suggestion made that any inference should be drawn by reason of a failure of AMPFP to call Mr Traynor; nor did ASIC subpoena him and call him in its case. Accordingly, I am only left to speculate as to what Mr Traynor meant and what he knew.

82 The recipient of his email, Ms Gregory, gave evidence in chief, which included the following:

On 7 March 2013, I called Todd Traynor who was an underwriter with AMP in order to obtain further information in relation to Mr Panganiban... While I no longer recall the conversation, I have no reason to doubt that the file note is accurate. In that file note, I have recorded that Mr Traynor has said that this appears to be a “common scenario”. I do not now recall whether Mr Traynor identified how he formed this view or whether he indicated that such a view related to Mr Panganiban or was also in relation to other financial advisers.

83 She gave further evidence as follows:

On 17 June 2013 I sent an email to Peter Bennett who was in ERM… I did so because I considered that it was necessary to escalate the matter to a licensee level so that a determination could be made as to whether there were any licensee concerns. In that email I noted that “New Business have told me that this practice is wide spread...”. In that statement I was referring to my discussion with Mr Traynor, rather than any conversation I had with someone in the New Business team. As I have noted above, I did not know the basis for Mr Traynor’s statement. I had not seen such a practice before Mr Panganiban came to my attention.

84 There was no cross-examination. Additionally there was no exploration of, and challenge to, the evidence in chief of Ms Firmansjah, Mr Coroneos or Ms Britt. Regarding AMPFP’s submission that they each gave unchallenged evidence that they have never seen conduct like that engaged in by Panganiban outside of the advisers named in this proceeding, this was not entirely accurate. As I have explained above, the evidence of Mr Coroneos and Ms Firmansjah was that they had not observed Rewriting Conduct outside of Panganiban. Notably, superficially consistent but subtlety different evidence was adduced by AMPFP through Ms Britt after the making of admissions in May 2019 following service of the JER. Such inconsistencies were unexplored.

85 AMPFP’s submission that by embracing the JER, ASIC accepted that it was apparently necessary to investigate to ascertain whether Rewriting Conduct was widespread, has little substance. How it was within the experts’ knowledge to draw conclusions, even implicitly, about the fact of the extent of AMPFP’s knowledge, was not really explained. The experts were not acting in an inquisitorial fashion ascertaining precisely what AMPFP knew and when it knew it. Nor is there much substance in AMPFP’s reliance on its later internal investigations because of the limitations of those investigations, which I will deal with below.

86 More relevantly, however, there was no evidence as to why Mr Buckler’s evident concerns, as early as February 2013, were not followed up; it will be recalled he had been sent an earlier email from Mr Traynor saying “*[t]hey* should NOT be allowed to do this as it is not right by the client BUT as per below unfortunately nothing we can do” (emphasis added). Further, Ms Gregory was not cross-examined on precisely why she formed the view “that it was necessary to escalate the matter to a licensee level”, which would seem to me to indicate that she might have considered, partly on the basis of what had been communicated by Mr Traynor, that it was of sufficient significance to be reported (a view later shared by the initially constituted Issues Panel).

87 All the affidavit evidence, as ASIC correctly submits, was evidently finely drafted but taken together, on the state of the evidence as a whole, there is no secure basis upon which I can reach a level of reasonable satisfaction to make a finding in accordance with s 140 of the *Evidence Act 1995* (Cth) that senior management of AMPFP had reason to believe that the Rewriting Conduct was common or widespread in June 2013 (although I wish to emphasise that this does not equate to a finding that I am satisfied that this was not the case).

88 I hasten to add that in making this finding I am not being critical of the way ASIC’s case was run. Experienced and highly competent counsel advanced ASIC’s case with skill. In not exploring and testing some curious aspects of AMPFP’s evidence, they were no doubt acting on instructions from ASIC. Perhaps it was thought by ASIC that it does not matter a great deal because a penalty at the higher end of the range is required to be imposed to achieve the ends of specific and general deterrence, irrespective as to whether AMPFP had or should have had knowledge, as at June 2013, as to how widespread the conduct might have been (and actually was). It may have also been thought that the essence of at least some of the contraventions was not taking steps to investigate and then address the extent and seriousness of Rewriting Conduct, irrespective of whether it had reason to believe, as at June 2013, it was widespread. It is further relevant that the knowledge of the seriousness of the Rewriting Conduct problem, and its possible causes, evolved in the manner I have explained after June 2013, up until the emergence of the Issues Panel. But having noted these matters, as a consequence of the way ASIC has approached this aspect of the case as to early knowledge of AMPFP, I am left looking through a glass darkly. I can only speculate as to how widespread the Rewriting Conduct actually was in mid-2013 and, in particular, what those responsible within AMPFP actually knew or should have known about the extent of such conduct. But speculation is not proof. At the end of the day, as will be explained in the context of determining penalty, irrespective of ASIC’s failure to prove that as at 1 July 2013 AMPFP had reason to believe that the Rewriting Conduct was common, what really matters is that during the Relevant Period, and the latter part of that period in particular, it signally failed to determine the extent and seriousness of the Rewriting Conduct in the wider representative network and assess what changes were needed.

## G.2. How many contraventions of s 961L?

89 The second contested issue is a dispute between the parties as to how many contraventions of s 961L were committed by AMPFP as a result of its admitted conduct. It is this issue to which I now turn.

### I The competing contentions

90 Following the hearing, in submissions filed on 9 July 2019, ASIC contended that the following approaches were open to the Court in determining the number of contraventions of s 961L:

(1) ASIC’s primary case, being that AMPFP committed 120 contraventions of s 961L on the basis that there was a separate contravention of s 961L for each underlying contravention of ss 961B, 961G and 961J in respect of the advice provided to each of the 40 clients identified on the schedules to the statement of claim in circumstances where AMPFP failed to take reasonable steps to ensure that each of the six identified authorised representatives complied with each of the three relevant best interests obligations (being ss 961B, 961G and 961J);

(2) in the alternative, AMPFP committed ***18 contraventions*** of s 961L on the basis that AMPFP failed to take reasonable steps to ensure that each of the six identified authorised representatives complied with each of the three relevant best interests obligations; or

(3) in the further alternative, AMPFP committed ***six contraventions*** of s 961L on the basis that AMPFP failed to take a set of steps referable to Panganiban’s contraventions of the three best interests obligations and a distinct set of steps to ensure that Other Authorised Representatives complied with each of the three relevant best interests obligations.

91 AMPFP submits that it committed ***two contraventions*** of s 961L of the Act, rather than the six, 18 or 120 contraventions for which ASIC contends.

### II A preliminary issue

92 Before considering these alternative contentions, it is convenient to turn first to a preliminary issue, being the submission of AMPFP that it is not open to the Court to find that there were 18 contraventions by AMPFP of s 961L.

93 AMPFP stresses that the proceeding is to be determined on the basis of the case as pleaded and run noting that in a civil penalty context, close adherence to the pleadings is essential: see *Vines v Australian Securities and Investments Commission* [2007] NSWCA 75; (2007) 73 NSWLR 451 at 458 [55]. Here, until the hearing, both parties conducted the case on the basis that there are two, six or 120 contraventions and AMPFP submits it is now far too late for the Court to be considering a different potential number of contraventions, namely, the 18 contraventions raised by the Court for the first time at the hearing. AMPFP asserted that it would suffer prejudice should the Court entertain an alternative case of 18 contraventions, because:

(1) AMPFP has made admissions of conduct alleged against it in the context of the pleaded case which involved forensic assessments and resulted in decisions which cannot now be undone, in the sense they have been publicly recognised by AMPFP as contraventions; this public recognition, evinced by the media articles comprising Exhibit F, cannot be remedied by an adjournment or withdrawal of admissions;

(2) the evidence that has been adduced that formed the basis for the admissions that were made has been directed to the case as pleaded and run by ASIC; this is made most clear through the JER; and

(3) relying on Beach J’s observations in *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; (2018) 131 ACSR 585 at 606 [106], there will be an inherent prejudice in circumstances where a departure is sought from the case as pleaded and conducted.

94 For the reasons that follow, the submissions of AMPFP in this regard should be rejected.

95 The starting point is that it is obviously correct that adherence to pleadings is important and especially so in a civil penalty context. However, one must not lose sight of the primary purpose of pleadings: to ensure procedural fairness is provided to an opposing party by furnishing a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it: *Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658 at 664 [6] and *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279 at 286 [18].

96 On any view of things, AMPFP came prepared to meet a case alleging, at its highest, 120 contraventions of s 961L arising out of each and every instance of advice being provided to a client identified in the schedules to the SOC by Panganiban and five of the Other Authorised Representatives in a manner non-compliant with the relevant best interests obligations. This primary submission of ASIC was known to AMPFP when it came to the admissions ultimately made by way of letter dated 16 May 2019. In this regard, it is worth focussing on the precise form of the admissions made. The terms of this letter (Exhibit A) are instructive (with my emphasis):

In the light of the conclusions expressed in the [JER], we are instructed that AMPFP will now also admit to the pleaded contravention of s 961L of the [Act] **concerning rewriting conduct** in [25] of the statement of claim, namely, that during the Relevant Period, in contravention of s 961L of the Act, AMPFP failed to take reasonable steps to ensure that Authorised Representatives (other than Panganiban) complied with ss 961 B, 961G and 961J of the Act.

97 Although AMPFP might emphasise the use of the definite article in relation to the pleaded contravention of s 961L as suggesting an admission only with respect to a single contravention, when one continues to read the sentence, it becomes clear it is an admission “concerning rewriting **conduct**” (as pleaded in the statement of claim at [25]). It is this *conduct* which constitutes the essential facts or elements giving rise to potentially multiple contraventions.

98 Importantly, in admitting the conduct referred to in the statement of claim at [25], which senior counsel accepted was the effect of the letter dated 16 May 2019, what was being admitted by AMPF was that:

During the Relevant Period, in contravention of s 961L of the Act, AMPFP failed to take reasonable steps to ensure that Authorised Representatives (other than Mr Panganiban) complied with ss 9618, 961G and 961J of the Act.

Particulars

(i) AMPFP failed to take reasonable steps:

(A) to determine whether, among the Authorised Representatives who provided financial product advice to retail clients about AMP Life Products, there were others (in addition to Mr Panganiban) who had engaged, or were engaging, in Rewriting Conduct in contravention of ss 9618, 961G and 961J of the Act; and

(B) to determine how common or widespread any such conduct was and what reasonable steps should be taken in order to ensure that it ceased;

(C) to then take the steps identified in (B);

(ii) AMPFP failed to take reasonable steps to remove (or to request AMP Life remove) the incentive created by the Commission Model for Authorised Representatives to engage in Rewriting Conduct in contravention of ss 961B, 961G and 961J of the Act;

(iii) AMPFP failed to take reasonable steps to implement appropriate policies and procedures designed to ensure that Authorised Representatives did not engage in Rewriting Conduct in contravention of ss 961B, 961G and 961J of the Act;

(iv) AMPFP failed to take reasonable steps to consider whether the Rewriting Conduct engaged in by Mr Panganiban had disclosed weaknesses in AMPFP’s compliance systems and to then take reasonable steps to remedy those weaknesses.

99 While in civil proceedings there is generally very considerable scope for the parties to agree on the facts and upon consequences, this is subject to the court being “sufficiently persuaded of the accuracy of the parties’ agreement as to facts and consequences”: see *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at 507 [57], and [58] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). This means that the task of determining the number of contraventions arising on the established facts is one properly for the determination of the Court, not the parties (nor their experts), subject to the need to afford procedural fairness by giving the parties notice that the Court is contemplating a conclusion that had not been the subject of submissions and inviting the parties to make submissions or (if relevant) to adduce further evidence relevant to the question. In this regard, I respectfully agree with Moshinsky J’s observations in *Australian Competition and Consumer Commission v Meriton Property Services Pty Ltd (No 2)* [2018] FCA 1125at [66], albeit in the context of an agreed penalty hearing:

… the Court is not constrained by the agreement of the parties as to the amount of the proposed penalty or by the parties’ agreement as to the number of contraventions. It is open to the Court to form a different view (subject, of course, to giving the parties appropriate notice). This is because the Court needs to be satisfied that the proposed penalty is an appropriate penalty and that the statement of agreed facts provides a proper basis upon which to proceed. By parity of reasoning, even in an adversarial context, the Court is not necessarily constrained by the positions adopted by the parties as to the amount of a penalty or the number of contraventions. Of course, this is subject to the proceeding being conducted fairly and appropriate notice being given if the Court is minded to depart from the basis upon which the parties have proceeded…

100 Consistently with the approach explained by his Honour, procedural fairness was provided; indeed, it might be said, it was provided in spades. When the possibility of 18 contraventions of s 961L was first flagged on the second day of the hearing, AMPFP was afforded the opportunity to apply for an adjournment, adduce further evidence and/or to make an application to withdraw any admissions it had made. The following exchange occurred (at T114.9-115.10):

HIS HONOUR: … I don’t want to cause any unfairness whatsoever to your client, and … the more I look at it, the more I think [18 contraventions is] at least an available way of going. Now, if that’s the case, I don’t want to put your client in a situation where it… suffers any unfairness whatsoever…. if you take instructions and establish to my satisfaction that you propose to put on further evidence in order to meet such [a characterisation] - I must say, I’m a little confused as to what evidence will be relevant to this, given the nature of the underlying facts, but if you tell me that you made forensic decisions about evidence on the basis that – notwithstanding a case of 120 contraventions was open; notwithstanding a case of two contraventions was open; and notwithstanding a case of six contraventions was open – you’re not in a position to meet a case of 18 contraventions from an evidentiary point of view, then I would give you the opportunity of having an adjournment to put further material that you wish to put forward, if you’re following instructions and considering the matter, that’s a submission you put, and reserve the issue of costs of the adjournment, but - - -

MS COLLINS: I will take – it’s an important matter, of course, and I will take instructions on it, but can I just say this first. I can’t unscramble the egg. We admitted to contraventions as set out in the joint expert report. As I will take your Honour through, there is nothing in the joint expert report which distinguishes between a failure on my client to take reasonable steps to ensure compliance with, for instance, 961B and 961G. We made an assessment about the strength of the case based upon the NSG line of authority, which is an assessment, obviously, we will have to live with, but we would - it's a matter, with respect, that can be cured by an adjournment because it's just - - -

HIS HONOUR: Well, it would be either cured by an adjournment or cured by withdrawal of admissions then, wouldn’t it?

MS COLLINS: Can I take instructions?

HIS HONOUR: Well, it must be, mustn’t it?

MS COLLINS: Well - - -

HIS HONOUR: You’re saying to me that you can meet a case for 120 contraventions but you can’t meet a case of 18, and because of that you’ve raised two issues. One, you said you may have adduced further evidence; secondly, you may not have made admissions. If senior counsel tells me seriously that they would have put on further evidence, they wouldn’t have made admissions that they make, given the nature of the admissions made in this case, then I will accept that at face value.

MS COLLINS: Well, obviously I will need to get instructions about that, but the first and primary point I’m putting to your Honour is that it’s too late in the day to take up a blue pencil and redraft ASICs case. Redraft the way in which ASIC has put its case. It’s just too late. It would be too late in a civil case, with respect, and it’s particularly too late in a civil penalty proceeding.

101 Later, after obtaining the foreshadowed instructions following the luncheon adjournment, senior counsel (at T171.5-12) informed the Court of the following:

MS COLLINS: So I’m instructed we don’t seek an adjournment and our position is that an adjournment wouldn’t cure what we say the prejudice is if ASIC are allowed to, effectively, put forward a case that’s contradictory – or, sorry, which is outside the realms of the case that has been foreshadowed to date.

HIS HONOUR: Okay.

MS COLLINS: So that’s our position.

102 At the resumed hearing on 26 July 2019, when the issue of prejudice was again pressed by AMPFP, and following the tender of Exhibit F (discussed at [93(1)] above), it was made clear on several occasions that despite the force of Ms Collins’ submissions, upon reflection, I was experiencing some difficulty in accepting AMPFP’s contentions as to prejudice in the absence of evidence explaining how AMPFP might have conducted their case differently in the counterfactual (where the prospect of 18 contraventions had been raised in advance of the hearing). After a short adjournment to enable senior counsel to take instructions on the point, it was confirmed that AMPFP did not propose to adduce any evidence from its solicitor or any other person responsible for giving instructions. Senior counsel, with her customary candour, did not contend (after having had the opportunity of taking instructions) that some *specific* different course would or may have been taken by AMPFP if the possibility of 18 contraventions had been raised earlier. Given what had been conveyed in the JER, that is hardly unsurprising. That evidence, if accepted, made AMPFP’s resistance to a finding it had engaged in the underlying contravening conduct at best, highly problematical and at worst, untenable.

103 Looked at realistically, the position following service of the JER was that the admissions as to contravening conduct were, in a practical sense, forensically necessary, irrespective as to whether this meant there were two or 120 contraventions. I reach that conclusion with more confidence in the absence of any sworn evidence from AMPFP to the contrary. Put another way, in the absence of any evidence, I am unpersuaded of any realistic (as opposed to entirely theoretical) prospect that AMPFP would not have made the admissions it made or might otherwise have conducted its case differently in the counterfactual. Given the opportunities afforded to AMPFP to make further submissions, adduce further evidence, or seek leave to withdraw any admissions, it is open for the Court to entertain the prospect that on proper analysis that were 18 contraventions of s 961L.

### III Three observations as to the construction of s 961L

104 Three things can be said about s 961L by way of preliminary observation.

105 *First*, the word “ensure” is forward-looking. It is directed to the taking of steps to achieve compliance with certain statutory norms (including the relevant best interests obligations) before any particular instance of non-compliance has arisen. Although the seriousness of the obligation is amplified by the use of the word “ensure” (see *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Limited* [2006] VSC 112; (2006) 15 VR 87 at 108 [105] (Byrne J)), the onerousness of the standard is moderated by the requirement to take “reasonable steps”. Such language of “reasonable steps” is redolent of defences to liability employed in the Act (such as the safe harbour provisions in Ch 5) and other legislation, although in this case the absence of reasonable steps is itself an element of any contravention.

106 *Secondly*, the text of s 961L makes its focus the conduct of the licensee, not the representative, and whether the licensee has taken “reasonable steps” (albeit these steps are directed at the conduct of their representatives). Critically, there is nothing in the text of s 961L that makes a contravention of the relevant best interests obligations a pre-requisite to a contravention of s 961L. Indeed, it was common ground between the parties that a contravention of s 961L may arise even if there has been no contravention of the relevant best interests obligations. This is easily imagined: a licensee could run a “bucket shop” without taking any reasonable steps to put in place adequate safeguards but may, by luck, have conscientious representatives who do their job. This would not inoculate the licensee from liability. Of course, the converse may also be the case, and the provision does not visit liability on a conscientious licensee, who has done all that could reasonably be expected, by reason of a representative unexpectedly going rogue.

107 *Thirdly*, the relevant best interests obligations to which s 961L refers fall under separate subdivision headings and each prescribe distinct statutory norms of conduct for the providers of financial advice, broadly summarised as: (a) acting in the best interests of the client (s 961B); (b) providing advice only where it is appropriate to the client (s 961G); (c) warning clients that advice is based on incomplete or inaccurate information (s 961H, not being in issue in this case); and (d) giving priority to the client’s interests when giving the advice (s 961J). Although the obligations relate to one another and breach of one may, depending upon the circumstances, amount to a breach of another, their particular content and focus differs.

### IV Prior authority on s 961L

108 As noted above, ASIC’s primary case is that each and every time Panganiban (or any other representative) is found to have contravened ss 961B, 961G or 961J, and it can be established that AMPFP failed to take reasonable steps to ensure compliance, AMPFP contravened s 961L. As a consequence, and with reference to the provision of advice to 40 clients by AMPFP’s authorised representatives, ASIC contends that AMPFP’s conduct can properly be characterised as involving 120 contraventions of s 961L.

109 ASIC’s primary submission has some support in the case law. In particular, ASIC pointed to O’Callaghan J’s observations in *Australian Securities and Investments Commission v Financial Circle* [2018] FCA 1644; (2018) 131 ACSR 484 at 523 [215] where his Honour noted:

In relation to s 961L of the [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.

110 This was an approach consistent with that taken in *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345; (2017) 122 ACSR 47, where Moshinsky J at 53 [20] found the licensee breached s 961L by failing to take reasonable steps to ensure its representatives, in providing advice to their clients, complied with ss 961B(1) and 961G and then (at [76], Orders 5 to 20) made separate declarations of contravention of s 961L in respect of each underlying contravention of ss 961B and 961G for each separate piece of advice. Similarly, in *Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd (No 2)* [2018] FCA 59; (2018) 124 ACSR 351, Moshinsky J concluded that a licensee failed to take reasonable steps to ensure the financial services covered by its licence were provided efficiently, honestly and fairly, in contravention of ss 961L and 912A(1)(a) (given serious deficiencies in taking substantive steps, measures, processes or procedures of the kind that appropriate practice would require of an AFSL: at 373 [113]). But in framing relief, his Honour, at 377 [138], made declarations of breaches of s 961L in respect of each relevant client by reference to the licensee’s failure to take reasonable steps to ensure that its authorised representative complied with s 961G of the Act.

111 As might be expected, ASIC places considerable weight on *Financial Circle* notwithstanding the relevant part of his Honour’s judgment (extracted at [109] above) was delivered following no argument or dispute on the point and, wholly unsurprisingly in this context, without any detailed reasoning. It was a case where the civil penalties sought by ASIC were unopposed, at which the defendant did not appear, and at which there was no contradictor. Essentially the same position applies in respect of *Golden Financial Group Pty Ltd* (the authority relied on by O’Callaghan J in *Financial Circle*) and *Wealth & Risk Management Pty Ltd (No 2)*. Although there was some argument before Moshinsky J in *NSG Services* as to the requirements necessary to establish a contravention of s 961L, his Honour ultimately found that it was unnecessary to resolve the point (see 56 [39]).

112 The parties informed me that this is the first occasion on which a court has been required to deal with the issue of the number of contraventions arising under s 961L in a contested hearing. In determining this issue, I am unconstrained by the previous cases cited by ASIC consistently with the well-established principle that a court is not required to give deference to a proposition (even in an otherwise binding decision) in circumstances where the proposition was agreed or assumed without being the subject of argument or judicial consideration. That is true even where the conceded proposition forms part of the ratio of the previous decision. To this effect, in *CSR Ltd v Eddy* [2005] HCA 64; (2005) 226 CLR 1 at 11 [13], Gleeson CJ, Gummow and Heydon JJ noted:

[w]here a proposition of law is incorporated into the reasoning of a particular court, that proposition, even if it forms part of the ratio decidendi, is not binding on later courts if the particular court merely assumed its correctness without argument.

113 The fact that *Financial Circle* was a civil penalty decision does not prevent application of this principle – as is evident from *Australian Securities and Investments Commission v* *Cassimatis* (No 8) [2016] FCA 1023, where Edelman J was asked to apply principles from an earlier civil penalty decision in *Australian Securities and Investments Commission* v *Maxwell* [2006] NSWSC 1052. In rejecting this invitation, his Honour noted *Maxwell* was not a binding authority by reason of the principle identified above.

114 It follows that comity considerations do not oblige me to form the view that these previous cases were plainly wrong before departing from them.

### V Consideration of ASIC’s primary case

115 At its highest, ASIC submitted that proper consideration of text, structure and purpose of the provision supports the existence of a separate contravention of s 961L on each occasion that a representative, in respect of each client, contravened ss 961B, 961G or 961J, in circumstances where the licensee failed to take reasonable steps to ensure that the representative complied with those provisions.

116 While ASIC accepted that it was not necessary to establish actual or proven contraventions of ss 961B, 961G and 961J as a precondition to a finding of contravention of s 961L (referring to *Financial Circle* at 508 [123]), proven contraventions of ss 961B, 961G and 961J not only provide evidence of a licensee failing to take reasonable steps for the purposes of establishing the s 961L contraventions, but the underlying breaches point to the number of contraventions of s 961L.

117 ASIC submitted there is nothing in the text of s 961L which confines the obligation of the licensee to putting in place a general compliance framework with general measures, processes and procedures to ensure compliance. Rather, s 961L requires the licensee to be alive to the possibility of non-compliance each and every time a representative provides advice and to calibrate the steps taken having regard to their knowledge of the particular circumstances. Ultimately what is required by the obligation to take “reasonable steps” will vary depending on those circumstances. If the licensee is aware of the risk of non-compliance by a specific representative, the relevant steps are likely to be specific to that representative. If a risk of systemic non-compliance is identified, then it is likely that the necessary steps must address systems and processes.

118 In further support of its interpretation by reference to s 961L’s purpose (insofar as it can be discerned from extrinsic materials), ASIC called in aid certain parts of the revised explanatory memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (**EM**), including:

(1) paragraph 1.15 on page 8:

Any penalties flowing from the breach of an obligation by an individual adviser will continue to flow through to the licensee or authorised representative, rather than the individual adviser, unless that individual is also the licensee or authorised representative.

(2) paragraph 1.75, page 20, under the heading Licensee Obligations:

Again, as previously noted, even though most of the obligations in division 2 are imposed on the individual that provides the advice, the penalties resulting from any breach flow through to the relevant licensee or authorised representative.

(3) paragraph 1.79:

As noted above, licensees also have a general obligation to take reasonable steps to ensure their representatives, including authorised representatives, comply with their obligations. The penalty for a licensee that breaches this obligation is the same as the penalty for the obligation that the licensee failed to take reasonable steps to ensure compliance.

119 It was argued that this language of “flow through” to the relevant licensee employed in the EM favours a construction of s 961L which involves a link between the breach of an obligation by an adviser and the breach of an obligation by the licensee.

120 In essence, AMPFP says that ASIC’s approach to construction is flawed because it involves injecting into the finding of a contravention of s 961L, the conduct of an individual representative and thereby inappropriately diverts focus from the conduct of the licensee. The text of s 961L focusses on the conduct of the licensee, not the representative, and whether the licensee has taken “reasonable steps”; there is nothing in the text of s 961L that makes a contravention of the relevant best interests obligations of the Act a pre-requisite to a contravention of s 961L. It is further submitted that ASIC’s approach is contrary to the purpose of s 961L, which is prophylactic in nature, operating independently of any conduct of an adviser or underlying breach by that representative.

121 AMPFP’s submissions should be generally accepted. The statutory context in which s 961L operates supports AMPFP’s approach in that s 961L can be contrasted with so-called “look through” provisions, such as s 961K, which impose liability on a licensee where its representatives (other than authorised representatives) engage in a breach of the best interest obligations; it was open to Parliament to cast s 961L in identical terms if it intended it to have that outcome (subject to a reasonableness qualification) and the fact that it did not is a strong indication that the approach for which ASIC contends is incorrect.

122 As for the extrinsic materials, I consider them to be more or less neutral and of no particular assistance. There can be no doubt the motherhood statements at page 3 of the EM indicate that one of the purposes of the Future of Financial Advice (**FOFA**) reforms (of which s 961L is a part), was to build trust and confidence in the financial advice industry by requiring financial advisers to act in the best interests of their clients and to place the interests of their clients ahead of their own when providing personal advice to retail clients. It might be said that ASIC’s preferred construction would further the purpose of the statute by reinforcing the new statutory obligations. But legislation rarely pursues a single purpose at all costs (*Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at 143 [5] (Gleeson CJ)). I am not persuaded that the use of the language of “flow through” in the relevant parts of the EM assists ASIC’s construction in any meaningful way.

123 As explained above, the actual conduct to which s 961L is directed is the taking of reasonable steps by the licensee, not the provision of advice by representatives (being the conduct to which the best interests provisions are directed). It necessarily follows that the process of determining whether a contravention has occurred is assessed independently as to whether there have been particular contraventions by representatives. Properly understood, what we are concerned with is a “failure to perform” norm.

124 For these reasons, ASIC’s case that there was a separate contravention of s 961L on each occasion that an adviser, in respect of each client, contravened the relevant best interests obligations (where the licensee failed to take reasonable steps to ensure that the advisers complied with those provisions), must be rejected.

125 Having rejected ASIC’s primary case of 120 contraventions of s 961L, it is necessary to consider the alternatives put forward by the parties: six or 18 contraventions (as contended for by ASIC) or two (as contended for by AMPFP).

### VI Consideration of AMPFP’s case: two contraventions

126 AMPFP’s approach of arguing for two contraventions is said to be consistent with the approach adopted to determining the number of offences in the criminal law, in which particular acts are connected in their circumstances and linked by a common purpose so as to constitute a single offence: *Director of Public Prosecutions v Merriman* [1973] AC 584 at 607 (Diplock LJ).

127 It is submitted that ASIC’s pleaded case relies on two sets of circumstances giving rise to what are two contraventions of s 961L and makes no reference to repeated failures or contraventions; these circumstances are analogous to how an offence that involves a failure to engage in an act that persists over a period of time is properly characterised as a single crime that persists from day to day: see *R v Industrial Appeals Court; Ex parte Barelli’s Bakeries Pty Ltd* [1965] VR 615 at 620 (O’Bryan and Gillard JJ). Consistently with this, in this case, there are two sets of contraventions each linked by their circumstances (both temporally and in terms of the acts alleged to constitute the contraventions).

128 Superficially, AMPFP’s approach has some attraction, but it does not survive close analysis. It is true that ASIC has identified and pleaded two sets of circumstances that created failures to take “reasonable steps”. The conduct by AMPFP relating to Panganiban was logically distinct from AMPFP’s other contravening conduct. As explained above, the distinct steps identified by the experts that AMPFP should have taken (but failed to take) in respect of Panganiban’s Rewriting Conduct, were different to the reasonable steps AMPFP should have taken (but failed to take) in relation to possible Rewriting Conduct by Other Authorised Representatives.

129 However, I am not persuaded by the next step in the argument: AMPFP’s submission that given there were only two “sets” of circumstances that created failures to take reasonable steps, this leads axiomatically to the conclusion that there has been only two contraventions of s 961L. This is to oversimplify the position.

130 As observed above, each of the best interests provisions prescribes a distinct statutory norm of conduct designed to protect the clients of financial advisors. Indeed, the distinct and protective nature of each norm has recently been emphasised and discussed recently in *Australian Securities and Investments Commission* *v Westpac Securities Administration Limited* [2019] FCAFC 187, *Australian Securities and Investments Commission* *v Dover Financial Advisers Pty Ltd* [2019] FCA 1932 and *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147. These separate norms of conduct are the reference points by which a licensee is obliged by s 961L to take steps to ensure compliance by its representatives. Importantly, as ASIC correctly submitted, quite different reasonable steps might be required to ensure representatives comply with each of the relevant best interests obligations.

131 To adopt an example from ASIC’s submissions, different reasonable steps might be required to ensure representatives comply with their obligation under s 961J to give priority to a client’s interests where there is a conflict (such as by adjusting the Commission Model to remove any financial incentive for a representative to prefer his own interests) than those that might be required to ensure representatives comply with their obligation in s 961B to act in their clients’ best interests (such as by implementing and enforcing a policy prohibiting Rewriting Conduct and ensuring training is provided to representatives regarding such a policy).

132 Despite not being constrained by prior authority, I am fortified by the fact that each of Moshinsky J and O’Callaghan J recognised that different reasonable steps might be required to ensure representatives comply with each of the relevant best interests obligations: *NSG Services* and *Golden Financial Group*. In fact, in *NSG Services* (at 53-54 [21]), Moshinsky J expressly recognised the distinctness of the obligations (at least in respect of ss 961B and 961G):

It was common ground that, while s 961B is concerned with the process or procedure involved in providing advice that is in the best interests of the client, s 961G is concerned with the content or substance of that advice. At first blush, the text of s 961B does not appear to support the proposition that s 961B is concerned with the process or procedure involved in providing advice that is in the best interests of the client. However, support for this way of viewing the focus of s 961B is provided by the context in which it appears, including the language of s 961G, the legislative history, and the legislative materials (see, in particular, the revised explanatory memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) at [1.23], [1.24], [1.57]). It is unnecessary for present purposes to reach a concluded view on this issue.

133 If AMPFP’s approach were correct, it could lead to anomalous results. Say the evidence was capable of supporting a failure by a licensee to take reasonable steps to ensure that a representative of the licensee complies only with s 961J (perhaps because a representative had failed to give priority to a client’s interests when giving advice and the licensee failed to establish a system of conflict identification and management, but was otherwise beyond reproach), then the result would be a contravention by the licensee of s 961L. Alternatively, as is the case here, the evidence may establish a failure by a licensee to take reasonable steps to ensure that a representative of the licensee complies with multiple provisions which ground a contravention of s 961L. And yet, on AMPFP’s submission, that would still be a single contravention by the licensee of s 961L, notwithstanding the greater number of statutory norms contravened by representatives of the licensee and, by virtue of that fact, such an approach would direct focus away from the actual reasonable steps taken by the licensee which should have been directed to ensuring compliance with the differing requirements of the four distinct norms regulating the conduct of the authorised representative.

### VII ASIC’s alternatives: six or 18 contraventions

134 Part of the argument advanced by AMPFP in opposition to ASIC’s alternative submission that there are six or 18 contraventions relates to the argument advanced as to why ASIC’s primary submission foundered: that it is unsustainable because it seeks to shift focus impermissibly away from the obligation of the licensee under s 961L.

135 AMPFP further submits that the artificiality of ASIC’s approach is demonstrated by the fact that it seeks only one declaration in respect of s 912A(1)(ca) (being a similarly cast obligation on the licensee to take reasonable steps to ensure that its representatives comply with the financial services laws), but multiple declarations in respect of s 961L; indeed AMPFP goes so far as to submit that ASIC’s approach appears to be an attempt to increase the number of contraventions so as to increase the maximum penalty: see *ASIC v Westpac Banking Corporation (No 3)* at 608 [116]. I will return to s 912A later in these reasons.

136 Although I was initially attracted to the prospect of there being 18 contraventions, I have reached the conclusion that there were six contraventions of s 961L by AMPFP, having failed to take reasonable steps to ensure compliance by six of its representatives with respect to three separate statutory norms.

137 The essential reason why I have fastened upon six contraventions has already been partly explained in my rejection of ASIC’s primary case of there being 120 contraventions and AMPFP’s submission that there were two contraventions.

138 Most importantly, the s 961L contraventions by AMPFP relating to Panganiban were clearly distinct from the other contraventions of s 961L. Having become aware of Panganiban’s conduct, it was necessary for AMPFP to ascertain the extent of breaches by Other Authorised Representatives, and the reasonable steps AMPFP should have taken (but failed to take) in respect of Panganiban’s conduct, were distinct from the reasonable steps AMPFP should have taken (but failed to take) in relation to possible similar conduct by Other Authorised Representatives.

139 Further, separate contraventions arose in relation to the failures to take reasonable steps to ensure compliance with each of ss 961B, 961G and 961J. As ASIC correctly submits, in relation to a representative’s contraventions of each of ss 961B, 961G and 961J, there was a separate contravention of s 961L corresponding to each of the separate underlying contraventions because those underlying obligations are distinct. It follows that distinct contraventions of s 961L have occurred.

140 Accordingly, I conclude that AMPFP engaged in six contraventions which can be identified as follows:

(1) *first*, during the period 1 July 2013 to September 2014,one contravention of s 961L for failing to take reasonable steps to ensure that Panganiban complied with s 961B of the Act;

(2) *secondly*,during the period 1 July 2013 to September 2014, one contravention of s 961L for failing to take reasonable steps to ensure that Panganiban complied with s 961G of the Act;

(3) *thirdly*, during the period 1 July 2013 to September 2014, one contravention of s 961L for failing to take reasonable steps to ensure that Panganiban complied with s 961J of the Act;

(4) *fourthly*, during the period 1 July 2013 to 30 June 2015, one contravention of s 961L for failing to take reasonable steps to ensure that Other Authorised Representatives complied with s 961B of the Act;

(5) *fifthly*, during the period 1 July 2013 to 30 June 2015, one contravention of s 961L for failing to take reasonable steps to ensure that Other Authorised Representatives complied with s 961G of the Act; and

(6) *sixthly*, during the period 1 July 2013 to 30 June 2015, one contravention of s 961L for failing to take reasonable steps to ensure that Other Authorised Representatives complied with s 961J of the Act.

141 Noting the requirements of s 1317E(2)(d) of the Act, the particular reasonable steps that AMPFP omitted to take in respect of each contravention will need to be specified in the revised proposed orders to be brought in by the parties, by reference to those parts of the evidence in the JER that I have accepted (as outlined at Section E.2 and Section E.3 above)

## G.3 Follow on declarations: contraventions of ss 912A(1)(a), (c) and (ca)

142 Although contraventions of ss 912A(1)(a), (c) and (ca) did not, at the time relevant to this proceeding, sound in civil penalties, ASIC nonetheless seeks declarations pursuant to s 21 of the Federal Court Act that during the period 1 July 2013 to 30 June 2015, AMPFP contravened each provision.

143 I accept, as Perram J noted in *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* [2012] FCA 43; (2012) 213 FCR 380 at 441 [271], that pursuant to s 21 the Court has a general power to make a binding declaration of right even where no consequential relief is claimed.

144 Declarations should not, however, be spread around like confetti. As Wigney J observed in *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Limited (No 3)* [2018] FCA 1395 at [74], the fact that the parties have agreed a declaration should be made does not relieve the Court of the obligation to satisfy itself that the making of such a declaration is appropriate.

145 In particular, as with all discretionary remedies, a ground for refusing declaratory relief is that no good purpose will be served by granting it or that it lacks utility: see *Dillon v RBS Group (Australia*) *Pty Ltd* [2017] FCA 896; (2017) 252 FCR 150 at 158 [39] (Lee J) and *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 582 [38] (Mason CJ, Dawson, Toohey and Gaudron JJ).

146 ASIC submits that the authorities demonstrate that there is a public interest in declaring that by engaging in certain conduct a person has contravened the law, and the declarations would thus have utility because: (a) declarations sought by regulators may serve important law enforcement purposes, and (b) the making of such declarations “does not simply record the outcome of enforcement proceedings; it may also be an appropriate way of marking the court’s disapproval of the contravening conduct” (see *Australian Securities and Investments Commission v McDougall* [2006] FCA 427; (2006) 229 ALR 158 at 170 [55] (Young J)); and (c) the making of declarations may assist “perhaps in a small way” in clarifying the law (*Australian Competition and Consumer Commission v Goldy Motors Pty Ltd* [2000] FCA 1885 at [34] (Carr J)), by providing some clarity as to how certain practices fit within a regulatory framework (*ASIC v Australian Lending Centre* at 441 [272]).

147 AMPFP admits contravening ss 912(1)(a), 912A(1)(c) and 912A(1)(ca) of the Act. It does, however, draw attention to what it says is the artificiality of ASIC’s approach to the number of contraventions of s 961L when compared to the one declaration it seeks in respect of s 912A(1)(ca), since that provision imposes an obligation that is essentially equivalent to s 961L: see *NSG Services Pty Ltd* at 55 [31].

148 ASIC responded that the difference in the form of the declarations sought is explained, at least in part, by the fact that at the relevant time s 961L was a civil penalty provision whereas s 961A(1) was not. One of the consequences is that s 1317E(2) imposes specific requirements as to declarations of contravention of s 961L, which are not applicable to declarations in relation to s 912A(1). Which precisely of those requirements was relevant to this issue was not specified by ASIC.

149 There is force in AMPFP’s submission as to the less than ideal way in which the proposed declarations in relation to s 912A(1) are framed, which criticism has added force given I have found there to be six contraventions of s 961L (and in respect of which I will make declarations). But there remains the issue as to whether any additional declaration or declarations will produce some real consequence.

150 There are a number of cases in which judges have made declarations of contraventions of s 912A(1), even though no pecuniary penalties are able to be imposed. Indeed I have referred to some of these cases in these reasons (see, for example, *ASIC v Westpac (No 3)*). However, the remedy sought is discretionary and the discretion is one that ought not to be exercised unless circumstances call for it: *Ibeneweka v Egbuna* [1964] 1 WLR 219 at 224-225 (Viscount Radcliffe, Guest and Upjohn LLJ).

151 To ASIC’s submission that there is a public interest in declaring that a person who has engaged in certain conduct has contravened the law, I make this observation: the findings in these reasons will be noted, at least by the parties. I have made clear the Court’s disapprobation of AMPFP’s serious contravening conduct and will impose penalties. Reasons are not some kind of penumbral context surrounding an order made; they are its source: see *Athens v Randwick City Council* [2005] NSWCA 317;(2005) 64 NSWLR 58 at 78 [129] (Santow J, with whom Hodgson and Tobias JJA agreed). The reality is that both the Court’s disapproval of contravening conduct and clarification of the law is much more likely to emerge from a perusal of reasons than the bare terms of essentially repetitive declarations.

152 In the absence of a cogent reason demonstrated by ASIC, there is no point in indulging what was described by Gray J as the “fetish” of certain regulators seeking, and the Court granting declaratory relief, simply because the Court finds that a contravention has occurred: *Australian Competition & Consumer Commission v Francis* [2004] FCA 487; (2004) 142 FCR 1 at 36 [110]. This reluctance is reinforced by my conclusions that the proposed s 912A(1) declarations: (a) are pitched at too high a level of generality; (b) will not, of course, form a basis upon which pecuniary penalties will be imposed; and (c) will not be relevant to any issue as to costs.

153 However, in the light of the agreed facts and AMPFP’s admissions, I am prepared to make a finding that AMPFP contravened each of ss 912A(1)(a), (c) and (ca) in the manner explained in these reasons.

# H PENALTIES

## H.1 Pecuniary penalties

### I Introduction and relevant principles

154 At the time of each contravention, s 1317G(1E) relevantly provided that a Court may order a person to pay to the Commonwealth a pecuniary penalty if a declaration of contravention has been made under s 1317E, and the contravention is of one of the provisions listed in s 1317G(1E)(b)(i)-(xiv). Section 961L of the Act was listed in s 1317G(1E)(b)(ii).

155 Section 1317G(1F)(b) provided that the maximum pecuniary penalty for a corporation in relation to the contravention of a civil penalty provision, when imposed pursuant to s 1317G(1E), is $1 million. Other than specifying this maximum amount, the Act does not provide any express guidance in relation to the fixing of an appropriate pecuniary penalty.

156 The general principles in relation to the fixing of appropriate penalties are well-known and have been repeated in many cases. I am relieved of the necessity to set out the principles at any length as a (with respect) useful and concise summary of the applicable principles as to the importance of deterrence, the relevant factors generally, instinctive synthesis, the relevance of the maximum penalty, the “course of conduct principle” and totality, was recently provided by Wigney J in *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [255]-[272]. I adopt his Honour’s summary for present purposes without spilling further ink by setting it out in full.

157 It suffices to note three matters for present purposes.

158 *First*, and importantly in the present case, the principal object of a pecuniary penalty is to put a price on a contravention that is sufficiently high to deter both the contravenor (specific deterrence) and others who might be tempted to contravene (general deterrence); both specific and general deterrence are important: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 at 88 [98] (Dowsett, Greenwood and Wigney JJ).

159 *Secondly*, the process of quantifying pecuniary penalties is an inexact science, not subject to rigidity in approach but guided by well-accepted factors and a large number of cases have identified the various factors or considerations usually relevant to the assessment of an appropriate pecuniary penalty.

160 *Thirdly*, those various considerations or factors can be conveniently categorised according to whether they relate to the objective nature and seriousness of the contravention or to the particular circumstances of the respondent in question, with the factors relating to the *objective* nature and seriousness of the contravention including: (a) the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness; (b) whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time; (c) if the defendant is a corporation, the seniority of the officers responsible for the contravention; (d) the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation; (e) the impact or consequences of the contravention on the market or innocent third parties; and (f) the extent of any profit or benefit derived as a result of the contravention. While the factors that concern the *particular circumstances* of the respondent include: (a) the size and financial position of the contravening company; (b) whether the company has been found to have engaged in similar conduct in the past; (c) whether the company has improved or modified its compliance systems since the contravention; (d) whether the company (through its senior officers) has demonstrated contrition and remorse; (e) whether the company had disgorged any profit or benefit received as a result of the contravention, or made reparation; (f) whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and (g) whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* at 89-90 [102]-[104].

161 While recognising that in approaching the discretion as to fixing an appropriate penalty for each contravention it is necessary to have regard to all relevant factors and to disregard the irrelevant (and that the factors in one case may be inapplicable in another), it is convenient to organise my reasoning by reference to the factors specified above.

### II Objective factors that concern the seriousness of the contraventions

162 Before I embark on my analysis of the factors concerning objective seriousness, it is necessary to return to a point I touched upon above. Pecuniary penalties are not assessed in a vacuum: *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 at [42]. If they are to achieve their primary purpose of specific and general deterrence, they must be informed by *all the relevant circumstances* of the case. One of these circumstances, of course, is whether the contraventions with which I am concerned comprised isolated conduct, or were systematic or occurred over a period of time. Needless to say, this contextual consideration must not be confused with improperly imposing a penalty for conduct which might be thought to be similar to the contravening conduct, but which is unpleaded and not found to be contravening conduct. My task is to assess penalty *only* for the contraventions the subject of the proceeding and established on the evidence.

163 The consideration of this factor and assessing its relevance to penalty causes a potential difficulty. Having regard to the facts agreed and the unchallenged evidence, as noted above, I do not know the true extent of the Rewriting Conduct and the extent of AMPFP’s knowledge at the beginning of the Relevant Period. But I must put out of my mind any suspicions as to early knowledge and the true extent of Rewriting Conduct (which has not been revealed in this proceeding). Instead, I must proceed on the basis of my findings as identified in [87] and [88] above. With this in mind, I turn to the factors identified.

#### The extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness

164 As s 961L imposes a positive obligation on licensees to take reasonable steps, it necessarily follows that contraventions of s 961L may typically arise as a result of omissions, rather than as a result of positive acts. These omissions, which are in relation to Panganiban and the Other Authorised Representatives, have been identified in the JER and outlined at Part E above. In summary, AMPFP took some, but not all of the steps it would have been reasonable for it to take, to ensure compliance by its representatives with the best interest obligations and related obligations. Specifically, some key review measures were not in place either before or shortly after 1 July 2013, increasing the risk of some representatives not being compliant with the relevant best interests obligations and related obligations during the early part of the Relevant Period. Further, of the response measures that were taken to address Panganiban’s Rewriting Conduct, those measures (to express it in terms generous to AMPFP) were neither sufficiently comprehensive before September 2014, nor taken in a sufficiently timely way; and AMPFP took no response measures to respond to the risk of Rewriting Conduct engaged in by other AMPFP representatives even after September 2014 and during the balance of the Relevant Period.

165 AMPFP does not dispute that the omissions in this case were serious but, as explained above, submits there is no evidentiary basis to conclude that its conduct was deliberate, covert or systematic. It argues that the evidence establishes that AMPFP made a good faith attempt to comply with its statutory obligations.

166 As I have made clear above, logically, contraventions of the best interests provisions can stand apart from contraventions of s 961L. Therefore, it is important not to attribute the deliberateness and covertness of the Rewriting Conduct by Panganiban (and, to the extent it was proved, any of the Other Authorised Representatives) to AMPFP’s own conduct giving rise to its six contraventions of s 961L. To that extent, I do not accept ASIC’s submission that a matter relevant to assessment of penalty is the fact that *Panganiban’s* conduct was deliberate.

167 Ultimately, however, the contraventions, while not deliberate, cannot be regarded merely as a result of inadvertence or carelessness. The lack of a prompt response to the Panganiban conduct was the result of passivity and inaction following identified misconduct in contravention of the relevant best interests obligations. Contrary to AMPFP’s submissions, I reject the notion that the evidence establishes that AMPFP made a good faith attempt to comply with its statutory obligations. Although there is no finding of dishonesty by those who should have taken prompt action, their insouciance is striking. By way of example, when one has Mr Buckler telling the Head of New Business & Underwriting early on that Panganiban is “always cancel[ling] existing insurance before he applies for new insurance” and getting paid 100% commission; and later forwarding an email to higher-ups including the Manager of Retail Risk Product Operations which recorded a comment “[t]hey should NOT be allowed to do this as it is not right by the client BUT as per below unfortunately nothing we can do”, one would have thought alarm bells would have rung (indeed bellowed); as it happens, the lack of an effective response is an illustration of how badly things had gone wrong within the organisation. A good faith attempt would have been adopting a prompt and thorough remedial response when the problem was first discovered.

168 Although I accept the lack of some key review measures being in place either before or shortly after 1 July 2013 was not deliberate or reckless, the failure, after the Gregory Email, to take response measures to address Panganiban’s Rewriting Conduct, and to respond to the risk of more widespread Rewriting Conduct, is appropriately characterised as being reckless. More particularly, what is recorded in the minutes of the “Special Issues Panel Meeting” held on 1 October 2014 as being a “possible” explanation of what occurred is more likely than not to have been correct; that is, Panganiban’s conduct in cancelling insurance had been raised with AMPFP but Panganiban was “clearly writing a bucket load of business” and “there was a reluctance (on the Licensee’s behalf) to reprimand a productive adviser”. This conduct had consequences and reflects very poorly on AMPFP. What reflects even more poorly was the failure to take prompt and thorough steps to identifying whether there was evidence of possible Rewriting Conduct in the wider representative network when senior management became involved (notwithstanding I have not found there was actual knowledge that the non-compliant conduct was widespread at that time).

#### Whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time

169 I have found that AMPFP committed six contraventions of s 961L and that these contraventions occurred over a period of two years, from 1 July 2013 to 30 June 2015. While AMPFP resisted any suggestion that its contraventions, essentially arising from failures to engage in particular conduct (that is, omissions) could be described as “systemic”, the contraventions on the evidence are nevertheless not isolated conduct but, as ASIC submitted, amounted to failures to put in place policies, procedures and practices directed to preventing recurring Rewriting Conduct that was not consistent with the relevant best interests obligations.

170 I again emphasise the necessity to assess penalty in accordance with my finding that there is insufficient evidence to find that the Rewriting Conduct was more widespread than the pleaded contraventions and my further finding that ASIC has not proved that AMPFP had cause to believe it was more widespread during the entirety of the Relevant Period commencing in 2013 (although, as I have explained, knowledge of the scale of the potential problem is evident from the recommendations of the first Issues Panel in 2014).

#### Seniority of the officers responsible for the contravention

171 AMPFP says that there is no suggestion by ASIC that senior management of AMPFP, in the sense of those persons who were the directing mind and will of the corporation, were involved in the failures that led to the contraventions. To the extent that responsibility for the failures can be sheeted home to individuals, those failures were largely the result of people within the Planner Supervision and, its successor, Advice Governance teams, making errors of judgment and the ERM team failing to follow-up on an issue raised. None of the people in those teams could properly be described as part of the senior management of AMPFP.

172 Indeed, AMPFP submits the real failure was to escalate the matter to an appropriate level of seniority, rather than arising as a result of the conduct of senior management. Yet this is precisely the problem with AMPFP’s contraventions, at least after the discovery of the Rewriting Conduct by Panganiban. The fact that the issue of the Rewriting Conduct was not promptly escalated to a senior level brings into focus the inadequacy of AMPFP’s actions.

173 What the competing submissions do not address is something somewhat different to the actual involvement of senior management in the contraventions: that is, the conduct outlined at the beginning of these reasons. What occurred at the meeting of the reconstituted Issues Panel gives me no confidence whatsoever that if the matter had been raised at the highest levels of AMPFP earlier, the necessary action to have stopped further Rewriting Conduct would have been taken promptly. The response of the reconstituted Issues Panel, convened and attended by senior management (including no less a person than Mr Guggenheimer, the Managing Director of AMPFP) might be described in a number of ways, but whatever way one looks at it, it was not the reaction of senior managers who understood the true gravity of what had occurred and were committed to taking decisive action including investigating, with rigour, the possible extent of the problem and acquiring all necessary knowledge.

174 Moreover, related to the last point, the submissions do not distinguish between the different periods during which the contravening conduct occurred. As noted above, as to AMPFP’s failures to take reasonable steps to ensure Panganiban’s compliant behaviour, the contravening conduct occurred between 1 July 2013 and prior to September 2014; but there is also the balance of the Relevant Period *up to 30 June 2015*, which was the last part of the period during which AMPFP failed to take reasonable steps to ensure that Other Authorised Representatives engaged in compliant behaviour – despite involvement by senior management after the Panganiban balloon went up. In relation to this latter period, senior management were concerned with damage control (by painting Panganiban as a “bad apple”) and not taking the steps AMPFP was required to take up to 30 June 2015.

#### The existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation

175 The parties are agreed that AMPFP had in place various compliance and risk management systems and processes during the relevant period.

176 In its submissions, both written and oral, AMPFP made much of its elaborate and costly compliance system. It says that by the end of August 2014, AMP had spent $48 million on its FOFA programme, and its anticipated total spend was approximately $50.5 million. Further, since at least early 2012, AMP had established a steering committee titled the FOFA & Super Ready Steering Committee, which had obtained advice, from time to time, from external consultants including PwC.

177 As may already be evident from the introduction to these reasons, I consider AMPFP significantly overstates the significance of its compliance systems. These contraventions have arisen due to a want of corporate will to ensure the adequate working of AMPFP’s existing compliance systems, however elaborate and costly they were. The essence of AMPFP’s contraventions of s 961L lies in its failures to act and, insofar as the later period of the contraventions is concerned, a failure to act notwithstanding information about a particular kind of non-compliant conduct was available; that is, both to stop Panganiban from continuing to engage in his repeated and serious misconduct, but also to take what seem to me to be basic and obvious steps to investigate in a timely manner whether other representatives were engaged in similar conduct and to address the conduct that had come to the attention of AMPFP’s employees.

178 This was not a case of a “rogue” falling through the narrow cracks of an otherwise well-built compliance system. Panganiban, though undoubtedly a rogue, fell through holes in what may well have been an expensive, but was an inadequately operated compliance system. The system was operating in a context where someone like the Head of New Business & Underwriting could be aware conduct was taking place which was “not right by the client”, but despaired that there was nothing that could be done. A system is only as good as those responsible for its operation and seeing its requirements are enforced. The proof of the pudding about a lack of corporate will is demonstrated by the failure to act decisively throughout the Relevant Period.

#### The impact or consequences of the contravention on the market or innocent third parties

179 ASIC submitted that the Rewriting Conduct exposed clients to the Rewriting Risks outlined at [59(2)] above and that exposure of clients to those risks in itself caused detriment. Here, ASIC sought to prove that AMPFP’s contraventions of s 961L related to 40 clients of its representatives and each was exposed to one or more of the Rewriting Risks.

180 In terms of actual harm, the parties were agreed that the conduct in fact resulted in harm and Clients 16, 20, 36, 38 and 40 suffered as a result of the imposition of exclusions and/or loadings in respect of the relevant clients’ insurance policies. That said, the exposure of clients to the Rewriting Risks is of itself a detrimental impact on third parties which must be taken into account. Moreover, given the nature of the contraventions in relation to the Other Authorised Representatives and the limitations of investigations to date, the true extent of the Rewriting Conduct (and hence the extent of harm) is, as AMPFP accepted, presently unknown and may never be known with any precision.

#### The extent of any profit or benefit derived as a result of the contravention

181 Although the authorised representatives personally derived profit from the Rewriting Conduct (such profit being considerable in the case of Panganiban), it is not accurate to say that AMPFP itself profited or benefited from the Rewriting Conduct in any *direct* way and ASIC makes no submission that it did. That said, as I have explained above, there is an obvious, albeit indirect commercial benefit in not reprimanding productive advisers, including at least one who was “writing a bucket load of business”.

### III Subjective factors that concern the particular circumstances of AMPFP

#### The size and financial position of the contravening company

182 This is an important consideration.

183 As Beach J observed in *Australian Securities and Investments Commission v Westpac* *(No 3)* at 609 [121], in considering the extent to which the penalty achieves deterrence, it is necessary to have regard to a company’s size and profitability. The rationale is that modest penalties are unlikely to deter very large corporations from engaging in contravening conduct from which they may derive significant benefits. Of course, the present case is not an example of contravening conduct that resulted in direct, significant financial reward, but nonetheless if specific deterrence is to be promoted, the size of the company suffering a financial impost will be relevant to the subjective significance of a penalty.

184 It is common ground that AMPFP’s business is large and that at all relevant times it had, by industry standards, a large number of authorised representatives. Specifically, during the relevant period, it had between 1,662 and 1,716 representatives. In addition, AMPFP is a subsidiary of AMP Limited, an entity listed on the ASX. During the relevant period, AMP Limited held consolidated net assets of between $7.6 billion and $8.8 billion. AMP Limited’s total comprehensive income for the year ended 31 December 2018 was $91 million. AMP Limited’s consolidated net assets for the year ended 31 December 2018 was $6,791 million. Segment profit after income tax for Australian wealth management was $363 million. It should be noted, however, that in FY2018, AMPFP made a loss (before tax) of $64 million and had net assets in the order of $8 million.

185 AMPFP accepts that it may be appropriate to have regard to financial accommodation that may be available to a contravener but the approach suggested by ASIC, of looking at the assets of any related body corporate, is said to be inappropriate because it takes into account assets of separate legal entities not available to the contravener. Leaving aside the complexities of the inter-company organisation and financial accommodation of the corporate group, AMPFP is part of a much larger and coordinated corporate group. When one recalls the relevance of not only specific deterrence, but also general deterrence (see *Australian Competition and Consumer Commission v ACM Group Limited (No 3)* [2018] FCA 2059 at [96] (Griffiths J)), it can be appreciated why it is important that the public perception of AMPFP (as a constituent part of a large, internally coordinated and wealthy corporate group) is a relevant consideration, notwithstanding it being a separate, albeit associated legal person to AMP Limited and other sibling companies.

186 Although the size of a contravening corporation does not, of itself, justify a higher penalty than might otherwise be imposed (*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at 559-560 [89]-[92]), in the case of AMPFP, I am satisfied its size is highly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent.

#### Whether the company has been found to have engaged in similar conduct in the past

187 AMPFP has not previously been found by a court to have contravened s 961L of the Act (or similar provisions). This is not particularly surprising given the recent passage of the provisions, but it is nonetheless a mitigating factor when it comes to assessment of penalty.

#### Whether the company has improved or modified its compliance systems since the contravention

188 I accept and take into account when assessing the objective seriousness of the contraventions that AMPPF has taken some steps to improve and modify its compliance systems since its contraventions, both generally and in respect of Rewriting Conduct, but the significance and worth of these steps is a matter of dispute.

189 To the extent that AMPFP relies on matters which it says evince improvement or modification, it is necessary to inject a dose of reality. Despite the predictable, later incantations of acceptance that Panganiban’s conduct was serious, there was no contemporaneous and spontaneous sign of repentance (in the sense there was no evidence of any timely subjective remorse or appreciation of the seriousness of the misconduct producing immediate changes to AMPFP’s compliance systems). The truth appears to be that any changes, in reality, were the result of mitigating the “fall out” or protecting the position of AMPFP following the interest of ASIC (such as the 2015 investigation into whether Rewriting Conduct was widespread, which apparently followed a compulsory notice issued by ASIC).

190 I am not prepared to accept such matters are of real significance other than as evidence of a reduced risk of repetition of contravening conduct, a matter which is relevant to specific deterrence.

191 As will become apparent, the orders I propose to make under s 1101B in relation to a forward-looking compliance programme (discussed below) suggest there considerable work to be done by AMPFP when it comes to improving its compliance systems since the contraventions.

#### Whether the company (through its senior officers) has demonstrated contrition and remorse

192 This is a case where admissions of wrongdoing were made. This is relevant and is a factor to be taken into account in fixing penalty. However, I agree with ASIC’s submission that the limited scope of the admissions made in relation to the contravention of s 961L (being in relation to the conduct of Panganiban) and the denials of other contraventions of the Act until 16 May 2019 (shortly before the scheduled hearing, when it became forensically necessary following service of the JER), means that not too much should be made of the admissions of AMPFP’s wrongdoing.

193 The evidence of present contrition and remorse of AMPFP was unchallenged, but that does not mean I am obliged to accept it. As a general proposition, of course, unchallenged evidence which is not inherently incredible, ought to be accepted: *Precision Plastics Pty Limited v Demir* [1975] HCA 27; (1975) 132 CLR 362 at 370-371 [6] (Gibbs J, Stephen J agreeing, Murphy J generally agreeing). But it can be rejected if it is contradicted by facts otherwise established by the evidence or particular circumstances point to its rejection: *Ashby v Slipper* [2014] FCAFC 15; (2014) 219 FCR 322 at 347 [77] (Mansfield and Gilmour JJ).

194 Taking the actions rather than the words of AMPFP into account, I incline to the view that its actions in making admissions were informed far more by a recognition of the reality of being unable to defend its conduct, rather than some road to Damascus insight as to its failures or genuine remorse. One noteworthy aspect of the case, to which I drew attention on 20 June 2019 (T184), was that although in written submissions *to the Court* on penalty:

… there’s an apology proffered for this conduct, but at the moment I can’t see any correspondence with the people who actually suffered loss and damage by reason of this conduct, an unqualified admission that there has been a contravention of the law that has been engaged in by [AMPFP] in an unconditional communication to them, that [AMPFP] recognise(s) that there has been a contravention of the law and these people are entitled to be compensated for their loss and damage by reason of the fact [APFP] contravened the law.

195 In response, Senior Counsel for AMPFP accepted that she could not “suggest to your Honour there is evidence that suggests there’s communications from my client to the clients suggesting that [AMPFP] had contravened the law”. It was only after this exchange, in July 2019 (T234), that AMPFP evidently thought it was appropriate to:

… pick up what your Honour said during the course of argument about what the letter should state. And you can see, it’s to state that the review of the file has determined there has been a contravention of the best-interest duties, a contravention of 961L by my – relevant – sorry – by my client during the relevant period, and an unreserved apology for those contraventions and the re-review.

196 It is appropriate to have some regard to the evidence as to remorse and contrition, but I take it with more than a grain of salt. The fact that a proper apology to all those actually affected and an adequate and effective remediation programme, which had regard to the position of *all customers* who may be affected by wrongful conduct, took so long to be proposed, supports my less than enthusiastic acceptance of AMPFP’s evidence in this regard.

#### Whether the company had disgorged any profit or benefit received as a result of the contravention, or made reparation

197 On the question of disgorgement, it was not suggested that there was profit or benefit to be disgorged by AMPFP. This is distinct, however, from the issue of what the parties have described as “remediation”.

198 I accept, as AMPFP’s senior counsel submitted, that AMPFP have agreed to take on an obligation to do a large amount of work in order to make what was described as “reparation”. Even with the use of data analytics to identify suspect files, an extensive manual review is necessary and the labour costs and consultant fees will be significant. As touched upon above, after a number of fits and starts, AMPFP has proposed (and ASIC has agreed to) a remediation programme. In the absence of such a proposal, I would have imposed a similar programme in any event. Be that as it may, I accept that AMPFP’s current intention is to conduct a comprehensive remediation programme genuinely and this is an important factor relevant to penalty to which I will return below.

#### Whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention

199 ASIC was prepared to acknowledge that AMPFP’s admissions of contraventions in respect of Panganiban in its defence, and its decision, in May 2019, to admit all remaining allegations of contraventions of the Act pleaded in the statement of claim, is a matter of some mitigation in favour of AMPFP, because those admissions have avoided the need for a trial on liability: see *Australian Competition and Consumer Commission v Woolworths Ltd* [2016] FCA 44 at [161]-[162] (Edelman J).

200 Nevertheless, ASIC pointed to the lateness of AMPFP’s admissions as meaning that a good deal of the expense involved in preparing for a liability hearing (including preparing for and attending at least one interlocutory hearing) was incurred prior to AMPFP’s admissions being made. AMPFP’s senior counsel accepted that the lateness of the admissions was a fact that AMPFP could not walk away from, though ultimately said it was “better late than never”. I agree with ASIC that the fact of AMPFP’s later admissions must be balanced against the stage at which they were made. One must also recognise the reality, referred to above, that AMPFP had no sensible choice but to make the expanded admissions. Having said this, the admissions are not completely devoid of any value and must be taken into account including what I consider to be a relatively small reduction in hearing time occasioned by the admissions.

#### Whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law

201 ASIC is not aware of any extra-curial punishment or detriment AMPFP has suffered or will suffer arising from the finding it has contravened s 961L of the Act which would warrant any reduction in the pecuniary penalties that would otherwise be appropriate in the circumstances of this case. I accept this and need make no further comment on this factor.

### IV Are any difficulties AMPFP had in detecting Rewriting Conduct that contravened the relevant best interests obligations material matters affecting the assessment of penalty?

202 This was a matter first raised in AMPFP’s written submissions and subsequently addressed in oral and written argument. AMPFP says it goes some way to explaining AMPFP’s conduct in 2014 in failing to undertake a wide scale investigation in relation to Rewriting Conduct by advisers other than Panganiban.

203 It is true that the licensee experts accepted in the JER at [47] the “challenge” that AMPFP faced in taking reasonable steps to ensure that its representatives complied with the relevant best interests obligations. I accept that it would have been a resource intensive and time consuming exercise partly on account of the fact that data and information systems in large financial institutions were not necessarily designed to support compliance and risk management processes, that systems in many large organisations comprise legacy information and databases which are not necessarily linked or integrated, and that analysis of data and information from multiple systems entails significant manual intervention and investigation.

204 Yet all of this is no answer to the fact that AMPFP did not act promptly to try and, as the licensee experts said at [48] of the JER: “[i]n our opinion, despite these challenges, reasonable efforts should have been made to take the steps [as outlined]. Of course, the most serious problem with AMPFP’s conduct for the entirety of the Relevant Period (from 1 July 2013 to 30 June 2015) was not its failure to detect Rewriting Conduct, but rather, having detected it, its failure to adopt a proper remedial response.

205 For the above reasons, any difficulty of detectability does not factor significantly for the purposes of assessing the penalty for contraventions of s 961L given the fact the existence of the conduct was, in fact, detected. Mr Traynor, for one, did not have any difficulty in detecting and understanding the wrongful nature of the conduct as early as 2012 when, after being alerted to Panganiban’s behaviour, his initial response was that “[t]hey should NOT be allowed to do this as it is not right by the client”. Section A of these reasons does not reflect a failure caused by the wrongful conduct being undetectable; but rather a lack of will to get to the bottom of what was happening and to do the right thing.

### V Further matters

206 Before fixing penalty, I should make reference to five particular matters of principle to which I will have regard in fixing penalty, but which can be dealt with in summary fashion, given they are not in dispute.

207 *First*, there is the maximum penalty. This is a reflection of the legislature’s policy concerning the seriousness of the proscribed conduct. It also permits comparison with the worst possible case by providing a “yardstick” which should be taken and balanced with all of the other relevant factors bearing in mind: (a) the maximum penalty is generally reserved for the worst category of cases; and (b) the penalty imposed must be proportionate to the contravening conduct: *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* at 90 [106].

208 *Secondly*, there is the “course of conduct principle” which means that where, such as here, there is some interrelationship between the legal and factual elements of multiple contraventions, the contravenor should not be punished more than once for what is essentially the same contravening conduct. So to the extent the contravening conduct of AMPFP (although constituting separate contraventions) could nevertheless be characterised as a single act, the penalties imposed should ordinarily be moulded to reflect that fact. Accordingly, although I am required in a case such as the present to impose a separate penalty for each contravention, I am required, to the extent relevant, to adjust the individual penalties to avoid any double punishment. This does have some relevance, as explained below.

209 *Thirdly*, I have discussed above the factors that I consider to be of particular relevance. This then calls for me to approach penalty in a way which can in some respects be likened to the “instinctive synthesis” involved in criminal sentencing, being the “method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case”: *Markarian v The Queen* at 377-378 [51] (McHugh J).

210 *Fourthly*, after imposing separate penalties, I will turn to reviewing the aggregate of the penalty imposed on AMPFP and consider whether it is just and appropriate. This application of the totality principle is a separate exercise from the course of conduct principle explained above and its application is logically subsequent to it. Hence after considering whether the individual penalties should be adjusted to reflect the fact that the contraventions occurred as part of a course of conduct, I will then finally review the aggregate penalty to ensure that it is just and appropriate having regard to the contravening conduct considered as a whole.

211 *Fifthly*, prior cases which have considered contraventions of s 961L are of little or no assistance. They each turn on their individual facts. As Burchett and Kiefel JJ explained in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 at 295:

[T]he facts of the instant case should not be compared with a particular reported case in order to derive therefrom the amount of the penalty to be fixed. Cases are authorities for matters of principle; but the penalty found to be appropriate, as a matter of fact, in the circumstances of one case cannot dictate the appropriate penalty in the different circumstances of another case.

### VI Pecuniary penalty

212 In my discussion of the various factors I have already given an indication of my consideration as to the relevant objective and subjective factors (before any weighing and application of the course of conduct principle and, lastly, the totality principle).

213 As to the objective seriousness of the contraventions, it is possible to make some general comments (notwithstanding the need to fix a penalty individually by reference to each contravention). It must be borne in mind that the focus of the contraventions is on the conduct of AMPFP, not the underlying conduct of its representatives. That said, the underlying conduct was made possible by AMPFP’s breaches and the objective seriousness of Panganiban’s conduct, in particular, is not irrelevant. Panganiban’s conduct was seriously wrong, and its duration and scope was prolonged and wide, partly because of AMPFP’s failures. Given Panganiban was evidently motivated by greed, he was in the right place. As Ms Gregory informed Mr Bennett (Enterprise Risk Manager, AMP Advice) as early as mid-June 2013: “[w]e seem to be encouraging this behaviour with our current commission model i.e. 100% on commencement of a new plan but 0% on an internal insurance transfer”.

214 The farcical spectre of Panganiban being rewarded with a “B” rating as late as August 2014 (being the second highest of the five possible), shows how skewed the subjective assessment of merit was within AMPFP. In this atmosphere of what might generously be described as moral confusion, it is little wonder there was no appetite for blowing the whistle on a representative “clearly writing a bucket load of business”.

215 Failing to take adequate steps which allowed Panganiban to act the way he did was bad enough; but letting him continue was seriously wrong. Further, the later period of the contravening conduct up until 30 June 2015 was egregious because it reflected a failure to take steps to determine the extent and seriousness of the Rewriting Conduct with a view to identifying evidence of such behaviour in the wider representative network and assessing what changes needed to be made as a matter of priority to improve existing controls to prevent and detect such conduct. These failures caused real detriment to the affected clients. In the latter period, after Panganiban’s authorisation was revoked, the highest level of management was involved in minimising the extent of the problem. The contraventions of AMPFP go well beyond technical or process related breaches.

216 I accept ASIC’s submission that while the essence of AMPFP’s contraventions of s 961L lie in its compliance systems failing to respond satisfactorily, the fact that AMPFP had a general compliance system in place, however elaborate or expensive, is of minimal value. Such systems were necessary, but not sufficient.

217 I must, however, give full account to my findings that ASIC has not proved the conduct was widespread or that AMPFP had reason to believe the conduct was widespread from the start (notwithstanding my sense of disquiet as to the true picture remaining obscure).

218 As to mitigating and other subjective considerations, I have already made reference to the admissions, some of which were belated, which at least meant that the proceeding was heard relatively efficiently and expeditiously.

219 Far more significant is the remediation process. The fact that after some dilly-dallying, a comprehensive and apparently effective remediation programme has been agreed and will be put in place, is an important mitigating factor and weighs significantly in the mix. The compliance measures identified below are also a relevant consideration when it comes to the issue of specific deterrence.

220 Without, I hope, being unduly cynical, for reasons I have explained, I give little weight to AMPFP’s self-serving, albeit unchallenged evidence of “contrition” expressed after its failures became apparent. AMPFP’s size and financial position suggests that the objective of deterrence requires the imposition of higher penalties than would be required for smaller and less well-resourced companies.

221 As to the application of the course of conduct principle, this factor requires more detailed consideration.

222 AMPFP’s submissions had the tendency to elide the distinction between the course of conduct and totality principles, but its core point was clear: in short, it was that irrespective of the proper characterisation of the number of contraventions, properly analysed there are no more than *two failures to act*: the first concerning Panganiban and the second concerning the Other Authorised Representatives. There is more than a mere inter-relationship between the matters alleged to give rise to the contraventions; rather, it is submitted, they are precisely the same facts. So much is said to be clear from ASIC’s pleading and the JER, both of which identify the same factual matters giving rise to each relevant failure.

223 ASIC’s submissions as to the course of conduct principle rightly stressed that it is a “tool” of analysis that serves the primary objective of penalties, being specific and general deterrence and that its application required an evaluative judgment in respect of the relevant circumstances. In particular, it was asserted because the course of conduct principle is merely a discretionary tool available to the Court in arriving at an appropriate penalty:

[t]he Court is not required to apply it, particularly if the resulting penalty fails to reflect the degree of wrongdoing involved in the circumstances: [*Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1] at [41]-[42] per Middleton and Gordon JJ cited in [*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249] at [53] per Keane CJ, Finn and Gilmour JJ;… see also *ACCC v Australian Property Custodian Holdings Ltd (recrs and mgrs. Apptd)(in liq)(controllers apptd)* [2014] FCA 1308 at [41].

224 I have already explained why AMPFP’s conduct can properly be characterised as involving six contraventions of s 961L; this conduct, however, related to the provision of advice to 40 clients by AMPFP’s representatives, where in the provision of that advice, each representative contravened each of the relevant best interests obligations (ss 961B, 961G and 961J), giving rise to the underlying contraventions, in respect of which AMPFP contravened s 961L by failing to take reasonable steps to prevent non-compliance.

225 I accept the fact that the matter should be approached on the basis that the multiple contraventions as to the failures in relation to the Other Authorised Representatives are connected and, although each of the relevant best interests obligations are distinct, it is artificial to contend there is no interrelationship between the conduct, that is, the failures of AMPFP that allowed the separate underlying breaches to take place. There is also an obvious connexion between the aspects of the contravening conduct which related to Panganiban.

226 It follows that although separate penalties should be imposed in respect of each of the separate contraventions, the penalties should not reflect any double punishment (although they should reflect the fact that the separate contraventions each involve, to an extent, some separate and distinct elements of wrongdoing).

227 Moreover, and highly significantly, any adjustment downwards by reference to the course of conduct principle, or any weight given to the mitigating factors identified, does not deflect from the necessity to ensure that each penalty needs to reflect the degree of AMPFP’s serious wrongdoing and reflect the primary objective of deterrence. This is particularly important in the present case.

228 ASIC submits that if the Court proceeds on the basis that there were six contraventions, the appropriate aggregate penalty is in the range of $4.5 million to $5.1 million. In this regard, four matters are emphasised: *first*, if the correct characterisation of AMPFP’s conduct is that there were only six contraventions, it would follow that those contraventions are more serious than the contraventions premised on the primary case I have rejected (being 120 contraventions, because of the effect of the contraventions on multiple clients); *secondly*, the Court should not be constrained to adopt the evaluative “tool” being the course of conduct principle; *thirdly*, the point made above, that any application of the course of conduct principle must still reflect the seriousness of the contraventions and that penalties close to the maximum available penalties are necessary to achieve general and specific deterrence: *ASIC v Westpac (No 3)* at 619 [177]; and *fourthly*, penalties towards the higher end of the range would also properly reflect that there were multiple contraventions of AMPFP’s representatives’ relevant best interests obligations that underlie each contravention of s 961L.

229 AMPFP submits that the appropriate penalty in the case of six contraventions should be in the range of $1.2 million-$1.5 million. In doing so, it relies heavily on the conduct amounting to “no more than two failures to act” in the manner explained above.

230 For reasons I have already explained, I generally accept ASIC’s submissions (subject to a qualification discussed below) but consider there should be some modest adjustment downwards to reflect the course of conduct principle. But when all is said and done, the purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance with the law, and penalties imposed on an organisation like AMPFP must put a price on contraventions of this type to deter repetition by those involved in the particular contraventions and by others who may be tempted to act in a similar manner: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at 506 [55]. If the penalties in the circumstances of this case are to have an adequate general and specific deterrence purpose, even taking into account the course of conduct principle and all the subjective and mitigating factors to which I have had regard, a penalty at the higher end of the range is necessary for each contravention.

231 As to the contraventions in relation to Panganiban, as AMPFP accepted, the contraventions occurred over a period of time and the later conduct, after it was clear to some in AMPFP what Panganiban was up to, was indefensible. As to the contraventions in relation to the Other Authorised Representatives, the failures, after senior management became involved at the time of the Issues Panel in September 2014 up to 30 June 2015, was even more serious.

232 Balanced against this, is the submission that the penalties should reflect the differing scope of the conduct of Panganiban and the Other Authorised Representatives. In this last regard, ASIC pointed to the fact that AMPFP’s failures to take reasonable steps to ensure that Panganiban was compliant, was in relation to the advice provided to *30 clients* (being Clients 1-30 identified on Schedule A to the SOC); whereas, the failures to take reasonable steps to ensure that Other Authorised Representatives did not engage in Rewriting Conduct was in relation to advice provided to *10 clients* (being Clients 31-40 identified on Schedule B to the SOC). Although this has some relevance, I do not consider it to be of great significance to differing penalties as between the two “groups” of contraventions. The breach was a failure to ensure that the Rewriting Conduct did not take place. As I have explained, it is not a breach which has, as its focus, the underlying breaches. This is why the decision of ASIC not to attempt to prove how widespread to conduct was *in fact*, although relevant, does not impact significantly upon penalty.

233 Drawing all the threads together, including deterrence and course of conduct, it is necessary to fix individual penalties. But in completing this task individually, the result is that each of the penalties is towards the top of the range. I should further explain that I have fixed a penalty higher than sought by ASIC in relation to the contraventions in relation to the Other Authorised Representatives, because I disagree with the submission made by ASIC that each contravention was of “comparable seriousness”. They were not. The contravening conduct after senior management became involved in September 2014 up to 30 June 2015, was particularly egregious.

234 In the light of the above, the appropriate penalties for each of the contraventions of s 961L are as follows.

(1) Failure to take reasonable steps to ensure that Panganiban complied with s 961B of the Act - $850,000

(2) Failure to take reasonable steps to ensure that Panganiban complied with s 961G of the Act - $850,000

(3) Failure to take reasonable steps to ensure that Panganiban complied with s 961J of the Act - $850,000

(4) Failure to take reasonable steps to ensure that the Other Authorised Representatives complied with s 961B of the Act - $875,000

(5) Failure to take reasonable steps to ensure that the Other Authorised Representatives complied with s 961G of the Act - $875,000

(6) Failure to take reasonable steps to ensure that the Other Authorised Representatives complied with s 961J of the Act - $875,000.

235 Finally, I must address totality. The total penalty to be imposed on AMPFP, following the accumulation of the separate penalties imposed for each of its contraventions, is $5,175,000. I am more than satisfied that this total penalty is just and appropriate and not excessive having regard to the totality of the relevant contravening conduct. Indeed, much might be said for the proposition that the overall penalty is an inadequate reflection of the seriousness of the conduct; but due regard must be had to the then maximum penalty for the worst category of case, the mitigating factors such as they are, and the course of conduct principle. The aggregate reflects a proportionate response to the overall seriousness of the contravening conduct and no further adjustment is warranted.

# H.2 ORDERS UNDER SECTION 1101B

### I The Court’s power under s 1101B

236 Section 1101B(1) of the Act relevantly provides that, on the application of ASIC, if it appears to the Court that a person has contravened a provision of Ch 7 of the Act, the Court may make such order or orders “as it thinks fit”, subject to being satisfied that the order would not “unfairly prejudice any person”. Clearly, this is a provision which affords the Court a broad discretionary power: *ASIC v Westpac (No 3))* at 620-621 [183].

237 It has been said in respect of equivalent provisions of pre-uniform companies legislation, that courts are “left at large to determine each case according to the justice and equity of the circumstances” and “prima facie, any exercise of the discretions given to the court under the Code which enables all parties to return to the positions they were in before the impugned acquisition took place is a proper exercise of that discretion”: see *Gjergja & Atco Controls Pty Ltd v Cooper* [1987] VR 167 at 216, 218 (Ormiston J). I also note the recent comments of Beach J in *Australian Securities and Investments Commission v Westpac Banking Corporation* at 620-621 [183]:

ASIC further submits that a compliance program tailored to addressing the contraventions established falls within the scope of s 1101B. It says that that provision is broad enough to empower me to make an order requiring a contravener to establish a compliance program tailored to remedying the contraventions established. I agree, and would note the following. First and generally speaking, one should not read provisions conferring jurisdiction on, or granting powers to, a court by making implications or imposing limitations which are not found in the express words. Second, it is no objection to an order requiring a compliance program to be established that it is in a form of mandatory injunction; I would note that the illustrative orders set out in s 1101B(4) contain examples that are mandatory in nature. Third, what the court “thinks fit” is not at large. The power must be exercised judicially having regard to the text, context and purpose of the Corporations Act. Now given that this is a power that must relate to a contravention, a compliance program can be readily accommodated within its scope as an order designed to ensure that a contravention of a similar kind does not occur again. And given that one of the purposes of the civil penalty regime is deterrence, a compliance program can address specific deterrence.

238 I consider that in this case it is appropriate that both backward-looking and forward-looking orders are made under s 1101B. The backward-looking orders attempt to go some way to repair the harm that has been done by ensuring affected clients have been adequately compensated. The forward-looking orders are aimed at supplementing the penalties and ensuring specific deterrence in guarding against the possibility of the contravening conduct happening again.

### II Development of AMPFP’s position on a remediation programme

239 As noted above, after a number of fits and starts, AMPFP has proposed and ASIC has agreed to a remediation programme. Although this is to be welcomed and has been relevant in fixing the penalties, the path to reaching an agreed position was a bumpy one. The history is worth recounting in a little detail as it might provide some further context as to why I consider that, to some extent, AMPFP’s protestations of contrition and regret ring rather hollow.

240 ASIC expressed its concerns with AMPFP’s remediation programme both in writing and orally at the first hearing days in June 2019. Specifically, ASIC’s senior counsel pointed to the absence of specific evidence as to whether, and if so how, AMPFP’s existing remediation programme operated to identify Rewriting Conduct. It was submitted that the remediation process was not shown to be adequate for a number of reasons, unnecessary to now detail. In response, AMPFP’s senior counsel said that there had been a review and an attempt to remediate the 40 clients named in SOC, but further consideration would be given to the issues raised. On the morning of the second day of the hearing, a revised undertaking in relation to remediation was proffered to ASIC and handed up to the Court, being marked as MFI 2. In summary, AMPFP undertook that it would within four months of the date of the undertaking (in respect of clients 1 to 40) undertake a further review of the advice provided and make a determination in respect of the compensation payable or other non-monetary remediation. AMPFP’s senior counsel conceded that she could not shy away from the fact that the revised undertaking came late in the day.

241 And yet notwithstanding the progress made, when pressed by me on whether AMPFP was, in fact, undertaking to compensate *every client* who is identified by the remediation programme as having suffered detriment as a result of the Rewriting Conduct (rather than simply clients 1 to 40), AMPFP’s position was unclear and instructions needed to be sought. ASIC embraced this suggestion and when I proposed to AMPFP’s senior counsel that a remediation programme compensating all clients could occur by force of orders made under s 1101B, AMPFP resisted such a course and suggested its undertaking in respect of clients 1 to 40 was sufficient. The reason being, AMPFP did not have sufficient notice that such an expanded order would be sought by ASIC and it would need to put on further evidence going to the detail of the programme. Ultimately, AMPFP took up an offer of an adjournment until late July 2019 to allow it to file further evidence in relation to the remediation programme.

242 When the matter returned on 26 July 2019, a further revised undertaking was proffered by AMPFP in relation to clients 1 to 40 *as well as any other client*, identified through AMPFP’s remediation programme, to have been subject to Rewriting Conduct. However, there was further debate between the parties on the deficiencies of the review aspect of the remediation programme, by which AMPFP would, using the processes of data analytics, identify instances of Rewriting Conduct. ASIC was amply justified in raising these issues. Since pecuniary penalties were to be assessed on the basis that there would be an effective remediation programme, it was necessary there be an effective process by which clients eligible for compensation would be identified. For the reasons then identified by ASIC, I could not be satisfied at that time that the process AMPFP had proposed was effective. Accordingly, the matter was adjourned to allow the parties to further negotiate the terms of the undertaking and file further evidence.

243 It was only by 1 October 2019 that there was agreement between the parties on the remediation programme. The contrast between what AMPFP had proffered in June 2019 and what AMPFP ultimately proffered in October 2019 is significant.

### III Backward-looking: review and remediation programme

244 The comments above do not diminish the size of the undertaking to be undertaken by AMPFP. The details of the Review and Remediation Programme (**RRP**), as it currently stands, were contained in two affidavits affirmed by Ian Douglas Fletcher on 23 August 2019 and 23 September 2019, both of which were read without objection. Mr Fletcher is the programme director of the RRP.

245 It is necessary to wade briefly into the brume of the RRP. In short, in order to identify the recipients of remediation, the RRP uses the tools of data analytics. One such tool are “key risk indicators” or **KRIs** which identify a population of adviser files considered to be high risk for manual review. The “Lookback” programmes employ 22 KRIs (developed in conjunction with Deloitte) and include, for instance, “KRI 4 Insurance Clawbacks” and “KRI 5 Insurance and Superannuation Lapses”. The KRIs were run across a master data set covering approximately 8,758 advisers and approximately 1,300,000 clients and initially flagged approximately 26,387 files as in scope for approximately 420 advisers. Through further analysis and refinement and through thresholds applied to ensure the KRls identified systemic rather than isolated potential issues, the KRIs finally identified 21,824 files for 230 advisers as the “scope” for the Quality of Advice Lookback Programme. The evidence of Mr Fletcher is that without the use of KRIs to narrow the number of files in scope, the Lookback programme would take more than 10 years to complete.

246 Another tool is “conversion reporting” which, using a dataset of all insurance product files from 30 June 2013 to 30 August 2019, identifies situations where there has been lapsed or “off” business (in the sense of a decrease in the premium payable by the client) and new or “on” business (in the sense of an increase in the premium payable by the client) within 120 days of each other. The conversion report will capture instances of potential Rewriting Conduct because these circumstances will encompass where a policy has been cancelled and a subsequent new policy has been taken up. Admittedly, it will also capture many innocuous instances, such as when a client decides to make adjustments to the levels of insurance that the client holds which affect the premiums payable. As a result, further sets of filtering are applied.

247 Using conversion reporting, with further filtering, AMPFP has been able to identify an additional 626 clients where there was potential for them to have been subject to Rewriting Conduct.

248 Significantly, AMPFP acknowledged that it could not guarantee to the Court that the use of the RRP would ensure that all those who have suffered loss as a result of its contravening conduct would be compensated. Nonetheless, it considered that by operation of the two mechanisms of the RRP, being the Lookback Programme (with its use of KRIs) and conversion reporting, there was “every probability” that every client affected by Rewriting Conduct would be identified and compensated. With regard to non-monetary remediation, such remediation will be in accordance with ASIC Regulatory Guide at [128] (which aims to put the client in the position that they would have been in but for the relevant contravention) or as agreed with the client.

249 There is some complexity due to the fact that AMP Life is in the process of being sold insofar as for those clients for whom it is necessary to put in place new insurance arrangements, a separate agreement between AMPFP and the relevant insurer will need to be made.

250 As already noted, AMPFP envisaged its commitment to the RRP would be by way of a formal undertaking to the Court. However, with one exception, I consider it more appropriate that as with the forward-looking compliance plan discussed below, it instead be the subject of an order pursuant to s 1101B.

251 Moreover, and as I indicated to the parties at the final hearing day on 1 October 2019, I will make provision in the orders for an expert retained by AMPFP, being the partner at PwC, responsible on a day-to-day basis for implementing the RRP, to prepare a report reviewing the RRP and to provide to my Associate, via the solicitors for AMPFP, an affidavit deposing, with precision, as to what the review involved by way of further extraction or analysis of data, and whether it did involve a manual review of individual client policies and other systems. The affidavit should also provide details as to how many clients were actually compensated and in what amount, and an opinion as to whether the deponent perceives any deficiencies in the RRP’s implementation and effectiveness, based on his then state of knowledge. I have not specified a person as the deponent because I am not entirely sure that the appropriate person is Mr Craig Daynton (whom I was told was the head of the programme and has had discussions with ASIC). But the final orders should ensure that the affidavit is sworn by the partner in charge day-to-day and who has a detailed understanding of the RRP’s operation.

252 No doubt the partner of PwC will try to perform his role conscientiously, and I intend no disrespect by remarking that it is suboptimal that the firm PwC has been selected by AMPFP, and not the Court. This raises an issue in regulatory proceedings of more general importance. In my experience of a number of these cases, it has been common, quite early in the investigatory or enforcement stage, for large institutions to select professional services firms to provide advisory, investigative and implementation services. These are often vast exercises and involve the professional services firm being paid very large fees. Speaking generally, no doubt some selections are made with the knowledge and encouragement of a regulator. It is easy to understand why this occurs and speed of remediation is highly desirable, but the difficulty is that when the matter comes to Court, the judge hearing the case (and determining what orders should be made) is presented with what amounts to a *fait accompli*: so many costs have been expended, and so much work has been done, that the Court cannot practically fasten upon a new approach run by wholly independent professionals selected by the Court.

253 It may be this problem is insuperable because of the need for speed, but it seems to me to raise issues not dissimilar to those that have been often addressed in the context of the selection by parties of expert witnesses. There is a danger that even with the best will in the world, a partner of a firm retained by a large institution earning very significant sums from professional fees charged to the institution, could display a degree of “subconscious partisanship”, in that the expert is influenced by the client with whom he has a long running commercial relationship; moreover, issues of “selection bias” might arise, as they do in the context of expert witnesses: Victorian Law Reform Commission, Civil Justice Review: Report, 2008 at 484.

254 Although I have no reason to consider that this will create a difficulty in this case, my preference would have been to appoint someone myself, but it is now too late to do so.

255 I am confident that AMPFP has been brought, through the persistence of ASIC, to a position where it is now committed to doing the right thing, but to make assurance doubly sure (and to reflect the fact that the pecuniary penalties have been fixed on the expectation the RRP will be conducted properly and in accordance with what has been submitted to the Court) I propose to adjourn the proceeding until after the receipt of the affidavit from the partner of PwC to satisfy myself that no further steps are required to ensure the RRP is carried out in a way which fulfils AMPFP’s promises as to its operation. Put another way, I will trust, but then verify. If I am satisfied with the information provided by way of affidavit, then subject to hearing from the parties, it would then be my intention to bring the proceeding to an end. If clarification is needed, the proceeding will be re-listed, and I will consider what further orders may be necessary to obtain further clarification as to the operation of the RRP or to ensure its proper completion. I stress this course is not adopted to foreshadow further punitive or other steps being taken against AMPFP, but rather reflects the reality that the pecuniary penalties took into account that there would be an effective remediation programme as promised in the affidavit material and submissions, and it is appropriate that this be followed through to completion and then verified.

### IV Forward-looking: compliance plan

256 At the instigation of the proceeding ASIC sought, pursuant to s 1101B to the Act, the following orders:

(1) Pursuant to s 1101B of the Act, within two months after the date of these orders, AMPFP shall:

(a) issue a policy (or other written communication) to its representatives which has the effect of prohibiting its representatives from engaging in Rewriting Conduct unless the representative clearly demonstrates, in writing, that such conduct is in the client’s best interests;

(b) revise the training it provides to its representatives to reflect the policy or written communication referred to in sub-paragraph (a);

(c) review and revise its monitoring and supervision programme to ensure that it is designed to detect Rewriting Conduct that does not comply with ss 961B, 961G and/or 961J of the Act.

257 In addition, ASIC sought an order that within six months AMPFP would provide ASIC with a written report of a suitably qualified independent expert confirming AMPFP’s compliance with the earlier order as well as a written attestation from a responsible officer also confirming compliance with the earlier order and setting out in summary form any changes implemented pursuant to the earlier order.

258 Similar forward-looking orders have been made previously under s 1101B: see, for example, *ASIC v Westpac (No 3)*. However, the touchstone of such orders is as Beach J said at 621 [185], whether such an order “is necessary in light of the particular circumstances of the contravention, other relief proposed to be granted, and in particular in light of any existing compliance programme and steps taken since the contravention occurred”.

259 AMPFP resisted a number of aspects of the proposed orders, including that it have an obligation to: (a) review the incentives framework to address the differences in commissions paid to AMPFP’s representatives depending on whether insurance is transferred or subject to Rewriting Conduct; and (b) discuss with AMP Life possible changes to transfer polices and the processes used by AMP Life’s underwriting and new business teams in processing applications, in order to detect Rewriting Conduct.

260 AMPFP’s reasons for contending that such orders were unnecessary were twofold: *first*, yet again, that there was no basis for a factual finding that Rewriting Conduct was in fact common or widespread or that it had reason to believe that it was; and *secondly*,AMP Life, not being a party to the proceeding, was on the verge of being sold and in circumstances where AMP Life ultimately would come to be owned by an unrelated entity, the order would be inappropriate. I was informed at one stage of the hearing that the sale to AMP Life was unlikely to proceed and ASIC submitted that the prospect of a sale should not be given any weight.

261 I have reservations as to the first objection, particularly as to the latter period of the contraventions, but there are sound reasons to pause before making orders which require people to discuss matters with other people. I am persuaded by AMPFP’s submission that an order compelling discussions is unnecessary; indeed it seems to be at the outer limits of the principled exercise of judicial power. Orders should be “clear, unambiguous and capable of compliance” if they are to be enforced potentially by way of contempt proceedings: *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 at [31] (Gillard J). I am not satisfied that the proposed order is necessary and sufficiently precise as to have utility.

262 Aside from those aspects of the compliance plan requiring discussions between AMPFP and AMP Life and other entities, as with the RRP, it more appropriate that the balance of compliance plan be contained in the form of an order rather than an undertaking.

# I CONCLUSION AND ORDERS

263 I note that prior to delivery of my reasons the parties have provided my Chambers with competing sets of proposed orders. It may be that the wording of many of these proposed orders can remain unchanged to the extent they reflect my reasons. However, as foreshowed on the final day of the hearing, I consider it more efficient for the parties to have seven days to consider my reasons and bring in revised proposed orders, whether by consent, or otherwise. If orders cannot be agreed, I will list the matter and hear further from the parties.

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| I certify that the preceding two hundred and sixty-three (263) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee. |

Associate:

Dated: 5 February 2020