FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus) [2022] FCA 515

File numbers:	VID 704 of 2021 VID 705 of 2021 VID 707 of 2021 NSD 1239 of 2021 NSD 1240 of 2021 NSD 1241 of 2021
Judgment of:	**BEACH J**
Date of judgment:	22 April 2022
Catchwords:	**CORPORATIONS –** provision of financial services – regulatory proceedings – six proceedings brought by the Australian Securities and Investments Commission – contraventions by Westpac Banking Corporation and its subsidiaries – numerous breaches of the *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth) – dealings with de-registered company accounts and funds held therein – charging of advice fees to accounts of deceased customers – charging of contribution fees with respect to investment or superannuation products without proper disclosure documents – improper provision and charging for duplicate insurance policies to customers – insurance policies issued without consent – false and misleading representations and misleading and deceptive representations concerning the sale to debt purchasers of customers' debts relating to Westpac-branded cards, Westpac-branded loans and St George-branded cards – improper deduction of insurance fees including commissions – conflicted remuneration – assessment of pecuniary penalties and other relief – financial services laws – breaches of Australian financial services licence – non-compliance with s 912A of the Corporations Act – contraventions of ss 12CB, 12DA, 12DB, 12DI and 12DM of the ASIC Act – contraventions of ss 912A, 962P, 963K and 1041H of the Corporations Act – orders and declarations made in each of the six proceedings
Legislation:	*Corporations Act 2001* (Cth) ss 760A, 761A, 763A, 763B, 763C, 763D, 764A, 765A, 766A, 766B, 766C, 912A, 912B, 962A, 962B, 962C, 962D, 962P, 963A, 963B, 963C, 963F, 963L, 963K, 1041H, 1101B, 1317E, 1317G, 1528

	Australian Securities and Investments Commission Act 2001 (Cth) ss 12BA, 12BAA, 12BAB, 12CB, 12CC, 12DA, 12DB, 12DI, 12DM, 12GBA, 12GBB, 12GBCA 12GBCL(b), 12GLA, 322, 327
Cases cited:	*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312 *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (t/as Bet365 (No 2)* [2016] FCA 698 *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 3)* (2020) 275 FCR 57 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 *Australian Securities and Investments Commission v Kobelt* (2019) 368 ALR 1 *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	567
Date of hearing:	8, 20, 21 and 22 April 2022
VID 704 of 2021	
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Solicitor for the Defendant:	Allens

VID 705 of 2021

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Solicitor for the Plaintiff:	Australian Government Solicitor
Counsel for the Defendant:	Dr R Higgins SC and Mr J Hutton
Solicitor for the Defendant:	Allens

VID 707 of 2021

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Solicitor for the Applicant:	Maddocks Lawyers
Counsel for the Respondents:	Ms K Morgan SC and Ms Z Hillman
Solicitor for the Respondents:	King & Wood Mallesons

NSD 1239 of 2021

Counsel for the Plaintiff:	Mr L K Crowley QC and Mr D Healey
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendant:	Ms K Morgan SC
Solicitor for the Defendant:	Gilbert + Tobin

NSD 1240 of 2021

Counsel for the Plaintiff:	Mr Y Shariff SC and Mr T Kane
Solicitor for the Plaintiff:	Maddocks Lawyers
Counsel for the Defendants:	Dr R Higgins SC and Ms A Smith
Solicitor for the Defendants:	Ashurst

NSD 1241 of 2021

Counsel for the Plaintiff:	Ms D Hogan-Doran SC, Mr J Hewitt and Ms K Petch
Solicitor for the Plaintiff:	Australian Government Solicitor

Counsel for the Defendant:	Mr D F C Thomas SC and Ms A Smith
Solicitor for the Defendant:	Allens

ORDERS

VID 707 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**WESTPAC BANKING CORPORATION (ACN 007 457 141)** (and others named in the Schedule) Respondents

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **22 APRIL 2022**

THE COURT NOTES THAT:

In these orders, the following definitions apply:

"Advice Licensees" means the first, second and third respondents;

"Affected Members" means customers receiving financial advice from the first, second or third respondents (including through their authorised representatives), and whose accounts were charged advice fees after notification of their death;

"Non-Group Affected Members" means customers receiving financial advice from providers of financial advice outside of the Westpac Group (including through their authorised representatives), and whose accounts were charged advice fees after notification of their death;

"Penalty Period" means 30 November 2015 to 9 October 2019; and

"Post-FOFA customers" means customers first provided advice services after 1 July 2013.

THE COURT DECLARES THAT:

1. Pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (FCA Act), s 1317E of the *Corporations Act 2001* (Cth) and s 12GBA of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) (as in force at the relevant time), the first respondent (Westpac):

(a) contravened s 12DI(3) of the ASIC Act, on each of the 4,324 occasions during the Penalty Period up to 1 July 2019 that Westpac accepted payment of an advice fee after being notified of the customer's death, in circumstances where, at the time of acceptance there were reasonable grounds for believing that Westpac would not be able to supply the financial services within a reasonable time or at all;

(b) engaged in unconscionable conduct, in trade or commerce, in connection with the supply of financial services, in contravention of s 12CB(1) of the ASIC Act by charging advice fees during the Penalty Period up to 12 November 2018 to Affected Member accounts after being notified of the customer's death, for financial advice that could not and was not provided to the customer, and by retaining those fees;

(c) contravened s 962P of the Corporations Act on each of the 1,212 occasions during the Penalty Period up to 1 July 2019 that Westpac received an advice fee from a Post-FOFA customer after being notified of their death;

(d) contravened s 912A(1)(c) of the Corporations Act on each occasion that Westpac contravened ss 12DI(3) or 12CB of the ASIC Act or s 962P of the Corporations Act in breach of its general obligation to comply with the financial services laws;

(e) by its conduct during the Penalty Period up to 12 November 2018, in:

(i) failing to have systems, practices and/or policies capable of preventing the charging of advice fees to Affected Member accounts after notification of a customer's death; and

(ii) failing to have systems, practices and/or policies providing for the refund of advice fees back to the date of a customer's death,

breached its obligation to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

2. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, the second respondent (Securitor):

(a) contravened s 12DI(3) of the ASIC Act, on each of the 3,272 occasions during the Penalty Period up to 1 March 2019 that Securitor accepted payment of an

advice fee after being notified of the customer's death, in circumstances where, at the time of acceptance there were reasonable grounds for believing that Securitor would not be able to supply the financial services within a reasonable time or at all;

(b) engaged in unconscionable conduct, in trade or commerce, in connection with the supply of financial services, in contravention of s 12CB(1) of the ASIC Act by charging advice fees during the Penalty Period up to 19 November 2018 to Affected Member accounts after being notified of the customer's death, for financial advice that could not and was not provided to the customer, and by retaining those fees;

(c) contravened s 912A(1)(c) of the Corporations Act on each occasion that Securitor contravened ss 12DI(3) or 12CB of the ASIC Act in breach of its general obligation to comply with the financial services laws;

(d) by its conduct during the Penalty Period up to 19 November 2018, in:

(i) failing to have systems, practices and/or policies capable of preventing the charging of advice fees to Affected Member accounts after notification of a customer's death; and

(ii) failing to have systems, practices and/or policies providing for the refund of advice fees back to the date of a customer's death,

breached its obligation to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

3. Pursuant to s 21 of the FCA Act, s 1317E of the Corporations Act and/or s 12GBA of the ASIC Act (as in force at the relevant time), the third respondent (Magnitude):

(a) contravened s 12DI(3) of the ASIC Act, on each of the 1,214 occasions during the Penalty Period up to 9 October 2019 that Magnitude accepted payment of an advice fee after being notified of the customer's death, in circumstances where, at the time of acceptance there were reasonable grounds for believing that Magnitude would not be able to supply the financial services within a reasonable time or at all;

(b) engaged in unconscionable conduct, in trade or commerce, in connection with the supply of financial services, in contravention of s 12CB(1) of the ASIC Act by charging advice fees during the Penalty Period up to 19 November 2018 to Affected Member accounts after being notified of the customer's death, for financial advice that could not and was not provided to the customer, and by retaining those fees;

(c) contravened s 912A(1)(c) of the Corporations Act on each occasion that Magnitude contravened ss 12DI(3) or 12CB of the ASIC Act in breach of its general obligation to comply with the financial services laws;

(d) by its conduct during the Penalty Period up to 19 November 2018, in:

(i) failing to have systems, practices and/or policies capable of preventing the charging of advice fees to Affected Member accounts after notification of a customer's death; and

(ii) failing to have systems, practices and/or policies providing for the refund of advice fees back to the date of a customer's death,

breached its obligation to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

4. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, the fourth respondent (AAML):

(a) was knowingly concerned in a contravention of s 12DI(3) of the ASIC Act on each of the 5 occasions during the Penalty Period up to 10 September 2018 that AAML remitted payment of an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death and knowing, at the time of the remittance, that there were reasonable grounds for believing that the Advice Licensee would not be able to supply the financial services within a reasonable time or at all;

(b) contravened s 912A(1)(c) of the Corporations Act on each occasion that AAML was knowingly concerned in a contravention of s 12DI(3) of the ASIC Act in breach of its general obligation to comply with the financial services laws;

(c) by its conduct during the Penalty Period up to 10 September 2018, in failing to have systems, practices and/or policies to cease payment of advice related fees from Affected Member accounts after notification of a customer's death, breached its obligations to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

5. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, the fifth respondent (ACML):

(a) was knowingly concerned in a contravention of s 12DI(3) of the ASIC Act on each of the 781 occasions during the Penalty Period up to 10 September 2018 that ACML remitted payment of an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death and knowing, at the time of the remittance, that there were reasonable grounds for believing that the Advice Licensee would not be able to supply the financial services within a reasonable time or at all;

(b) contravened s 912A(1)(c) of the Corporations Act on each occasion that ACML was knowingly concerned in a contravention of s 12DI(3) of the ASIC Act in breach of its general obligation to comply with the financial services laws;

(c) by its conduct during the Penalty Period up to 10 September 2018, in failing to have systems, practices and/or policies to cease payment of advice related fees from Affected Member and Non-Group Affected Member accounts after notification of a customer's death, breached its obligations to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

6. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, the sixth respondent (BTFM):

(a) was knowingly concerned in a contravention of s 12DI(3) of the ASIC Act on each of the 3,948 occasions during the Penalty Period up to 10 September 2018 that BTFM remitted payment of an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death and knowing, at the time of the remittance, that there were reasonable grounds for believing that the

Advice Licensee would not be able to supply the financial services within a reasonable time or at all;

(b) contravened s 912A(1)(c) of the Corporations Act on each occasion that BTFM was knowingly concerned in a contravention of s 12DI(3) of the ASIC Act in breach of its general obligation to comply with the financial services laws;

(c) by its conduct during the Penalty Period up to 10 September 2018, in failing to have systems, practices and/or policies to cease payment of advice related fees from Affected Member and Non-Group Affected Member accounts after notification of a customer's death, breached its obligations to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

7. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act 2001, by its conduct during the Penalty Period up to 10 September 2018, in failing to have systems, practices and/or policies to cease payment of advice related fees from Affected Member and Non-Group Affected Member accounts after notification of a customer's death, the seventh respondent breached its obligations to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

8. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, the eighth respondent (BTPS):

(a) was knowingly concerned in a contravention of s 12DI(3) of the ASIC Act on each of the 717 occasions during the Penalty Period up to 10 September 2018 that BTPS remitted payment of an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death and knowing, at the time of the remittance, that there were reasonable grounds for believing that the Advice Licensee would not be able to supply the financial services within a reasonable time or at all;

(b) contravened s 912A(1)(c) of the Corporations Act on each occasion that BTPS was knowingly concerned in a contravention of s 12DI(3) of the ASIC Act in breach of its general obligation to comply with the financial services laws;

(c) by its conduct during the Penalty Period up to 10 September 2018, in failing to have systems, practices and/or policies to cease payment of advice related fees

to Affected Member and Non-Group Affected Member accounts after notification of a customer's death, breached its obligations to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

AND THE COURT ORDERS THAT:

9. Westpac pay pecuniary penalties to the Commonwealth of Australia:

   (a) pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, and s 12GBB of the ASIC Act as in force from 13 March 2019, in respect of its contraventions of s 12DI(3) of the ASIC Act referred to in declaration 1(a) above;

   (b) pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, in respect of its contravention of s 12CB(1) of the ASIC Act referred to in declaration 1(b) above;

   (c) pursuant to s 1317G(1E)(b)(iv) of the Corporations Act as in force until 12 March 2019, and section 1317G(4) of the Corporations Act as in force from 13 March 2019, in respect of its contraventions of s 962P of the Corporations Act referred to in declaration 1(c) above,

   in the aggregate amount of $15,950,000.

10. Securitor pay pecuniary penalties to the Commonwealth of Australia:

   (a) pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, in respect of its contraventions of s 12DI(3) of the ASIC Act referred to in declaration 2(a) above;

   (b) pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, in respect of its contravention of s 12CB(1) of the ASIC Act referred to in declaration 2(b) above,

   in the aggregate amount of $7,600,000.

11. Magnitude pay pecuniary penalties to the Commonwealth of Australia:

   (a) pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, and s 12GBB of the ASIC Act as in force from 13 March 2019, in respect of its contraventions of s 12DI(3) of the ASIC Act referred to in declaration 3(a) above;

(b) pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, in respect of its contravention of s 12CB(1) of the ASIC Act referred to in declaration 3(b) above,

in the aggregate amount of $4,450,000.

12. AAML pay pecuniary penalties to the Commonwealth of Australia pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, in respect of its knowing involvement in contraventions of s 12DI(3) of the ASIC Act referred to in declaration 4(a) above, in the aggregate amount of $100,000.

13. ACML pay pecuniary penalties to the Commonwealth of Australia pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, in respect of its knowing involvement in contraventions of s 12DI(3) of the ASIC Act referred to in declaration 5(a) above, in the aggregate amount of $1,800,000.

14. BTFM pay pecuniary penalties to the Commonwealth of Australia pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, in respect of its knowing involvement in contraventions of s 12DI(3) of the ASIC Act referred to in declaration 6(a) above, in the aggregate amount of $7,200,000.

15. BTPS pay pecuniary penalties to the Commonwealth of Australia pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, in respect of its knowing involvement in contraventions of s 12DI(3) of the ASIC Act referred to in declaration 8(a) above, in the aggregate amount of $2,900,000.

16. The respondents pay the applicant's costs of and incidental to the proceeding.

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

ORDERS

NSD 1240 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**WESTPAC BANKING CORPORATION** First Defendant
	MAGNITUDE GROUP PTY LIMITED (ACN 086 266 202) Second Defendant
	SECURITOR FINANCIAL GROUP PTY LIMITED (ACN 009 189 495) Third Defendant

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **22 APRIL 2022**

THE COURT NOTES THAT:

In these orders, the following definitions apply.

"**Contribution Fees**":

(a) is a reference to a fee charged to a retail client by reference to the amounts contributed by or on behalf of that client to their investment or superannuation products, being fees which are described within the Defendants' businesses using a number of descriptors including "contribution fees", "adviser contribution fees", "additional deposit fees", and "regular savings fees";

(b) includes such fees charged on regular contributions into the investment or superannuation products made by clients or their employer (e.g. such as Super Guarantee contributions from an employer) (Regular Contribution Fees), and also includes such fees charged on irregular contributions into the investment or superannuation products made by clients (Ad Hoc Contribution Fees); and

(c) excludes the "initial" contribution fees charged to a client on the initial transfer of a lump sum of funds into a superannuation or investment product in order to give effect

to the personal financial produce advice provided to that client, for the provision and/or implementation of that advice.

"**Penalty Period**" means 13 March 2019 to 30 June 2019 in the case of the first defendant and to 30 September 2019 in the case of the second and third defendants.

THE COURT DECLARES THAT:

1. Pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) and/or s 1317E of the *Corporations Act 2001* (Cth), during the Penalty Period, the first defendant (Westpac) contravened ss 912A(1)(a) and (5A) of the Corporations Act by failing to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly, in that during the said period:

   (a) a significant number of retail clients (BT Financial Advice Clients) (with the exact number of clients affected presently unknown to Westpac) were charged Ad Hoc Contribution Fees and Regular Contribution Fees for the benefit of Westpac and its employee advisers in circumstances where:

      (i) those fees were being charged in the Penalty Period without having been disclosed in Statements of Advice and/or Records of Advice (Disclosure Documents), or without having been adequately disclosed in Disclosure Documents (in that in respect of these clients the amount and/or basis upon which the fees would be charged had not been identified in adequate or precise terms and/or with adequate information given as to the fees); and

      (ii) Westpac admits that given the absence of disclosure or absence of adequate disclosure, those fees ought not to have been charged.

   (b) in the instances described in subparagraph (a) above:

      (i) the Ad Hoc and Regular Contribution Fees were charged to the BT Financial Advice Clients by deducting those fees from the superannuation and investment accounts of those clients whenever those clients made contributions to those accounts, in circumstances where Westpac admits that it ought not to have charged those fees;

      (ii) Westpac (and/or its financial adviser employees) received and retained the Ad Hoc Contribution Fees and Regular Contribution Fees that were

charged and deducted from the superannuation and investment accounts of those clients, in circumstances where Westpac admits that it ought not to have charged those fees;

(c) Westpac did not maintain systems and processes which:

(i) in the Penalty Period, ensured that Ad Hoc and Regular Contribution Fees to be charged to BT Financial Advice Clients were disclosed to them in Disclosure Documents;

(ii) in the Penalty Period, ensured that Ad Hoc and Regular Contribution Fees were not charged to BT Financial Advice Clients, in circumstances where those fees ought not to have been charged;

(iii) in the Penalty Period, ensured that Westpac and/or its financial advisers did not receive or retain Ad Hoc and Regular Contribution Fees for their benefit, in circumstances where those fees ought not to have been received and retained;

(iv) in the Penalty Period, in instances where there was a failure to disclose Ad Hoc and Regular Contribution Fees, provided to BT Financial Advice Clients information about the fees, in order to allow such clients to make an informed decision as to whether to agree to the deduction of those fees from their superannuation or investment account;

(v) in the Penalty Period, retained adequate records of Disclosure Documents (or their contents) to enable the ready identification of what Ad Hoc and Regular Contribution Fees had been disclosed to BT Financial Advice Clients in their Disclosure Documents;

(vi) in the Penalty Period, adequately trained staff as to the requirements to accurately disclose fees such as Contribution Fees to their BT Financial Advice Clients; and

(vii) in the Penalty Period, were capable of ensuring that the application and fee loading processes used by financial advisers in implementing the personal financial product advice accurately reflected the terms of Disclosure Documents.

2. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, during the Penalty Period, the second defendant (Magnitude), being a wholly owned subsidiary of

Westpac and operating as part of a business known as BT Group Licensees, contravened ss 912A(1)(a) and (5A) of the Corporations Act by failing to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly, in that during the said period:

(a) a significant number of retail clients (the Magnitude Clients) (with the exact number of clients affected presently unknown to Magnitude) were charged Ad Hoc Contribution Fees and Regular Contribution Fees for the benefit of Magnitude and its Authorised Representatives in circumstances where:

    (i) those fees were being charged in the Penalty Period without having been disclosed in Disclosure Documents, or without having been adequately disclosed in Disclosure Documents (in that in respect of these clients the amount and/or basis upon which the fees would be charged had not been identified in adequate or precise terms and/or with adequate information given as to the fees); and

    (ii) Magnitude admits that given the absence of disclosure or absence of adequate disclosure, those fees ought not to have been charged.

(b) in the instances described in subparagraph (a) above:

    (i) the Ad Hoc and Regular Contribution Fees were charged to the Magnitude Clients by deducting those fees from the superannuation and investment accounts of those clients whenever those clients made contributions to those accounts, in circumstances where Magnitude admits that it ought not to have charged those fees;

    (ii) Magnitude and/or Magnitude's Authorised Representatives received and retained the Ad Hoc Contribution Fees and Regular Contribution Fees that were charged and deducted from the superannuation and investment accounts of those clients, in circumstances where Magnitude admits that it ought not to have charged those fees;

(c) Magnitude did not maintain systems and processes which:

    (i) in the Penalty Period, ensured that Ad Hoc and Regular Contribution Fees to be charged to Magnitude Clients were disclosed to them in Disclosure Documents;

(ii) in the Penalty Period, ensured that Ad Hoc and Regular Contribution Fees were not charged to Magnitude Clients, in circumstances where those fees ought not to have been charged;

(iii) in the Penalty Period, ensured that Magnitude and/or Magnitude's Authorised Representatives did not receive or retain Ad Hoc and Regular Contribution Fees for their benefit, in circumstances where those fees ought not to have been received and retained;

(iv) in the Penalty Period, in instances where there was a failure to disclose Ad Hoc and Regular Contribution Fees, provided to Magnitude Clients information about the fees, in order to allow such clients to make an informed decision as to whether to agree to the deduction of those fees from their superannuation or investment account;

(v) in the Penalty Period, retained adequate records of Disclosure Documents (or their contents) to enable the ready identification of what Ad Hoc and Regular Contribution Fees had been disclosed to Magnitude Clients in their Disclosure Documents;

(vi) in the Penalty Period, adequately trained staff as to the requirements to accurately disclose fees such as Contribution Fees to the Magnitude Clients; and

(vii) in the Penalty Period, were capable of ensuring that the application and fee loading processes used by financial advisers in implementing the personal financial product advice accurately reflected the terms of Disclosure Documents.

3. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, during the Penalty Period the third defendant (Securitor), being a wholly owned subsidiary of Westpac and operating as part of a business known as BT Group Licensees, contravened ss 912A(1)(a) and (5A) of the Corporations Act by failing to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly, in that during the said period:

(a) a significant number of retail clients (the Securitor Clients) (with the exact number of clients affected presently unknown to Securitor) were charged Ad Hoc Contribution Fees and Regular Contribution Fees for the benefit of Securitor and its Authorised Representatives in circumstances where:

(i) those fees were being charged in the Penalty Period without having been disclosed in Disclosure Documents, or without having been adequately disclosed in Disclosure Documents (in that in respect of these clients the amount and/or basis upon which the fees would be charged had not been identified in adequate or precise terms and/or with adequate information given as to the fees); and

(ii) Securitor admits that given the absence of disclosure or absence of adequate disclosure, those fees ought not to have been charged.

(b) in the instances described in subparagraph (a) above:

(i) the Ad Hoc and Regular Contribution Fees were charged to the Securitor Clients by deducting those fees from the superannuation and investment accounts of those clients whenever those clients made contributions to those accounts, in circumstances where Securitor admits that it ought not to have charged those fees;

(ii) Securitor's and/or Securitor's Authorised Representatives received and retained the Ad Hoc Contribution Fees and Regular Contribution Fees that were charged and deducted from the superannuation and investment accounts of those clients, in circumstances where Securitor admits that it ought not to have charged those fees;

(c) Securitor did not maintain systems and processes which:

(i) in the Penalty Period, ensured that Ad Hoc and Regular Contribution Fees to be charged to Securitor Clients were disclosed to them in Disclosure Documents;

(ii) in the Penalty Period, ensured that Ad Hoc and Regular Contribution Fees were not charged to Securitor Clients, in circumstances where those fees ought not to have been charged;

(iii) in the Penalty Period, ensured that Securitor and/or Securitor's Authorised Representatives did not receive or retain Ad Hoc and Regular Contribution Fees for their benefit, in circumstances where those fees ought not to have been received and retained;

(iv) in the Penalty Period, in instances where there was a failure to disclose Ad Hoc and Regular Contribution Fees, provided to Securitor Clients

information about the fees, in order to allow such clients to make an informed decision as to whether to agree to the deduction of those fees from their superannuation or investment account;

(v) in the Penalty Period, retained adequate records of Disclosure Documents (or their contents) to enable the ready identification of what Ad Hoc and Regular Contribution Fees had been disclosed to Securitor Clients in their Disclosure Documents;

(vi) in the Penalty Period, adequately trained staff as to the requirements to accurately disclose fees such as Contribution Fees to the Securitor Clients; and

(vii) in the Penalty Period, were capable of ensuring that the application and fee loading processes used by financial advisers in implementing the personal financial product advice accurately reflected the terms of Disclosure Documents.

AND THE COURT ORDERS THAT:

4. Pursuant to s 1317G(1)(a) of the Corporations Act, Westpac pay a pecuniary penalty to the Commonwealth in respect of Westpac's contraventions of ss 912A(1)(a) and (5A) referred to in declaration 1 above, in the amount of $2 million.

5. Pursuant to s 1317G(1)(a) of the Corporations Act, Magnitude pay a pecuniary penalty to the Commonwealth in respect of Magnitude's contraventions of ss 912A(1)(a) and (5A) referred to in declaration 2 above, in the amount of $2 million.

6. Pursuant to s 1317G(1)(a) of the Corporations Act, Securitor pay a pecuniary penalty to the Commonwealth in respect of Securitor's contraventions of ss 912A(1)(a) and (5A), referred to in declaration 3 above, in the amount of $2 million.

7. The defendants pay the plaintiff's costs of and incidental to this proceeding.

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

ORDERS

NSD 1241 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**WESTPAC BANKING CORPORATION (ACN 007 457 141)** Defendant

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **21 APRIL 2022**

THE COURT DECLARES THAT:

Duplicate Policies

1. Westpac Banking Corporation (WBC) contravened each of ss 12DB(1)(b), (h) and (i) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to each of the customers identified in Part A of Schedule 1 to the Statement of Agreed Facts and Admissions filed 29 November 2021 (DP Customers), during the period 30 November 2015 to 30 June 2021 (Relevant Period), by reason of the following:

    (a) WBC caused Westpac General Insurance Limited ACN 003 719 319 (WGIL) to issue to each of the DP Customers, a home and contents insurance policy or landlord insurance policy (Policy), in circumstances where the DP Customer already held a Policy in respect of the same 'risk address' (together, Duplicate Policies);

    (b) Duplicate Policies were issued to each DP Customer in the following circumstances:

        (i) the DP Customer requested a change (Change) to their Policy (Original Policy);

        (ii) due to system limitations, the Change required a new Policy to be created (New Policy);

        (iii) this gave rise to the need for a cancellation request to be made for the Original Policy by WBC's representative;

(iv) the cancellation request for the Original Policy was not made by WBC's representative; and

(v) as a result, Duplicate Policies remained in effect - the Original Policy, being the Policy to be cancelled, and the New Policy, which was the Policy that the Customer agreed to be issued and in place from the time of the Change;

(c) after the Change, WBC collected premiums for an overlapping period in respect of both Policies, and in respect of the DP Customers, sent annual renewal documents in respect of the Original Policy;

(d) during the course of the conduct referred to in (b) and (c) above, in trade or commerce, and in connection with the supply of the financial services covered by its Australian financial services licence number 2337149 (the Services), WBC represented to each DP Customer (the DP Representations) that:

(i) WBC had arranged or would arrange for the cancellation of the Original Policy, which was a representation concerning the existence of a right, within the meaning of s 12DB(1)(i) of the ASIC Act;

(ii) the DP Customer had agreed to continue to acquire services provided by the Original Policy, within the meaning of s 12DB(1)(b) of the ASIC Act;

(iii) the DP Customer had a continuing need for the Original Policy upon the issuance of the New Policy, which was a representation within the meaning of s 12DB(1)(h) of the ASIC Act;

(iv) the DP Customer was liable to pay the premiums for the Original Policy and that WBC and/or WGIL had a continuing right to collect amounts for premiums in respect of the Original Policy, which were representations concerning the existence of a right, within the meaning of s 12DB(1)(i) of the ASIC Act; and

(e) the DP Representations were false or misleading because:

(i) WBC did not arrange for the cancellation of the Original Policy;

(ii) each DP Customer had not agreed to the Original Policy continuing from the time of the Change;

(iii) the DP Customer did not have a need for the Original Policy upon the issuance of the New Policy; and

(iv) WBC did not have a right to collect the premiums for the Original Policy from the time of the Change.

2. WBC contravened s 12DA(1) of the ASIC Act and s 1041H(1) of the *Corporations Act 2001* (Cth), during the Relevant Period, by reason of the matters set out in Declaration 1 above, in that WBC engaged in conduct, in this jurisdiction, that was misleading or deceptive or likely to mislead or deceive.

3. WBC contravened ss 912A(1)(a) and 912A(5A) of the Corporations Act between 13 March 2019 to 24 May 2021, by failing to do all things necessary to ensure that the Services were provided efficiently, honestly and fairly, in that WBC failed to have in place adequate:

(a) risk management procedures the objectives of which were to detect breaches of the "financial services laws" (as defined in the Corporations Act) in relation to the issuance of Duplicate Policies (the DP Detective Controls);

(b) risk management procedures the objectives of which were to prevent breaches of the financial services laws in relation to the issuance of Duplicate Policies (the DP Preventative Controls); and

(c) risk management procedures the objectives of which were to monitor the success or otherwise of the DP Detective Controls and DP Preventative Controls (the DP Monitoring Controls).

4. WBC contravened ss 912A(1)(ca) and 912A(5A) of the Corporations Act between 13 March 2019 to 24 May 2021, by reason of the matters set out in Declaration 3 above, in that WBC failed to take reasonable steps to ensure that its representatives complied with the financial services laws.

5. WBC contravened s 912A(1)(a) of the Corporations Act during the Relevant Period prior to 13 March 2019, by failing to do all things necessary to ensure that the Services were provided efficiently, honestly and fairly, in that WBC failed to have in place adequate DP Detective Controls, DP Preventative Controls and DP Monitoring Controls.

6. WBC contravened s 912A(1)(ca) of the Corporations Act during the Relevant Period prior to 13 March 2019, by reason of the matters set out in Declaration 5 above, in that

WBC failed to take reasonable steps to ensure that its representatives complied with the financial services laws.

7. WBC contravened s 912A(1)(c) of the Corporations Act during the Relevant Period, by reason of the matters set out in Declarations 1 to 6 above, in that WBC failed to comply with the financial services laws.

Policies Issued Without Consent

8. During the Relevant Period:

   (a) WBC caused WGIL to issue to each of the customers identified in Part B of Schedule 1 to the said Statement of Agreed Facts and Admissions (the Non-Consent Customers), the Policies identified in Part B of Schedule 1 (the Non-Consent Policies) in circumstances where the Non-Consent Customer did not consent to the issuance of the Non-Consent Policy relevant to that customer;

   (b) after the Non-Consent Policy was issued, WBC sent to each of the Non-Consent Customers a pack of documents (the New Business Welcome Pack) which:

      (i) informed the Non-Consent Customer that he or she had been issued with a Policy;

      (ii) included statements regarding the premium that would be payable by the customer (to WBC for its own benefit and on behalf of WGIL) on either a monthly or annual basis;

   (c) during the course of the conduct referred to in (a) and (b) above, in trade or commerce, and in connection with the Services, WBC represented to each Non-Consent Customer (the Non-Consent Representations) that:

      (i) the Non-Consent Customer had agreed to acquire the services provided by the Non-Consent Policy, within the meaning of s 12DB(1)(b) of the ASIC Act;

      (ii) the Non-Consent Customer was liable to pay the premiums for the Non-Consent Policy set out in the New Business Welcome Pack and that WBC had a continuing right to be paid amounts for premiums in respect of the Non-Consent Policy set out in the New Business Welcome Pack, which were representations concerning the existence of a right, within the meaning of s 12DB(1)(i) of the ASIC Act;

   (d) the Non-Consent Representations were false or misleading because:

(i) the Non-Consent Customers did not agree to the Non-Consent Policy being issued;

(ii) WBC was not entitled to be paid the amount of premium set out in the New Business Welcome Pack for the Non-Consent Policies; and

(e) by reason of (a), (b), (c) and (d) above, in respect of each of the Non-Consent Customers, WBC contravened each of ss 12DB(1)(b) and (i) of the ASIC Act.

9. During the Relevant Period, by reason of the matters set out in Declaration 8 above, WBC engaged in conduct, in this jurisdiction, that was misleading or deceptive or likely to mislead or deceive, and thereby contravened s 12DA(1) of the ASIC Act and s 1041H(1) of the Corporations Act.

10. During the Relevant Period, by reason of the matters set out in Declaration 8 above, WBC in trade or commerce asserted on one or more occasions to Non-Consent Customers a right to payment from another person for unsolicited financial services, and by each such assertion contravened s 12DM(1) of the ASIC Act.

11. During the Relevant Period, by reason of the matters set out in Declarations 8 to 10 above, WBC failed to comply with the financial services laws, and thereby contravened s 912A(1)(c) of the Corporations Act.

AND THE COURT ORDERS THAT:

Pecuniary Penalties

12. Pursuant to ss 12GBA (as in force before 13 March 2019) and s 12GBB (as in force on and from 13 March 2019) of the ASIC Act, WBC pay to the Commonwealth of Australia pecuniary penalties in an amount of $13 million in respect of its contraventions of ss 12DB(1)(b), (h) and (i) and 12DM(1) of the ASIC Act referred to in Declarations 1, 8, and 10.

13. Pursuant to s 1317G of the Corporations Act, WBC pay to the Commonwealth of Australia pecuniary penalties in an amount of $2 million in respect of its contraventions of s 912A(5A) of the Corporations Act referred to in Declarations 3 and 4.

Compliance Programme

14. Pursuant to s 1101B(1) of the Corporations Act and s 12GLA(1) of the ASIC Act, WBC is required at its expense to:

(a) within 1 month of the date of this order, engage an independent expert with expertise in regulatory compliance, the identity of whom is to be agreed between

the parties, or in the absence of agreement, as proposed by the parties and determined by the Court;

(b) instruct the expert to:

(i) review WBC's arrangements for ensuring that it complies with ss 912A and 1041H of the Corporations Act and ss 12DA, 12DB and 12DM of the ASIC Act in relation to dealing in home and contents insurance policies and landlord insurance policies;

(ii) prepare a written report which:

A. describes his or her expertise and confirms his or her independence;

B. identifies any aspects of the arrangements referred to in sub-paragraph (i) above that, in the opinion of the expert, is not appropriate or adequate to cause WBC to comply with ss 912A and 1041H of the Corporations Act and ss 12DA, 12DB and s 12DM of the ASIC Act in the future; and

C. provides recommendations to WBC to remedy any aspects of WBC's arrangements of the kind described in sub-paragraph B above identified in the course of the expert's review;

(c) within 7 months of the date of this order, provide to ASIC a copy of the report referred to in sub-paragraph (b)(ii) above which has been signed by the expert;

(d) within 13 months of the date of this order, provide to ASIC a written report signed by the expert and a Group Executive of WBC which:

(i) annexes a copy of the report referred to in sub-paragraph (b)(ii) above;

(ii) states what steps WBC has taken to give effect to the expert's recommendations;

(iii) annexes a copy of all internal documents that have been amended as a consequence of the expert's recommendations; and

(iv) identifies any of the expert's recommendations not given effect to by WBC, and the reasons why WBC did not give effect to those recommendations.

Other orders

15. Pursuant to s 43 of the *Federal Court of Australia Act 1976* (Cth), WBC pay ASIC's costs of the proceedings.

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

ORDERS

NSD 1239 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**WESTPAC BANKING CORPORATION (ACN 007 457 141)** Defendant

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **21 APRIL 2022**

DEFINITIONS

In these orders:

(i) ***ASIC Act*** means the *Australian Securities and Investments Commission Act 2001* (Cth).

(ii) ***Corporations Act*** means the *Corporations Act 2001* (Cth).

(iii) ***Debt Purchaser*** means Baycorp Collections PDL (Australia) Pty Limited (ACN 119 478 778), Credit Corp Services Pty Ltd (ACN 082 928 872), Panthera Finance Pty Ltd (ACN 147 634 482), ACM Group Pty Limited (ACN 127 181 097), Credit Corp Acceptance Pty Limited (ACN 119 211 317) (then known as Great Western Asset Management Pty Ltd), Lion Finance Pty Ltd (ACN 095 926 766), and/or Pioneer Credit Solutions Pty Ltd (ACN 136 062 970).

(iv) ***FCA Act*** means the *Federal Court of Australia Act 1976* (Cth).

(v) ***St George-branded cards*** means St George-branded consumer credit cards, Bank SA-branded consumer credit cards and Bank of Melbourne-branded consumer credit cards.

(vi) ***Westpac-branded cards*** means Westpac-branded consumer credit cards.

(vii) ***Westpac-branded loans*** means Westpac-branded Flexi Loans.

THE COURT DECLARES THAT:

Westpac-branded cards

1. Between 17 March 2011 and 30 November 2015, the Defendant (Westpac):

    (a) in trade and commerce and in connection with the supply of financial services, on 709 occasions represented to a Debt Purchaser that one or more interest rates applied to a customer's corresponding Westpac-branded card account balance and that no other interest rates applied to the customer's account, when in fact the interest rate or rates that Westpac (and then the Debt Purchaser) was entitled to charge the customer on either a portion of the account balance, or the whole of the account balance, was lower than the lowest interest rate that Westpac provided to the Debt Purchaser; and

    (b) thereby, on each occasion, in contravention of ss 12DB(1)(a) and (i) of the ASIC Act, Westpac made false and misleading representations, and in contravention of s 12DA(1) of the ASIC Act, made misleading and deceptive representations.

2. Between 1 December 2015 and 10 May 2018, Westpac:

    (a) in trade and commerce and in connection with the supply of financial services, on 3,477 occasions represented to a Debt Purchaser that one or more interest rates applied to a customer's corresponding Westpac-branded card account balance and that no other interest rates applied to the customer's account, when in fact the interest rate or rates that Westpac (and then the Debt Purchaser) was entitled to charge the customer on either a portion of the account balance, or the whole of the account balance, was lower than the lowest interest rate that Westpac provided to the Debt Purchaser; and

    (b) thereby, on each occasion, in contravention of ss 12DB(1)(a) and (i) of the ASIC Act, Westpac made false and misleading representations, and in contravention of s 12DA(1) of the ASIC Act, made misleading and deceptive representations.

3. Between 17 March 2011 and 10 May 2018, by reason of the conduct described in the declarations in paragraphs 1 and 2 above, Westpac failed to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act.

Westpac-branded loans

4. Between 10 October 2013 and 30 November 2015, Westpac:

(a) in trade and commerce and in connection with the supply of financial services, on 28 occasions represented to a Debt Purchaser that an interest rate applied to the customer's Westpac-branded loan account balance and that no other interest rates applied to the customer's account, when in fact the interest rate that Westpac (and then the Debt Purchaser) was entitled to charge on the whole of the account balance was lower than the interest rate that Westpac provided to the Debt Purchaser; and

(b) thereby on each occasion, in contravention of ss 12DB(1)(a) and (i) of the ASIC Act, made false and misleading representations; and, in contravention of s 12DA(1) of the ASIC Act, made misleading and deceptive representations.

5. Between 1 December 2015 and 10 May 2018, Westpac:

(a) in trade and commerce and in connection with the supply of financial services, on 162 occasions represented to a Debt Purchaser that an interest rate applied to the customer's Westpac-branded loan account balance and that no other interest rates applied to the customer's account, when in fact the interest rate that Westpac (and then the Debt Purchaser) was entitled to charge on the whole of the account balance was lower than the interest rate that Westpac provided to the Debt Purchaser; and

(b) thereby on each occasion, in contravention of ss 12DB(1)(a) and (i) of the ASIC Act, made false and misleading representations; and in contravention of s 12DA(1) of the ASIC Act, made misleading and deceptive representations.

6. Between 1 October 2013 and 10 May 2018, by reason of the conduct described in the declarations in paragraphs 4 and 5 above, Westpac breached its obligation to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act.

St George-branded cards

7. Between 1 March 2010 and 30 November 2015, Westpac, in trade and commerce and in connection with the supply of financial services, represented to a Debt Purchaser that one single interest rate applied to a customer's St George-branded card account balance and that no other interest rates applied to the customer's account, when in fact:

(a) on 450 occasions, the interest rate that Westpac (and then the Debt Purchaser) was entitled to charge on the whole of the account balance was lower than the single interest rate that Westpac provided to the Debt Purchaser; and

(b) on 6,840 occasions, two or more interest rates applied to different parts of the customer's account balance and the interest rate that Westpac (and then the Debt Purchaser) was entitled to charge the customer on a part of the account balance was lower than the single interest rate that Westpac provided to the Debt Purchaser,

thereby on each occasion, in contravention of ss 12DB(1)(a) and 12DB(1)(g) (from 10 March 2010 to 31 December 2010) and 12DB(1)(i) (from 1 January 2011) of the ASIC Act, made false and misleading representations; and in contravention of s 12DA(1) of the ASIC Act, made misleading and deceptive representations.

8. Between 1 December 2015 and 19 March 2018, Westpac, in trade and commerce and in connection with the supply of financial services, represented to a Debt Purchaser that one single interest rate applied to a customer's St George-branded card account balance and that no other interest rate applied to the customer's account, when in fact:

(a) on 532 occasions, the interest rate that Westpac (and then the Debt Purchaser) was entitled to charge on the whole of the account balance was lower than the single interest rate that Westpac provided to the Debt Purchaser; and

(b) on 4,337 occasions, two or more interest rates applied to different parts of the customer's account balance and the interest rate that Westpac (and then the Debt Purchaser) was entitled to charge the customer on a part of the account balance was lower than the single interest rate that Westpac provided to the Debt Purchaser,

thereby on each occasion, in contravention of ss 12DB(1)(a) and 12DB(1)(i) of the ASIC Act, made false and misleading representations; and in contravention of s 12DA(1) of the ASIC Act, made misleading and deceptive representations.

9. Between 1 March 2010 and 19 March 2018, by reason of the conduct described in the declarations in paragraphs 7 and 8 above, Westpac breached its obligation to comply with financial services laws in contravention of s 912A(1)(c) of the Corporations Act.

AND THE COURT ORDERS THAT:

10. Pursuant to s 12GBA and s 12GBC of the ASIC Act (as in force prior to 13 March 2019) that, within 14 days of the date of this order, Westpac pay to the Commonwealth of Australia a pecuniary penalty in the sum of $12,000,000 in respect of Westpac's declared contraventions set out in paragraphs 2, 5 and 8 above.

11. Westpac pay the Plaintiff's costs of and incidental to these proceedings.

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

ORDERS

VID 704 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**WESTPAC BANKING CORPORATION (ACN 007 457 141)** Defendant

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **20 APRIL 2022**

THE COURT DECLARES THAT:

1. Pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) and s 1317E of the *Corporations Act 2001* (Cth) (Corporations Act), Westpac Banking Corporation (Westpac) breached its obligation to do all things necessary to ensure the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened ss 912A(1)(a) and 912A(5A) of the Corporations Act, in that:

    1.1. On and after 13 March 2019, Westpac knew that it did not have processes or controls in place:

        1.1.1. to identify when a company holding a bank account with Westpac had been deregistered under the Corporations Act; or

        1.1.2. to manage on an ongoing basis Westpac bank accounts held in the name of deregistered companies (Deregistered Company Accounts) in a manner consistent with funds in those accounts having vested in ASIC or the Commonwealth pursuant to s 601AD of the Corporations Act.

    1.2. Despite this knowledge:

        1.2.1. Westpac did not implement within its Westpac Institutional Bank division ongoing processes or controls to identify and manage Deregistered Company Accounts until, at the earliest, October 2019;

1.2.2. for all other divisions within Westpac:

1.2.2.1. Westpac did not commence implementation of manual processes to identify and manage Deregistered Company Accounts until 27 October 2020;

1.2.2.2. Westpac did not approve or provide adequate funding or resources to implement ongoing processes or controls to identify and manage Deregistered Company Accounts until October 2020; and

1.2.2.3. Westpac did not implement ongoing processes or controls to identify and manage Deregistered Company Accounts until, at the earliest, 25 March 2021.

1.3. Further, between 13 March 2019 and 27 October 2020:

1.3.1. Westpac did not place any blocks on withdrawals from approximately 4200 Deregistered Company Accounts which Westpac had identified in that period;

1.3.2. Westpac staff removed withdrawal blocks from approximately 100 Deregistered Company Accounts which Westpac had previously identified; and

1.3.3. Westpac did not have controls or adequate systems in place to prevent staff from removing blocks on withdrawals from Deregistered Company Accounts which had been identified and blocked.

1.4. Further:

1.4.1. at all times after August 2019, Westpac knew that Deregistered Company Accounts for companies which had been deregistered before April 2017 remained open;

1.4.2. however, Westpac did not take steps to manage or remediate those historical Deregistered Company Accounts, which totalled approximately 11,000 accounts, until, at the earliest, 25 March 2021.

1.5. By the above conduct in paragraphs 1.2 to 1.4, approximately 21,000 Deregistered Company Accounts held with Westpac (both accounts identified and not identified by Westpac), remained open or were reopened, and transactions could be carried out on those accounts, which included funds from those accounts being received by persons authorised by Westpac to operate the accounts and third parties, in circumstances where those funds in fact vested in ASIC or the Commonwealth.

1.6. In respect of the Deregistered Company Accounts in paragraph 1.5, Westpac:

1.6.1. received payment of fees, interest, overdraft and loan repayments from funds held in the Deregistered Company Accounts (both accounts identified and not identified by Westpac) and made use of the funds in those accounts in the course of its business, in circumstances where the funds had vested in ASIC or the Commonwealth; and

1.6.2. did not remit to ASIC or the Commonwealth funds from those accounts which had vested in ASIC or the Commonwealth. The total vested funds that could be, and in some instances were, withdrawn and / or paid to third parties on the instructions of persons who had previously been authorised by the now deregistered company to operate the accounts rather than remitted to ASIC or the Commonwealth, is estimated at a total of:

1.6.2.1. in respect of deregistered companies which remained deregistered:

1.6.2.1.1. approximately $35.5 million calculated at the date that the company was deregistered; and

1.6.2.1.2. approximately $44.2 million calculated at the date that the company was identified by Westpac as deregistered; and

1.6.2.2. approximately $41 million in respect of companies that were subsequently reinstated or are in the process of being reinstated.

1.7. Despite having previously told ASIC that it was implementing an ongoing control or process to deal with Deregistered Company Accounts, at all times on and after 13 March 2019 until November 2020, Westpac did not tell ASIC that it had not implemented an ongoing control or process across its divisions.

AND THE COURT ORDERS THAT:

2. Pursuant to s 1317G of the Corporations Act, within 30 days of the date of this Order, Westpac pay to the Commonwealth of Australia a pecuniary penalty in the sum of $20 million in respect of Westpac's conduct declared to be a contravention of s 912A(5A) of the Corporations Act.

3. Westpac pay ASIC's costs of and incidental to the proceeding.

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

ORDERS

VID 705 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**BT FUNDS MANAGEMENT LTD (ACN 002 916 458)** Defendant

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **8 APRIL 2022**

THE COURT DECLARES THAT:

1. The defendant contravened ss 12DA(1) and 12DB(1) of *the Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and s 1041H(1) of the *Corporations Act 2001* (Cth) (Corporations Act):

   (a) during the period from 30 November 2015 to 21 September 2020 in respect of members of the Asgard Fund who held insurance cover under the Asgard Employee Super Account policies held by the defendant in its capacity as the trustee of the Asgard Fund (AESA policies); and

   (b) during the period from 30 November 2015 to 4 December 2020 in respect of members of the Asgard Fund who held insurance cover under the Asgard Personal Protection Plan policies held by the defendant in its capacity as the trustee of the Asgard Fund (APPP policies),

   by representing that insurance fees had been properly deducted from the accounts of members who obtained insurance cover under the AESA policies on or after 22 October 2013, or who obtained insurance cover under the APPP policies on or after 1 July 2014, when in fact the insurance fees that were deducted included commissions that were not permitted to be deducted from the member's account.

2. The defendant contravened ss 12DA(1) and 12DB(1) of the ASIC Act and s 1041H(1) of the Corporations Act:

   (a) during the period from 30 November 2015 to 21 December 2020 in respect of members of the Asgard Fund who held insurance cover under the AESA policies; and

(b) during the period from 30 November 2015 to 25 August 2021 in respect of members of the Asgard Fund who held insurance cover under the APPP policies,

by representing that insurance fees had been deducted as permitted or required from the accounts of members:

(c) who obtained insurance cover under the AESA or APPP policies before 1 July 2013; and

(d) in respect of whom, after 1 July 2013, the arrangement pursuant to which insurance commissions were paid to a financial adviser was terminated,

when, in fact, following the termination of the arrangement, the insurance fees that were deducted included commissions that were not permitted or were not required to be deducted from the member's account.

3. The defendant contravened ss 12DA(1) and 12DB(1) of the ASIC Act and s 1041H(1) of the Corporations Act during the period from 30 November 2015 to 22 June 2020 in respect of members of the Asgard Fund who:

(a) held insurance cover under the master policies; and

(b) returned a "request to remove a financial adviser from an account" form to the defendant on or after 30 November 2015,

by representing that the insurance fees charged to those members did not include any fee payable to the member's financial adviser, when in fact the systems and processes of the defendant to process "request to remove a financial adviser from an account" forms did not ensure that the fees charged to the account of a person who returned such a form would be reduced by an amount equivalent to the commissions previously paid to the person's financial adviser in respect of the person's insurance cover.

4. The defendant contravened s 963K of the Corporations Act during the period from 30 November 2015 to 25 August 2021 by giving conflicted remuneration to financial advisers or their advice licensees in respect of insurance cover held by members of the Asgard Fund, being the payment of commissions in respect of insurance cover obtained by members of the Asgard Fund under the master policies, which commission was paid as a percentage of the insurance premium payable in respect of the relevant member.

5. For the avoidance of doubt, the particular members referred to in each declaration are those identified in the relevant schedules to the statement of agreed facts and admissions and the supplementary such statement filed with the Court.

6. By engaging in the conduct giving rise to the contraventions the subject of each of declarations 1 to 4 above, the defendant:

   (a) contravened s 912A(1)(b) of the Corporations Act by failing to comply with a condition on its licence; and

   (b) contravened s 912A(1)(c) of the Corporations Act by failing to comply with the financial services laws.

AND THE COURT ORDERS THAT:

7. Pursuant to s 12GBA of the ASIC Act (as in force before 13 March 2019) and s 12GBB of the ASIC Act (as in force on and from 13 March 2019) and s 1317G of the Corporations Act, the defendant pay to the Commonwealth of Australia a combined pecuniary penalty in the amount of $20 million, in respect of:

   (a) the defendant's contraventions of s 12DB(1) of the ASIC Act referred to in declarations 1 to 3; and

   (b) the defendant's contraventions of s 963K of the Corporations Act referred to in declaration 4.

8. Pursuant to s 43 of the *Federal Court of Australia Act 1976* (Cth), the defendant pay the plaintiff's costs of the proceeding.

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

REASONS FOR JUDGMENT

BEACH J:

1 These reasons embody the *ex tempore* reasons that I gave in each of six proceedings brought by ASIC against Westpac Banking Corporation and its subsidiaries for declarations, pecuniary penalties and other relief for various contraventions of ss 12CB, 12DA, 12DB, 12DI and 12DM of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act) and ss 912A, 962P, 963K and 1041H of the *Corporations Act 2001* (Cth).

2 I heard and disposed of these six matters last month. There were different legal teams for each of the parties in each matter. In terms of the written submissions, I required and was provided with two types of submissions for use in each of the six proceedings. The first set of submissions contained the relevant legal principles. This set was common to all six proceedings. The second set of submissions was different in each proceeding and tailored to the specific contraventions in the particular proceeding before me.

3 In terms of the factual foundation upon which I proceeded, this was provided by specific statements of agreed facts filed in each case invoking s 191(2) of the *Evidence Act 1995* (Cth); some of the statements were amended and further amended in some of the proceedings. These statements also contained admissions made by Westpac or its relevant subsidiary(s).

4 In relation to the hearing and disposition of these six proceedings, the process adopted was to list and hear them in half-day slots. After each hearing, and usually within 2 to 4 hours of their conclusion, I gave an *ex tempore* judgment; occasionally I reserved my decision until the following morning and then gave judgment with oral reasons.

5 At the request of the parties I have produced this omnibus set of reasons for all six proceedings. It contains for each case a corrected transcription of my *ex tempore* reasons together with the legal principles upon which I proceeded, which as I explained in each *ex tempore* judgment incorporated by reference the first set of submissions dealing with legal principles.

6 In summary, these reasons record why I imposed pecuniary penalties totalling $113 million on Westpac and its subsidiaries.

7 Let me begin by setting out the statutory provisions relevant to all six matters and the legal principles that I applied, and then I will repeat my reasons specific to each matter in the form of a corrected transcription of the *ex tempore* reasons.

The statutory provisions – contraventions

8 I should begin with some definitions and then turn to the substantive conduct provisions.

Definitions of financial product and financial services

9 Many of the provisions that applied to the six proceedings before me involved the statutory definitions for "financial product" and "financial service".

10 Section 12BAA(1) of the ASIC Act and s 763A(1) of the Corporations Act contained the following general definition of "financial product":

> a facility through which, or through the acquisition of which, a person does one or more of the following:
>
> (a) makes a financial investment…;
>
> (b) manages a financial risk…;
>
> (c) makes non-cash payments…

11 Both Acts contained further general definitions of "makes a financial investment", "manages a financial risk" and "makes non-cash payments" (ss 12BAA(4), (5) and (6) of the ASIC Act and ss 763B, 763C and 763D of the Corporations Act), as well as a list of things which were specifically included as financial products (s 12BAA(7) and s 764A), which included a contract of insurance, any deposit taking facility made available by an authorised deposit-taking institution, a security, an interest in a registered scheme, and a superannuation interest (s 12BAA(7)(f) and s 764A(1)(g)).

12 A "credit facility" was excluded from the definition of financial product in the Corporations Act (s 765A and reg 7.1.06 of the *Corporations Regulations 2001*), but specifically included as a financial product for the purposes of the ASIC Act (s 12BAA(7)(k)). Regulation 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth) sets out that a credit facility is essentially the provision of credit, being a contract, arrangement or understanding under which payment of a debt owed by one person to another person is deferred, or one person incurs a deferred debt to another person. It specifically includes any form of financial accommodation, a financial benefit arising from or as a result of a loan and a credit card.

13 Section 12BAB(1) of the ASIC Act and s 766A(1) of the Corporations Act contained the following definition referable to a "financial service":

> … subject to paragraph (2)(b), a person provides a financial service if they:

(a) provide financial product advice (see subsection (5)); or

(b) deal in a financial product (see subsection (7)).

14 Further, s 12BAB(5) of the ASIC Act and s 766B of the Corporations Act defined "financial product advice", with some qualifications which are not relevant, as a recommendation or a statement of opinion, or a report of either of those things, that is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence.

15 The concept of "dealing" was also defined, and included applying for or acquiring a financial product or issuing, varying or disposing of a financial product (s 12BAB(7) of the ASIC Act and s 766C of the Corporations Act).

Section 12CB of the ASIC Act

16 Proceeding VID707 of 2021 (fees for deceased customers) includes admitted contraventions of s 12CB(1) of the ASIC Act.

17 Section 12CB relevantly provided (as in force throughout the penalty period as that term is defined in proceeding VID707 of 2021):

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of financial services to a person…; …

…

engage in conduct that is, in all the circumstances, unconscionable.

…

(3) For the purposes of determining whether a person has contravened subsection (1):

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(4) It is the intention of Parliament that:

(a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct;…

18 Though not relevant for present purposes, until 26 October 2018 s 12CB(1)(a) concluded with "(other than a listed public company)".

19 Section 12CC sets out a non-exhaustive list of factors to which the Court may have regard for the purpose of determining whether a person has contravened s 12CB(1). The matters enumerated assist in understanding the scope of the meaning of unconscionable conduct, though the presence of one or more matters listed or indeed their absence is not necessarily determinative (see *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation) (No 2)* [2017] FCA 709 at [63], with reference to ss 21 and 22(1) of the Australian Consumer Law, Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).

20 At all material times s 12CC(1) provided:

> (1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the supplier) has contravened section 12CB in connection with the supply or possible supply of financial services to a person (the service recipient), the court may have regard to:
>
> (a) the relative strengths of the bargaining positions of the supplier and the service recipient; and
>
> (b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
>
> (c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; and
>
> (e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and
>
> (f) the extent to which the supplier's conduct towards the service recipient was consistent with the supplier's conduct in similar transactions between the supplier and other like service recipients; and
>
> (g) if the supplier is a corporation—the requirements of any applicable industry code (see subsection (3)); and
>
> (h) the requirements of any other industry code (see subsection (3)), if the service recipient acted on the reasonable belief that the supplier would comply with that code; and
>
> (i) the extent to which the supplier unreasonably failed to disclose to the service recipient:
>
> (i) any intended conduct of the supplier that might affect the

interests of the service recipient; and

(ii) any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and

(j) if there is a contract between the supplier and the service recipient for the supply of the financial services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the service recipient in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the service recipient engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and

(l) the extent to which the supplier and the service recipient acted in good faith.

21 Relevant principles as to ss 12CB and 12CC were distilled by me in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 3)* (2020) 275 FCR 57; [2020] FCA 208 at [358] to [379] and for present purposes can be expressed in 13 points.

22 First, the relevant standard is a statutory standard, not limited by equitable doctrine, although the equitable doctrine provides some background against which the statutory concept may be appreciated.

23 Second, the evaluation of the conduct in all the circumstances requires close consideration of the facts. Section 12CC elaborates on the factual matters and circumstances that are to be considered. Assessing whether conduct in all the circumstances is to be characterised as unconscionable involves an evaluative judgment which has the consequence that the factors in s 12CC(1) must be considered together.

24 As to the third, fourth and fifth points, it is more convenient to set out what I said in *ASIC v AGM (No 3)* at [365] to [370]:

> Third, one cannot simply align the statutory concept of unconscionable with something not done in good conscience in the sense in which equity has so treated the matter. It is clear from s 12CB and the factors that may be taken into account under s 12CC(1)

that one is dealing with a broader notion. But reference to intellectual ideas of customary morality and societal values without further delineation and ready identification may be at too high a level of abstraction to be an objective touchstone. Further, such general themes may distract attention from the values that need to be considered, namely the values explicitly or implicitly enshrined in the text, context and purpose of the ASIC Act, the Corporations Act and any other relevant statutory framework applicable to the activities in issue. But in identifying and applying those values, and indeed in considering the relevant matters under s 12CC(1) applicable to the particular case, societal or community values may also be implicitly satisfied. For example, in considering conduct affecting a particular sub-group, for example an indigenous community, the application of each relevant matter under s 12CC(1) may take into account and may need to be tailored to the characteristics of that sub-group and the alleged contravener's interaction therewith, consistent implicitly with community standards. But if unconscionable conduct is found, it will not be because of some characterisation of it as being against community values without more. Rather, it will be so characterised as being against the statutory construct informed by the values that I have identified and which I will partly expand upon in a moment, as applied to the characteristics and conduct of the participants involved in the commerce in question.

Fourth, let me say something on the question of "conscience". In the context of equity, *Kakavas* explained the matter by reference to the appellant's submissions in that case in the following terms (at [15] and [16]):

> In advancing a claim based on the principle expounded by Mason J in *Amadio*, the appellant relies upon the standards of personal conduct compendiously described as the conscience of equity. According to Pomeroy's Treatise on Equity Jurisprudence:
>
> > "the 'conscience' which is an element of the equitable jurisdiction came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals, and by which it tests the conduct and rights of suitors, — a juridical and not a personal conscience."
>
> *The conscience spoken of here is a construct of values and standards against which the conduct of "suitors" — not only defendants — is to be judged.*
>
> (My emphasis, citations omitted.)

As I said in *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [239], in the present context dealing with the element of "conscience" in statutory unconscionability, the "construct of values and standards" is extended beyond the boundaries and content of what equity would normally embrace. The metaphorical term of "conscience" in the present context has an enhanced dimension. Moreover, it is not just a juridical conscience to use Pomeroy's description. It is a statutorily created or recognised conscience with its construct of values and standards informed by the explicit and implicit values enshrined in the text, context and purpose of the ASIC Act and the Corporations Act. It is a "statutory norm of conscience" (*Kobelt* at [47] per Kiefel CJ and Bell J). And if that be the case, the qualifying epithet "good" in the phrase "good conscience" is otiose. The relevant conduct is either against the statutory construct of conscience or it is not; the qualifier of "good" in opposition to "bad" may have made sense when dealing with a moralistic version of conscience that had that implicit duality, but it is misconceived to suggest

that the statutory construct so requires. Now any description of values even within the statutory construct of conscience will have attendant imprecision in terms of their boundaries and content. But it would be an exaggeration to say that they are so indeterminate as to be little more than a pretext to facilitate condemning conduct that is disapproved of simply on moral grounds.

As Gageler J explained in *Kobelt* at [87]:

> The correct perspective is that s 12CB operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. The function of the court exercising jurisdiction in a matter arising under the section is to recognise and administer that normative standard of conduct. The court needs to administer that standing in the totality of the circumstances taking account of each of the considerations identified in s 12CC if and to the extent that those considerations are applicable in the circumstances.

As Nettle and Gordon JJ said in *Kobelt* at [153]:

> [At] least in the Australian statutory context, what is involved is an evaluation of business behaviour (conduct in trade or commerce) in light of the values and norms recognised by the statute.

Fifth, in terms of any requirement to demonstrate "moral obloquy" or "a high level of moral obloquy", the use of such labels is a gloss on the statutory text. As has been explained in numerous authorities in this area, the statutory language should not simply be restated by substituting words or a phrase that Parliament did not choose. At most, the statutory concept of unconscionable may accommodate a *flavour* of moral obloquy in the sense that it means more than "unjust", "unfair" or "unreasonable" (*Kobelt* at [118] per Keane J), but it is to divert the relevant normative inquiry to specifically seek to identify its existence or to clothe the relevant conduct with such a conclusory label.

25 This in turn draws upon what I said in *Australian Competition and Consumer Commission v Medibank Private Ltd* (2018) 267 FCR 544 at [232] to [255], which as best as I can tell is consistent with *Australian Securities and Investments Commission v Kobelt* (2019) 368 ALR 1 handed down the following year. Further, nothing said in *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6 significantly alters *Kobelt*, with the plurality in *Stubbings* focused on equitable rather than statutory notions of unconscionability.

26 Sixth, as to relevant underpinning values and conceptions:

(a) fairness and equality are values and conceptions underpinning s 12CC(1)(a), (b), (d) to (f) and (i) to (k); more particularly, s 12CC(1)(a), (j)(i) and (k) recognise asymmetry of power;

(b) a lack of understanding or ignorance of a party is the conception underpinning s 12CC(1)(c);

(c) the risk and worth of the bargain are the conceptions underpinning s 12CC(1)(e) and (i); a broader and related although not explicit concept is the question of asymmetry of information; and

(d) good faith and fair dealing are values and conceptions underpinning s 12CC(1)(l).

27 Seventh, although honesty and fairness in dealing with consumers is relevant including acting without deception, unfair conduct in and of itself does not amount to unconscionable conduct. Establishing unfair conduct may be a step along the way to showing unconscionable conduct if it ultimately amounts to an illegitimate exploitation of a person's vulnerability and therefore amounts to an unjustifiable pursuit of self-interest. Hardship to a consumer does not in and of itself establish that conduct was unconscionable. Establishing actual or likely hardship may be a step along the way to showing unconscionable conduct, although it is not a necessary condition.

28 Eighth, statutory unconscionability does not require only focusing on the alleged wrongdoer's or its officers' or employees' state of mind, whether actual intention or knowledge or what it ought to have known. It is a broader objective evaluation of behaviour including the causes and reasons for such behaviour and its effect or likely effect. But the subjective state of mind of the alleged contravener whether actual or constructive is relevant to the broader sense.

29 Ninth, industry practice is a relevant consideration.

30 Tenth, the boundaries and content of any applicable statutory regime beyond the ASIC Act and the Corporations Act is also important context within which to assess statutory unconscionability.

31 Eleventh, it is not necessary to show that a person is under a disadvantage or that any particular person has been disadvantaged by conduct (s 12CB(4)(b)). Statutory unconscionability does not require some form of pre-existing disability, vulnerability or disadvantage of which advantage was taken; there is no need to establish exploitation of disadvantage. In any event, a person is not treated as being in a position of substantial disadvantage merely because there is an inequality of bargaining power. And the mere existence of disparity in bargaining power does not establish that the party which enjoys the superior power acts unconscionably by exercising it.

32 Twelfth, it is necessary to consider each of the non-exhaustive list of matters set out in s 12CC(1) that is potentially relevant to the conduct under consideration, and it is inappropriate to focus on one or more of those matters to the exclusion or unjustifiable expense of others.

33 Thirteenth, conduct which attracts the operation of s 12CB is assumed to be of sufficient seriousness such as to potentially warrant the imposition of a pecuniary penalty. That perspective is not irrelevant to the construction and application of ss 12CB and 12CC(1).

Sections 12DA and 12DB of the ASIC Act & s 1041H of the Corporations Act

34 Before dealing with these provisions I should note that:

(a) proceedings NSD 1239 of 2021 (Westpac debt sale) included admitted contraventions of s 12DA(1) and s 12DB(1)(a) and (g)/(i) ((i) replacing (g) in relevantly the same terms from 1 January 2011) of the ASIC Act for the period 1 March 2010 to 10 May 2018;

(b) proceedings NSD 1241 of 2021 (general insurance) included admitted contraventions of s 12DA(1), s 12DB(1)(b), (h) and (i) and also s 1041H of the Corporations Act for the period 30 November 2015 to 30 June 2021; and

(c) proceedings VID 705 of 2021 (insurance in superannuation) included admitted contraventions of s 12DA(1) and s 12DB(1)(g) and s 1041H for the period 30 November 2015 to 7 December 2020.

35 Now at all material times s 12DA relevantly provided:

> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in sections 12DB to 12DN limits by implication the generality of subsection (1).

36 Further, s 12DB(1) relevantly provided:

> A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> (a) make a false or misleading representation that services are of a particular standard, quality, value or grade **[**prior to 31 December 2010, the former s 12DB(1)(a) stated "falsely represent that services are of a particular standard, quality, value or grade"**]**; or
>
> (b) make a false or misleading representation that a particular person has agreed to acquire services; or
>
> ...

> (g) make a false or misleading representation with respect to the price of services; or
>
> (h) make a false or misleading representation concerning the need for any services; or
>
> (i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED) **[**prior to 31 December 2010, s 12DB(1)(i) was 12DB(1)(g) and excluded the parenthetical reference to the s 12ED implied warranty**]**.
>
> …

37 In relation to s 12DB(1), the word "services" is defined to include "any rights … benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce", subject to certain exceptions which are not presently relevant (s 12BA(1)).

38 Further, at all material times s 1041H(1) of the Corporations Act provided:

> A person must not, in this jurisdiction, engage in conduct in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

39 Broadly speaking, the elements of a contravention of ss 12DA(1), 12DB(1) of the ASIC Act or s 1041H(1) of the Corporations Act require that, first, a person engages in conduct, second, that conduct is "in trade or commerce" (ss 12DA(1) and 12DB(1)), "in relation to financial services" (s 12DA(1)), "in connection with the supply or possible supply of financial services or in connection with the promotion by any means of the supply or use of financial services" (s 12DB(1)) or "in relation to a financial product or a financial service" (s 1041H(1)) and, third, the conduct is misleading or deceptive or likely to mislead or deceive (s 12DA(1) and 1041H(1)) or constitutes making a false or misleading representation about a relevant matter under s 12DB(1).

40 Generally, there is no material difference between the expression "false or misleading representations" in s 12DB(1) and the expression "misleading or deceptive conduct" in s 12DA(1) or s 1041H(1) in their legal application.

41 The central question arising under each provision is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error, that is, to form an erroneous assumption or conclusion about some fact or matter.

42 And the following principles are relevant in answering that question. First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so. Second,

it is not necessary to prove an intention to mislead or deceive. Third, it is unnecessary to prove that the conduct in question actually misled or deceived anyone. Fourth, it is not sufficient if the conduct merely causes confusion.

Section 12DI(3) of the ASIC Act

43 Proceeding VID707 of 2021 (fees for deceased customers) includes admitted contraventions of s 12DI(3) of the ASIC Act, and knowing involvement in the contraventions.

44 At all material times s 12DI(3) provided:

> A person contravenes this subsection if:
>
> (a) the person, in trade or commerce, accepts payment or other consideration for financial services; and
>
> (b) at the time of acceptance, there are reasonable grounds for believing that the person will not be able to supply the financial services within the period specified by the person or, if no period is specified, within a reasonable time.

45 In *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790, I set out the elements of a contravention of s 12DI(3) (at [40]) being, first, an accepted payment, second, the payment is accepted in trade or commerce, third, the payment is for financial services and, fourth, at the time of acceptance there are reasonable grounds for believing that the person will not be able to supply the financial services within the period specified by the person or, if no period is specified, within a reasonable time.

46 I further noted that based on the legislative history of the provision, that is, the amendments to the section following enactment of the *Financial Services Reform (Consequential Provisions) Act 2001* (Cth), s 12DI(3) does not require proof that the financial services provider is aware or ought reasonably to be aware of the reasonable grounds. I stated that it is only necessary to prove that objectively as at the time of acceptance of payment there were facts and circumstances which constituted reasonable grounds for believing that the financial services provider would not be able to supply the relevant financial services. There is no requirement to establish that the financial services provider was aware or ought reasonably to have been aware of the relevant reasonable grounds.

Knowingly Concerned in a Contravention of s 12DI(3) of the ASIC Act

47 At all material times to 12 March 2019, s 12GBA(1) relevantly provided:

> (1) If the Court is satisfied that a person:

> (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA); or
>
> …
>
> (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision;…
>
> the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by that person to which this section applies, as the Court determines to be appropriate.

48 Since 13 March 2019, s 12GBCL(b) of the ASIC Act has provided that a "person who is involved in a contravention of a civil penalty provision… is taken to have contravened the provisions". ASIC does not rely upon this provision, as it does not for the purposes of proceeding VID707 of 2021 (fees for deceased customers), allege involvement in contraventions occurring later than 10 September 2018.

49 In order to establish that a respondent has been knowingly concerned in a contravention, within the meaning of the then s 12GBA(1)(e), it is necessary to show that the respondent was an intentional participant, knowing the essential facts and circumstances constituting the principal contravention by that other which gives the conduct the character of a contravention. The important matter is therefore the content of the statutory text that governs the contravention in which the respondent is said to be knowingly concerned. There is no need to establish that the respondent knew that the conduct in which they are said to have been knowingly concerned had a particular legal character or that the respondent knew that the conduct of that other engaged a particular sequence of integers of a statutory provision rendering the other's conduct contravening conduct.

50 In order to establish that a respondent has been knowingly concerned in a contravention of s 12DI(3), it is necessary to establish inter-alia that the respondent knows that the principal contravener accepted a payment, knows that the payment is accepted in trade or commerce, knows that the payment is for financial services, and knows, at the time of acceptance, that there are reasonable grounds for believing that the principal contravener will not be able to supply the financial services within the period specified or, if no period is specified, within a reasonable time.

Section 12DM of the ASIC Act

51 Proceeding NSD1241 of 2021 (general insurance) includes admitted contraventions of s 12DM of the ASIC Act.

52 At all material times, the then s 12DM relevantly provided:

> (1) A person must not, in trade or commerce, assert a right to payment from another person for unsolicited financial services.
>
> (1A) Subsection (1) does not apply if the person had reasonable cause to believe that there was a right to payment.
>
> (1AA) A person must not, in trade or commerce, send to another person an invoice or other document that:
>
> (a) states the amount of a payment, or sets out the charge, for supplying unsolicited financial services; and
>
> (b) does not contain a warning statement that complies with the requirements set out in the regulations.
>
> (2) Subsection (1AA) does not apply if the person had reasonable cause to believe that there was a right to the payment or charge.
>
> (3) An offence under subsection 12GB(1) relating to subsection (1) or (1AA) of this section is an offence of strict liability.
>
> (4) In a proceeding against a person in respect of a contravention of this section, the burden lies on the person of proving that the person had reasonable cause to believe that there was a right to payment.

53 Section 12DM(1) applies where a person has asserted a right to payment, the assertion has been made in trade and commerce, the assertion relates to unsolicited financial services and the person who made the assertion did not have reasonable cause to believe that there was a right to payment.

54 The term "unsolicited financial services" is defined in s 12BA(1) as "financial services supplied to a person without any request made by the person or on the person's behalf". Financial services, in turn, includes the provision of financial product advice or dealing in a financial product.

55 The onus of proving that a person had "reasonable cause to believe that there was a right to payment" for the purposes of s 12DM(1A) lies on the person asserting that belief (s 12DM(4)).

56 The consequence of a contravention of s 12DM is that the person who received the unsolicited service is not liable to make payment. Further, the contravener may be ordered to pay a pecuniary penalty (s 12GBA as in force before 13 March 2019, and s 12GBB as in force on and from 13 March 2019).

Section 912A of the Corporations Act

57 Section 912A of the Corporations Act prescribes general obligations for the holders of an Australian Financial Services Licence.

Section 912A(1)(a)

58 Proceedings NSD1240 of 2021 (contribution fees), NSD1241 of 2021 (general insurance), VID704 of 2021 (deregistered company accounts) and VID707 of 2021 (fees for deceased customers) include admitted contraventions of s 912A(1)(a).

59 At all material times, s 912A(1)(a) provided:

> (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.

60 In *ASIC v AGM (No 3)* I said (at [505] to [512] and [520] to [528]):

> Now in reaching this conclusion I have applied the following principles concerning s 912A(1)(a) elucidated in *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* (2012) 88 ACSR 206 at [69] per Foster J which I restated in *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 at [2347]-[2350].
>
> First, the words "efficiently, honestly and fairly" are to be read as a compendious indication requiring a licensee to go about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.
>
> Second, the words "efficiently, honestly and fairly" *connote* a requirement of competence in providing advice and in complying with relevant statutory obligations. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client's affairs. I have emphasised here the notion of connotation rather than denotation to make the obvious point that the boundaries and content of the phrase or its various elements are incapable of clear or exhaustive definition.
>
> Third, the word "efficient" refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate. Inefficiency may be established by demonstrating that the performance of a licensee's functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect.
>
> Fourth, it is not necessary to establish dishonesty in the criminal sense. The word "honestly" may comprehend conduct which is not criminal but which is morally wrong in a commercial sense.
>
> Fifth, the word "honestly" when used in conjunction with the word "fairly" tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound.
>
> These observations are consistent with the express object of Ch 7 of the Corporations

Act set out in s 760A as follows:

> The main object of this Chapter is to promote:
>
> (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
>
> (b) fairness, honesty and professionalism by those who provide financial services; and
>
> (c) fair, orderly and transparent markets for financial products; and
>
> (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

Further, it is also not in doubt that a contravention of the "efficiently, honestly and fairly" standard does not require a contravention or breach of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise. The statutory standard itself is the source of the obligation.

…

Let me say something about "fairly". Judges applying s 912A(1)(a) have usually not sought to define "fairly" except to explain its structural setting in the composite phrase. This is unsurprising. And of course no dictionary definition could be adequate for the task given the intrinsic circularity with such definitions. For example, take the *Macquarie Dictionary* definition. First, the concept of "free from injustice" is question begging and conclusionary. It adds little to elucidate "fairly". Second, the phase "that which is legitimately sought, pursued, done, given etc." is also question begging. No content is given to what is legitimate. There is irremediable circularity unless legitimacy simply incorporates other statutory or common law/equitable normative standards of behaviour. Third, the phrase "proper under the rules" is also devoid of content unless "proper" means "in compliance with". Fourth, if one construes "fair" to include "free from dishonesty", then this all just suggests that the phrase "efficiently, honestly and fairly" should be read compendiously.

Could you convincingly define "fairly" by what it lacks? To say that fairly means free from bias, free from dishonesty, etc, is to stipulate necessary negative conditions. And to do so may give you some boundary conditions. But no positive conditions are stipulated. No content is given, let alone sufficient conditions. But to stipulate negative conditions may not be unhelpful.

Should "fairly" only be viewed from the perspective of an investor, borrower or other person interacting with the licensee? No. Fairness is to be judged having regard to the interests of both parties. Other statutory provisions may be designed to tilt the scales, but not s 912A(1)(a) and the statutory composite norm it enshrines. Disproportionate emphasis should not be given to what is the third part of a composite phrase in a manner which creates unsatisfactory asymmetry in favour of those with whom the licensee deals. This section is not a back door into an "act in the [best] interests of" obligation. Other specific provisions of the Act nicely fulfil that role. There is nothing to indicate that s 912A(1)(a) was to have that bias.

Finally, it ought not to be forgotten that s 912A(1)(a) is principally a licensee disciplinary command such that a breach thereof might sound in revocation of the AFSL, conditions being imposed on the AFSL or a pecuniary penalty being imposed. But that context gives rise to three points.

> First, in such a context one would expect that the normative standard would be suitably vague and flexible. This is common when dealing with the stipulated standard of behaviour expected of licensees or regulated persons in a wide variety of contexts. But that does not invite conceptual inflation.
>
> Second, one is looking at the licensee's behaviour more generally rather than with regard to any one person. After all, s 912A(1)(a) is expressed:
>
> > (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; …
>
> The language is in the generality of "the financial services covered by the licence".
>
> Third, and relatedly, one is not at all concerned to ascertain the boundaries and content of a cause of action or an element thereof sounding in damages in favour of an individual (cf claims for misleading or deceptive conduct or statutory unconscionability).
>
> In summary, in my view it is not justifiable to take one word from a composite phrase, artificially elevate its significance and read it in a manner asymmetrically in favour of an investor.

61 There is no good reason not to apply these observations. Further, there has not yet been any judicial consideration of s 912A(1)(a) since it became, in effect, a civil penalty provision with the introduction of s 912A(5A).

62 Clearly, s 912A(1)(a) does not require dishonesty in the traditional or criminal sense. A finding of contravention is determined by reference to objective circumstances. Accordingly, a contravention may be made out even though it is not shown that the contravener engaged in an intentional wrong.

63 And neither does a contravention of the "efficiently, honestly and fairly" standard require a contravention of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise. The statutory standard itself is the source of the obligation.

64 The words "efficiently, honestly and fairly" must be read as a compendium describing a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.

65 Now in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 at [162] to [176], at [286] to [291] and at [421] to [427], the Full Court considered an appeal from a finding of a contravention of s 912A(1)(a) by Westpac. In this regard I said in *ASIC v AGM (No 3)* (at [513] to [519]):

> On the question of the proper construction of s 912A(1)(a), my attention has been drawn to various observations made by the Full Court in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* that I discussed earlier in the context of financial product advice. But several points should be noted.
>
> First, before the trial judge, Westpac did not question the statements of principle propounded by ASIC which in essence applied the principles discussed by Foster J.
>
> Second, ASIC's three appeal grounds in that matter rather concerned s 766B(3); ASIC's notice of appeal was tendered before me in order to properly identify the s 766B(3) points that had been raised and that I have discussed earlier in my reasons. Further, to the extent that s 912A(1)(a) was raised by Westpac on any cross-appeal, as I say the parties' positions on construction seem to have been in substance as before the trial judge.
>
> Third, some members of the Full Court queried whether the phrase "efficiently, honestly and fairly" should be read compendiously (O'Bryan J at [422]-[426]). But as this was not decided by at least a majority, I am bound to apply the single judge decisions unless I consider them to be plainly wrong, which I do not.
>
> Fourth, Allsop CJ said (at [172]):
>
> > Words such as "efficiently", "honestly" and "fairly" and a composite or compendious phrase or expression such as "efficiently, honestly and fairly" do not admit of comprehensive definition. Certainly a degree of articulation of instances or examples of conduct failing to satisfy the phrase will be helpful and of guidance, as will an articulation or description of the norms involved.
>
> With respect, I agree with that statement. He then went on to say (at [173]):
>
> > The provision is part of the statute's legislative policy to require social and commercial norms or standards of behaviour to be adhered to. The rule in the section is directed to a social and commercial norm, expressed as an abstraction, but nevertheless an abstraction to be directed to the "infinite variety of human conduct revealed by the evidence in one case after another." (See Gummow WMC, "The Common Law and Statute" in *Change and Continuity*: *Statute, Equity and Federalism* (Oxford University Press, 1999) at 18-19.)
>
> Now neither Jagot J nor O'Bryan J went so far. With respect, I prefer to view s 912A(1)(a) as enshrining a statutory norm to be read conformably with s 760A and the other provisions of the Corporations Act and the ASIC Act, of course to be applied to an infinite variety of corporate delinquency and self-interested commerciality. But to say this is not to deny that it may implicitly pick up some aspects of what some might identify as social and commercial norms, although reasonable minds might differ as to where to ground such an otherwise free-floating concept.

66 It is not necessary for me to discuss further the obiter reservations recorded without argument on the subject in *ASIC v Westpac Securities*. I am bound to apply the numerous single judge decisions to the effect that the expression is to be interpreted compendiously unless I consider that they are plainly wrong, which I do not. Indeed, and with respect to the contrary views of others, I consider the single judge decisions to be correct. And this is now more so given that the provision has civil penalties attached. If there was any ambiguity in s 912A(1)(a), which

there is not, it should be read in favour of a compendious approach, with its integers read as reflected in the single judge decisions.

Section 912A(1)(b)

67 Proceeding VID705 of 2021 (insurance in superannuation) includes admitted contraventions of s 912A(1)(b) of the Corporations Act.

68 At all material times, s 912A(1)(b) relevantly provided that:

> (1) A financial services licensee must:
>
> ...
>
> (b) comply with the conditions on the licence
>
> ...

69 As such, the holder of an AFSL is required to comply with the conditions on its licence.

Section 912A(1)(c)

70 Proceedings VID705 of 2021 (insurance in superannuation), VID707 of 2021 (fees for deceased customers), NSD1239 of 2021 (Westpac debt sale) and NSD1241 of 2021 (general insurance) include admitted contraventions of s 912A(1)(c).

71 At all material times, s 912A(1)(c) provided that an AFSL holder must "comply with the financial services laws".

72 At all material times s 761A of the Corporations Act defined "financial services law" to include a provision of Chapter 7 of that Act or a provision of Division 2 of Part 2 of the ASIC Act.

73 Sections 12CB, 12DA, 12DB, 12DI and 12DM fall within Division 2, Part 2 of the ASIC Act. Sections 962P, 963K and 1041H fall within Chapter 7 of the Corporations Act. Therefore, a contravention of these provisions results in a failure to comply with financial services laws and is, itself, a contravention of s 912A(1)(c).

Section 912A(1)(ca)

74 Proceeding NSD1241 of 2021 (general insurance) includes admitted contraventions of s 912(1)(ca).

75 At all material times s 912A(1)(ca) imposed an obligation on a financial services licensee to "take reasonable steps to ensure that its representatives comply with the financial services laws". What steps are reasonable will depend on the nature of the obligation to be complied

with and the circumstances of the licensee. The obligation on a financial services licensee to "take reasonable steps to ensure" compliance mirrors the obligation on a licensee imposed by s 961L; see also s 963F.

76 Whilst the precise content of the obligation has not received detailed consideration, it may be taken to impose an obligation to establish an adequate system for the supervision of representatives, as well as policies and procedures that are designed to address identified or reasonably identifiable risks of non-compliant conduct by representatives.

77 As with s 912A(1)(a), s 912A(1)(ca) was made a civil penalty provision in March 2019.

Section 962P of the Corporations Act

78 Proceeding VID707 of 2021 (fees for deceased customers) includes admitted contraventions of s 962P of the Corporations Act on each of the occasions that a fee was charged in the circumstances the subject of the provision.

79 At all material times, s 962P was in the following terms:

> If an ongoing fee arrangement terminates for any reason, the current fee recipient in relation to the arrangement must not continue to charge an ongoing fee.

80 In order to make out a contravention of s 962P as against the holder of an AFSL, it is necessary to prove the following.

81 First, it must be shown that the holder of the AFSL was in an "ongoing fee arrangement" with a client within the meaning given by s 962A(1). For there to be an ongoing fee arrangement, the holder of the AFSL must give personal advice to the person as a retail client, and the client must enter into an arrangement with the holder of the AFSL (or its representative) the terms of which include that a fee is to be paid during a period of more than 12 months (the "ongoing fee"); s 962A(1) and (2) and s 962B. A fee that is payable under an ongoing fee arrangement is referred to in Division 3 as an "ongoing fee".

82 Second, the holder of the AFSL in the ongoing fee arrangement must also be the "fee recipient": s 962C(1). The AFSL in the ongoing fee arrangement is the "fee recipient" unless it has assigned its rights under the arrangement: s 962C(1)(b). In proceeding VID707 of 2021 (fees for deceased customers), Westpac does not assert that it had assigned its rights under the arrangement.

83 Third, the client must be a post-FOFA (future of financial advice) customer, meaning relevantly that the client had:

(a) not been provided with personal advice as a retail client by the holder of the AFSL (or a representative of the AFSL) before 1 July 2013; see the then s 962D(1)(a)(i) and (2)(b); and

(b) not entered into the ongoing fee arrangement on or before 1 July 2013; see the then s 962D(1)(b) and (2)(b).

84 Fourth, the ongoing fee arrangement had terminated "for any reason".

85 Fifth, after termination of the ongoing fee arrangement, the fee recipient continued to charge an ongoing fee.

Section 963K of the Corporations Act

86 The proceeding VID705 of 2021 (insurance in superannuation) includes admitted contraventions of s 963K of the Corporations Act.

87 Division 4 of Pt 7.7A of the Corporations Act and Division 4 of Part 7.7A of the Corporations Regulations bans the giving and acceptance of conflicted remuneration in certain circumstances.

88 At all material times s 963K provided as follows:

> An issuer or seller of a financial product must not give a financial services licensee, or a representative of a financial services licensee, conflicted remuneration.

89 At all material times s 963A of the Corporations Act defined "conflicted remuneration", for the purpose of s 963K, as follows:

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

90 The note at the end of s 963A was inserted with effect from 19 March 2016 by the *Corporations Amendment (Financial Advice Measures) Act 2016* (Cth). With effect from 1 January 2018, the *Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017* (Cth) (LIRA Act) inserted s 963AA of the Corporations Act which provided that the regulations may prescribe circumstances in addition to those set out in s 963A in which a benefit given to a financial services licensee or representative in relation to a life risk insurance product is "conflicted remuneration".

91 The definition of "conflicted remuneration" has not yet been authoritatively considered. The statutory language of s 963A(b) suggests that it is directed to the capacity of a benefit to influence the content of financial product advice, and not whether the benefit will influence a decision to give, or not to give, financial product advice.

92 At all material times, ss 963B and 963C provided for a range of circumstances in which a monetary or non-monetary benefit given to a financial services licensee, or its representative, is not conflicted remuneration. Section 963B from 1 November 2015 to 13 December 2017, set out the circumstances in which monetary benefits given to a financial services licensee or its representatives were not "conflicted remuneration". The LIRA Act, with effect from 1 January 2018, repealed the blanket exception for life risk insurance products (other than a group life policy for members of a superannuation entity or a life policy for a members of a default superannuation fun) and replaced it with a more limited exception.

93 At all material times s 963L provided that certain benefits were presumed to be conflicted remuneration unless the contrary was proved, that is, unless it was proved that the benefit could not reasonably be expected to influence the choice of financial product recommended or the financial product advice given to retail clients by the licensee or representative. The benefits subject to the presumption in s 963L were, broadly, benefits where access to the benefit, or the value of the benefit, was wholly or partly dependent on the total value or number of financial products of a particular class or classes recommended by the licensee or representative or acquired by retail clients or a class of retail clients. The heading to s 963L describes these as "volume-based benefits".

94 Broadly speaking, the elements of a contravention of s 963K are, first, an issuer or seller of a financial product gives a "benefit" to a financial services licensee or a representative of a financial services licensee, second, the financial services licensee, or representative, provides financial product advice to persons as retail clients and, third, because of the nature of the

benefit or the circumstances in which it was given, the benefit could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients or to influence the financial product advice given to retail clients by the licensee or representative.

95 At all material times, s 1528 provided a grandfathering exception to the giving of a benefit for the purpose of s 963K as follows:

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

96 In the period following 1 July 2013, Division 4 of Pt 7.7A (including the definition of "conflicted remuneration" set out in s 963A) did not extend to benefits in the circumstances prescribed under the then Corporations Regulations.

97 The grandfathering exception in s 1528 and the exceptions in the Corporations Regulations applied only to any benefits given under an arrangement (as defined in s 761A) entered into before 1 July 2013. Section 761A defined "arrangement" to mean a contract, agreement, understanding, scheme or other arrangement (as existing from time to time), whether formal or informal, or partly formal and partly informal, and whether written or oral, or partly written and partly oral, and whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights. These exceptions did not apply to benefits given after such an arrangement was terminated.

98 Let me now turn to the relevant principles concerning penalties and the other relief sought.

Legal principles relevant to relief

99 Let me briefly set out the applicable legal principles relevant when making orders by agreement, including declaratory relief, and the relevant considerations when determining the appropriate penalty.

Joint position of the parties

100 As to the proper approach to civil penalty orders which are sought on an agreed basis, there is an "important public policy involved in promoting predictability of outcome in civil penalty proceedings" which "assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention" (*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [40]). As a result, there is "very considerable scope" for the parties to civil proceedings to agree upon the appropriate remedy and for the court to be persuaded that it is an appropriate remedy (at [57]). Their Honours went on to state (at [58]):

> Subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is an appropriate remedy in the circumstances thus revealed, it is consistent with principle and … highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty. (original emphasis)

101 A further reason for courts acting upon such submissions is that they are advanced by a specialist regulator able to offer "informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance" (at [60] and [61]), albeit that such submissions will be considered on the merits in the ordinary way.

102 These principles are not confined to agreed submissions on pecuniary penalties but apply equally to agreement on other forms of relief.

Declarations

103 The Court has had a wide discretionary power to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth).

104 Further, s 1317E of the Corporations Act provides that the Court must make a declaration of contravention if it is satisfied that a person has contravened one of its civil penalty provisions. Further, for conduct from 13 March 2019, s 12GBA of the ASIC Act has similarly provided that the Court must make a declaration of contravention if it is satisfied that a person has contravened one of its civil penalty provisions (see also ss 322 and 327).

105 Further, the Court also has power under s 1101B(1) of the Corporations Act to make ancillary orders, which includes declarations on the application of ASIC if a person has contravened a law relating to dealing in financial products or providing financial services or a provision in Chapter 7, provided that the proposed orders do not unfairly prejudice any person.

106 Before making declarations, three requirements should usually be satisfied being, first, there must be a real controversy, as opposed to a hypothetical or theoretical question, second, the applicant must have a real interest in raising the question and, third, there must be a proper contradictor.

107 Clearly these conditions are satisfied in all six cases before me. Further, there is a utility in declarations which set out the particular liability found and the basis for penalties ordered. Declarations are appropriate to record the Court's disapproval of the conduct and satisfy in part the objective of general deterrence.

Pecuniary penalties

108 At all relevant times, ss 12CB, 12DB(1), 12DI(3) and 12DM(1) of the ASIC Act and ss 962P and 963K of the Corporations Act were civil penalty provisions; see s 12GBA of the ASIC Act, and s 1317E of the Corporations Act.

109 Sections 912A(1)(b) and (c) of the Corporations Act and s 12DA of the ASIC Act are not civil penalty provisions and were not civil penalty provisions at the relevant times.

110 But the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (the Amending Act), schedule 1, s 76, inserted a new s 912A(5A) of the Corporations Act which effectively converted ss 912A(1)(a) and 912A(1)(ca) into civil penalty provisions. Section 912A(5A) provides:

> A person contravenes this subsection if the person contravenes paragraph (1)(a), (aa), (ca), (cc), (d), (e), (f), (g), (h) or (j).

111 Further, by s 3 and schedule 1, item 146 of the Amending Act, s 1657 was added to Chapter 10 of the Corporations Act (Transitional provisions), which provides:

> Subject to this Part, the amendments made by Schedule 1 to the [A]mending Act apply in relation to the contravention of a civil penalty provision if the conduct constituting the contravention of the provision occurs wholly on or after the commencement day.

112 The commencement day of the Amending Act was 13 March 2019.

113 The following provisions provide the power to the Court to impose pecuniary penalties:

(a) for a contravention of a civil penalty provision of the Corporations Act – s 1317G of the Corporations Act;

(b) for a contravention of a provision of Subdivision C, D or GC (other than s 12DA) of the ASIC Act:

(i) arising from conduct that was not wholly on or after 13 March 2019 (see s 322) – ss 12GBA(1) of the ASIC Act (as it stood immediately prior to 13 March 2019); and

(ii) arising from conduct wholly on or after 13 March 2019 – s 12GBB of the ASIC Act (as in force on and from 13 March 2019).

114 Let me at this point say something about the maximum penalties.

115 For contraventions arising from conduct which was not wholly on or after 13 March 2019 the maximum penalties for a corporation:

(a) for a contravention of ss 12CB, 12DB(1), 12DI(3) and 12DM(1) of the ASIC Act was 10,000 penalty units (see s 12GBA(3) as it stood prior to 13 March 2019);

(b) for a contravention of s 963K of the Corporations Act was $1 million (see s 1317G(1B) as it stood prior to 13 March 2019); and

(c) for a contravention of s 962P of the Corporations Act was $250,000 (see s 1317G(1G) as it stood prior to 13 March 2019).

116 The Amending Act introduced substantially increased penalties for breaches of civil penalty provisions in the Corporations Act and ASIC Act. For contraventions arising from conduct which was wholly on or after 13 March 2019 (including contraventions of ss 912A(1)(a) and 912A(1)(ca)) the maximum penalty for such a contravention by a body corporate is the greatest of:

(a) 50,000 penalty units;

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention – that amount multiplied by 3; and

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) If the amount worked out under subparagraph (i) above is greater than the amount equal to 2.5 million penalty units – 2.5 million penalty units (see section 1317G(4) of the Corporations Act and s 12BCA(2) of the ASIC Act as in force from 13 March 2019).

117 The value of a penalty unit is fixed by s 4AA of the *Crimes Act 1914* (Cth) and was:

(a) $180 between 25 September 2015 and 30 June 2017;

(b) $210 between 1 July 2017 and 30 June 2020; and

(c) $222 with effect from 1 July 2020.

118 At this point it is convenient to note for completeness that the language of the penalty provisions does not allow for the imposition of a single joint and several penalty against multiple respondents (*Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312; [2017] FCAFC 159 at [376] to [392] per Middleton, Beach and Moshinsky JJ).

119 Let me at this point say something about the relevant factors going to penalty.

120 Each of the provisions conferring power to impose civil penalties outlined above gives the Court a discretion to order the contravening person to pay the Commonwealth a pecuniary penalty and requires the Court to take into account all relevant matters when determining the amount of the pecuniary penalty.

121 Further, each section sets out certain non-exhaustive considerations that the Court must have regard to in determining the appropriate pecuniary penalty. Whilst differently worded they are in essence the same, being:

(a) the nature and extent of the contravention;

(b) the nature and extent of any loss or damage suffered because of the contravention;

(c) the circumstances in which the contravention took place;

(d) whether the person has previously been found by a court to have engaged in any similar conduct; and

(e) from 13 March 2019 under s 1317G of the Corporations Act and s 12GBB of the ASIC Act, in the case of a contravention by the trustee of a registrable superannuation entity, the impact that the penalty under consideration would have on the beneficiaries of the entity.

122 Further to these mandated factors associated with contraventions of particular provisions, other augmented *French* factors, in some respects overlapping with the express matters, that have been identified as being potentially relevant in setting a pecuniary penalty in relation to a body

corporate and listed by me (see *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585; [2018] FCA 1701 at [49]) include:

(a) the extent to which the contravention was the result of deliberate or reckless conduct by the corporation, as opposed to negligence or carelessness;

(b) the number of contraventions, the length of the period over which the contraventions occurred, and whether the contraventions comprised isolated conduct or were systematic;

(c) the seniority of officers responsible for the contravention;

(d) the size and financial position of the contravening group of which the corporation forms part (taking into account capacity to pay) and the degree of power it has, as evidenced by its market share;

(e) the existence within the corporation at the time of the contravention or contraventions of compliance systems, including provisions for and evidence of education and internal enforcement of such systems; the notion of an existing culture of compliance is an amorphous concept which transcends simply putting in place expensive systems, or having persons whose titles include terms such as governance and compliance;

(f) remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention; where a compliance program seeks to ensure an understanding by executives of the requirements of the Act and of their obligations under it, and where a corporation has committed itself to future expenditure upon such a program, that may provide reason to reduce the penalty;

(g) whether the directors of the corporation were aware of the relevant facts and, if not, what processes were in place at the time or put in place after the contravention to ensure their awareness of such facts in the future;

(h) any change in the composition of the board or senior managers since the contravention;

(i) the degree of the corporation's cooperation with the regulator, including any admission of an actual or attempted contravention;

(j) the impact or consequences of the contravention on the market or innocent third parties;

(k) the extent of any profit or benefit derived as a result of the contravention;

(l) whether the company has disgorged any profit or benefit received as a result of the contravention, or made reparation; and

(m) whether the corporation has been found to have engaged in similar conduct in the past.

123 Further to factor (l) above, a voluntary remediation program that is effective and provides adequate financial compensation to persons affected by the contravention and ameliorates loss or damage otherwise suffered by consumers is a mitigating circumstance in relation to the assessment of penalty. Further, coupled with other factors, a voluntary remediation program can be one aspect of evidence of a corporate culture that is likely to be conducive to compliance and demonstrative of contrition, and so may warrant a reduction in penalty. But although an effective remediation program may be a mitigating factor on penalty, a willingness to remediate by a financial service licensee who provides financial services to retail clients (and any assessment as to whether that willingness reflects a culture conducive to compliance or contrition) must be considered in the context where that licensee is required by s 912B of the Corporations Act to have arrangements for compensating clients for loss or damage suffered because of breaches of the relevant obligations by the licensee or its representatives.

124 The appropriateness of the amount of a penalty must be assessed by reference to the specific civil penalty provision which has been contravened in light of its context and purpose, and the objects of the relevant statute as a whole (see s 1 of the ASIC Act and s 760A of the Corporations Act concerning Chapter 7).

125 Let me say something at this point on deterrence.

126 The primary purpose for the imposition of a pecuniary penalty under civil penalty regimes is deterrence, both specific and general. The pecuniary penalty imposed must operate to deter the particular contravener who is before the Court from taking future action of a similar kind and also to deter others from doing the same.

127 The penalty "must be at a level that a potentially-offending corporation will see as eliminating any prospect of gain. … It is in this way that the statutory object of ensuring the contravention is not regarded as a mere cost of doing business is achieved" (*ASIC v Westpac (No 3)* at [98]).

128 In considering the extent to which the penalty achieves deterrence, it is relevant to have regard to a contravener's size and financial position. In this respect, where the contravener is a distinct legal entity within a broader corporate structure, it is appropriate to take into account that broader structure in assessing deterrence, including where the contravener is part of a much larger, internally coordinated and wealthy corporate group. In that regard, the particular

importance of the size and resources of the Westpac corporate group in setting penalties for entities within it is self-evident.

129 The process of fixing a pecuniary penalty under civil penalty regimes proceeds by way of intuitive synthesis. This calls for a discretionary value judgment based on all relevant factors. The court undertakes a balancing exercise of all the relevant factors, including aggravating and mitigating factors, to ascertain the most appropriate penalty in the case before it. A court should also have regard to prescribed maximum penalties.

130 For completeness, I should note that I have also had regard in relation to 5 of the 6 matters heard by me after 13 April 2022 to *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 and the plurality's discussion concerning their rejection of the Full Federal Court's "notion of proportionality" (as the plurality described it) in the decision under appeal and the Full Federal Court's approach to the statutory maximum and their focus on the circumstances of the contravention(s) at the expense of the circumstances of the contravener. As the plurality said (at [57]):

> …both the circumstances of the contravener and the circumstances of the contravention may be relevant to the assessment of whether the maximum level of deterrence [scil maximum penalty] is called for.

131 So, "the maximum penalty is intended by the Act to be imposed in respect of a contravention warranting the strongest deterrence within the prescribed cap" (at [58]). And in that regard, one does not "ascertain the extent of the necessity for deterrence by reference exclusively to the circumstances of the contravention" (at [58]).

132 I applied these statements to the 5 matters that I heard after 13 April 2022. As to the matter heard before 13 April 2022 and somewhat in anticipation, I did not expressly apply any proportionality analysis.

133 Let me turn to matters of aggregation.

134 Where there are multiple contraventions, with multiple acts and omissions, occurring over a particular period, the Court may group the contraventions together as a single course or courses of conduct. As I said in *ASIC v Westpac (No 3)* at [131] to [134]:

> Now the ASIC Act does not contain any express limitation requiring a course of conduct involving multiple acts or omissions to be treated as a single contravention or to otherwise limit the penalty payable in relation to the contraventions. But rather than imposing separate penalties for each relevant act or omission I may, in an appropriate case, apply the "course of conduct" principle where there is a sufficient

interrelationship between the legal and factual elements of the acts or omissions constituting the contraventions. This principle was explained in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; [2010] FCAFC 39 at [39], [41]–[42].

The principle can apply when imposing penalties for multiple contraventions of the ASIC Act. But using this tool of analysis to group contraventions does not make the maximum penalty for one contravention the maximum penalty for a course of conduct as a whole where that course of conduct comprises many separate contravening acts. Further, the principle does not restrict the Court's discretion as to the amount of penalty to be imposed for the course of conduct. Further, the Court is not obliged to apply the principle if the resulting penalty fails to reflect the seriousness of the contravention.

Generally, the principle does not have paramountcy in the process of assessing an appropriate penalty. It cannot operate as a de facto limit on the penalty to be imposed and it cannot unduly fetter the proper application of s 12GBA of the ASIC Act.

In this regard, I repeat what I said in *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (t/as Bet365) (No 2)* [2016] FCA 698 at [21]–[25] to the following effect:

> In determining the appropriate penalty for multiple contraventions, there are two related principles to consider: the "totality" principle and the "course of conduct" principle.
>
> As I have explained, the totality principle requires that the total penalty for related offences not exceed what is proper for the entire contravening conduct involved taking into account *all* factors. The principle operates to ensure that the penalties to be imposed, considered as a whole, are just and appropriate.
>
> Contrastingly, the "course of conduct" principle gives consideration to whether the contraventions arise out of the same course of conduct to determine whether it is appropriate that a single overall penalty should be imposed that is appropriate for the course of conduct. It has a narrower focus. The principle was explained in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; 194 IR 461; [2010] FCAFC 39 at [39] per Middleton and Gordon JJ:
>
> > It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality" and that is necessarily a factually specific inquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions. (emphasis in original)
>
> But even if the contraventions are properly characterised as arising from a single course of conduct, I am not obliged to apply the principle if the resulting penalty fails to reflect the seriousness of the contraventions. The principle does not restrict my discretion as to the amount of penalty to be imposed for the course of conduct. Further, the maximum penalty for the course of conduct is not restricted to the prescribed statutory maximum penalty for any *single*

> contravening act or omission (ie $1.1 million); the respondents' submission to the contrary is rejected.
>
> Further, the "course of conduct" principle does not have paramountcy in the process of assessing an appropriate penalty. It cannot of itself operate as a *de facto* limit on the penalty to be imposed for contraventions of the ACL. Further, its application and utility must be tailored to the circumstances. In some cases, the contravening conduct may involve many acts of contravention that affect a very large number of consumers and a large monetary value of commerce, but the conduct might be characterised as involving a single course of conduct. Contrastingly, in other cases, there may be a small number of contraventions, affecting few consumers and having small commercial significance, but the conduct might be characterised as involving several separate courses of conduct. It might be anomalous to apply the concept to the former scenario, yet be precluded from applying it to the latter scenario. The "course of conduct" principle cannot unduly fetter the proper application of s 224.

135 There are several matters to note.

136 First, whilst contraventions arising from separate acts ordinarily attract separate penalties, where there is an inter-relationship between the factual and legal matters of two or more contraventions it may be appropriate to group them as a single course of conduct, so as to avoid double punishment in respect of the relevant acts or omissions that comprise the multiple contraventions. But the course of conduct principle is no more than a tool of analysis and does not restrict the Court's discretion as to the amount of the penalty to be imposed. As I said in *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (t/as Bet365 (No 2)* [2016] FCA 698 at [24] and [25], the course of conduct principle does not have paramountcy in the process of assessing an appropriate penalty. It cannot in itself operate as a de facto limit on the penalty to be imposed for contraventions. Further, its application and utility must be tailored to the circumstances.

137 Second, where there have been discrete episodes, each involving deliberation, then such a grouping may be inapposite, even if they reflect a common theme, strategy or model.

138 Third, even a single strategy involving a single or substantially consistent form of conduct might deny such a grouping where the conduct is directed towards numerous recipients. Further, it is not necessarily the case that a "failure of process" which has an impact at different times, upon different people, at different locations or involving different staff of a defendant must be treated in a global way, though the totality principle may still apply.

139 Let me say something about the totality principle. In *ASIC v Westpac (No 3)*, I said (at [162]):

> Where multiple penalties are to be imposed upon a particular wrongdoer, the totality

> principle must be considered. The totality principle means that the total penalty for related offences ought not to exceed what is proper for the entire contravening conduct involved. The totality principle operates as a final check to ensure that the penalties to be imposed on a wrongdoer, considered as a whole, are just and appropriate. In determining whether the final penalties are just and appropriate, the correct approach is to start by ascertaining the penalty that would be appropriate for each individual contravention and then to adjust those amounts for reasons of totality. The question of totality is not of significance in the present context.

140 Let me also say something about parity. Now differences in the facts and circumstances which underlie different cases mean that there is usually little to be gained by comparing the penalties imposed in other litigation. The parity principle is a doctrine developed in criminal law, the purpose of which is to ensure that like offenders are treated in a like manner. Otherwise, the consistency that is sought is consistency in the application of principle. So, whilst consideration of analogous cases may provide guidance, in all but the co-offender scenario or analogues thereof it is conceptually problematic to look at penalties in other cases to calibrate a figure in the present case when all that one has from the other cases are single point determinations produced by opaque intuitive synthesis. Deconvolution analysis of the single point determinations in order to work out the causative contribution of any particular factor is unrealistic.

Compliance Orders

141 Section 1101B(1) of the Corporations Act provides:

> (1) The Court may make such order, or orders, as it thinks fit if:
>
> (a) on the application of ASIC, it appears to the Court that a person:
>
> (i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services …

142 Further, s 12GLA(1) of the ASIC Act provides:

> (1) The Court may, on application by ASIC, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.
>
> (2) The orders that the Court may make in relation to the person are:
>
> ….
>
> (b) a probation order for a period of no longer than 3 years;
>
> …
>
> (4) In this section:
>
> …

> "probation order", in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order, and includes:
>
> (a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
>
> (b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
>
> (c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.

143 Section 1101B empowers the Court to make an order requiring a contravener to establish a compliance program tailored to remedying the contraventions established. The power to make an order under s 1101B as the Court "thinks fit" is broad, but not at large. It must be exercised judicially having regard to the text, context and purpose of the Corporations Act. In *ASIC v Westpac (No 3)* I said that in relation to a contravention, a compliance program can be "readily accommodated within [the scope of s 1101B] as an order designed to ensure that a contravention of a similar kind does not occur again." (at [183]). Orders under s 1101B may be both backward and forward looking, the forward looking orders being aimed at "supplementing the penalties and ensuring specific deterrence in guarding against the possibility of the contravening conduct happening again". A compliance program, focused on specific deterrence, is consistent with the purposes of the civil penalty regime.

144 Section 12GLA(2)(b), read together with the definition of "probation order" in s 12GLA(4), empowers the Court to make an order for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order. Typically, such orders include compliance orders, which may include an order directing the defendant to establish a compliance program for its employees designed to ensure their awareness of the responsibilities and obligations in relation to the contravening (or related) conduct. The fundamental purpose of a compliance program is to assist in ensuring the risk of further contraventions is removed or significantly reduced.

145 In *ASIC v Westpac (No 3)* I outlined the effect of s 1101B and s 12GLA and the matters to be taken into account when deciding whether to exercise power conferred by those provisions in the following terms (at [185] to [187]):

> First, both s 1101B of the Corporations Act and s 12GLA of the ASIC Act confer a broad discretionary power. So much is evident from the text of s 1101B(1), which provides that the Court "may make such order, or orders, as it thinks fit". And whilst s 12GLA is drafted differently, the same point can be made. Moreover, I must consider 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 program and steps taken since the contravention occurred".
>
> Second, the compliance program must have a connection with the contravening conduct that has been found.
>
> Third, I must strike the appropriate balance between prescription, so as to avoid uncertainty, and over particularity, so as to avoid unworkability.
>
> (citations omitted)

146 In *ASIC v Westpac (No 3)* I made orders that required Westpac to ensure that appropriate systems, policies and procedures were in place and for the adequacy of those systems to be assessed by an independent expert. I ordered that the expert review was to be at Westpac's expense and that ASIC was to be given the opportunity to have input on the selection of the expert and the terms of the retainer.

VID 704 of 2021 (deregistered company accounts)

147 The present matter concerns setting a pecuniary penalty for contraventions of s 912A of the Corporations Act by Westpac.

148 The parties have provided to me a joint submission on penalty, and the factual foundation that they have asked me to proceed on is set out in an amended statement of agreed facts tendered for the purposes of s 191 of the Evidence Act.

149 The legal principles for the setting of a penalty are not in dispute. And for the purpose of this proceeding and 5 other related proceedings I have been provided with a joint outline on the legal principles, the content of which I adopt for present purposes.

150 At base, the contraventions of Westpac, which have been admitted concern its failures dealing with deregistered companies.

151 Chapter 5A of the Corporations Act deals with the deregistration of companies. A company may be deregistered voluntarily, on ASIC's initiative or following amalgamation or winding up.

152 Section 601AD provides for the effect of deregistration. A company ceases to exist on deregistration. On deregistration, a company's property, other than trust property, vests in ASIC, and all property that the company held on trust immediately before deregistration vests in the Commonwealth. If property vests in ASIC under s 601AD(2), ASIC may dispose of or deal with the property as it seems fit, apply any money it receives to defray certain expenses and otherwise deal with the property in accordance with Part 9.7 of the Corporations Act, which concern unclaimed moneys.

153 Further, ASIC may reinstate a company if it is satisfied that the company should not have been deregistered. The Court may also make an order that ASIC reinstate the registration of a company in certain circumstances, including on the application of a person aggrieved by the deregistration, such as a former director of the company. The effect of reinstatement is that they company is taken to have continued in existence as if it had not been deregistered, and "any property of the company that is still vested in the Commonwealth or ASIC revests in the company".

154 ASIC has brought this proceeding drawing to the Court's attention the fact that Westpac did not have a process to identify when a company holding a bank account with it had been deregistered. Westpac also did not have a process to manage on an ongoing basis accounts held with Westpac in the name of deregistered companies consistently with the Corporations Act and ASIC guidance.

155 Further, despite Westpac telling ASIC on several occasions in 2018 that it was in the process of designing and implementing a control which would enable Westpac to identify deregistered company accounts as they arose, Westpac did not approve or provide adequate funding or resources to implement ongoing processes or controls to manage deregistered company accounts across all of its divisions until October 2020. For the most part, Westpac only commenced implementation of manual processes to identify and manage deregistered company accounts in October 2020, and it only commenced implementing ongoing processes and controls to identify and manage deregistered company accounts, at the earliest, on 25 March 2021.

156 As a result of Westpac's conduct between 13 March 2019 and 27 October 2020, over 21,000 deregistered company accounts held with Westpac remained open, transactions could continue on those accounts, and Westpac did not remit to ASIC the funds from those accounts which had vested in ASIC or the Commonwealth upon the companies' deregistration. The total funds

from those accounts which could be withdrawn from those accounts and/or paid to third parties on the instructions of persons who had previously been authorised to operate the accounts, rather than remitted to ASIC or the Commonwealth, is estimated to be in the order of $120 million.

157 Let me elaborate on that estimate of $120 million. In this regard the following may be noted:

(a) The total funds breakdown is estimated at:

(i) approximately $35.5 million in vested funds from accounts held in the name of deregistered companies, representing approximately 70% of total accounts (calculated at the date that the company was deregistered); and

(ii) approximately $44.2 million in vested funds from accounts held in the name of deregistered companies, representing approximately 28% of total accounts (calculated at the date that the deregistered company account was identified by Westpac as deregistered).

(b) In addition, Westpac did not remit approximately $41 million in funds (calculated at the date that the deregistered company account was identified by Westpac as deregistered) from accounts held in the name of deregistered companies which Westpac has described as belonging to companies which were either reinstated or in the process of reinstatement, and which ASIC asserts vested in ASIC or the Commonwealth upon deregistration, representing approximately 2% of the total accounts.

(c) Adding the $35.5 million, the $44.2 million and the $41 million gives you approximately $120.7 million.

158 Now Westpac knew that its systems and processes were inconsistent with the provisions of the Corporations Act concerning deregistered companies and yet, disappointingly, it did not fix these systems, at least in a timely fashion.

159 Further, in failing to fix its systems, Westpac allowed its systems and services to be used in a manner inconsistent with Chapter 5A of the Corporations Act. It would seem that Westpac benefited from its own conduct by allowing accounts to remain open and operational. It also seems to have prioritised the interests of former directors and officers of its now deregistered customers over its legal obligations. And it allowed the funds which vested in ASIC and the Commonwealth to be paid out of deregistered company accounts.

160 Now Westpac has admitted that between 13 March 2019 and 27 October 2020 it contravened ss 912A(1)(a) and (5A) of the Corporations Act in relation to this conduct.

161 And I am satisfied that Westpac did breach its obligation to do all things necessary to ensure that the financial services covered by its financial services license were provided efficiently, honestly and fairly, and thereby contravened ss 912A(1)(a) and (5A) of that Act.

162 The parties have jointly submitted that a pecuniary penalty of $20 million is appropriate.

163 Not without some hesitation I am prepared to accept that $20 million is within the reasonable range. Further, I accept, as Mr Philip Solomon QC, counsel for ASIC, has submitted, that this $20 million penalty has been properly calibrated against:

(a) the other 5 cases before me, and

(b) other penalty cases for contraventions, including cases involving Westpac and its subsidiaries, some cases of which I have some passing familiarity at least.

164 The parties before me have emphasised various factors in support of the appropriateness of the penalty proposed. I would emphasise the following factors, although I have taken into account all relevant matters identified.

165 First, Westpac's senior management did not provide sufficient funding or resources to implement a satisfactory system or process or to address remediation of the balances of the deregistered company accounts.

166 Moreover, in the period December 2019 to October 2020, the Business Bank Chief Executive was told, both directly and via his membership of various committees about:

(a) the deregistered company accounts issue and the fact that it had not been addressed or remediated;

(b) the consequences of and the high risks associated with Westpac's failure to deal with this issue; and

(c) from at least June 2020, the commitments Westpac made to ASIC in 2018 and that these commitments had not been met.

167 Yet despite this knowledge, and unacceptably, Westpac failed to approve sufficient funding or resources to address the issue until October 2020.

168 Second, the contravening conduct occurred over a not insubstantial period of time, being March 2019 to 27 October 2020. And even after that period, Westpac did not implement an ongoing process to identify and manage deregistered company accounts until, at least, 25 March 2021.

169 Third, by deregistered company accounts remaining open, Westpac continued to charge fees to those accounts and to have the funds held in those accounts available for its use. The quantum of that benefit has not been calculated, but given the conduct related to some tens of thousands of accounts, and occurred over more than 18 months, I am prepared to find that Westpac received a not insubstantial benefit.

170 Fourth, as I have said, the total funds from affected deregistered company accounts which vested in ASIC or the Commonwealth and which could have been paid out of the accounts, and in some cases were paid out, was approximately $120 million.

171 Fifth, the effect of Westpac's conduct was to prefer the interests of the former directors and officers of its now deregistered customers over the interests of ASIC and the Commonwealth and its regulatory obligations.

172 But on the other side of the ledger in terms of mitigating factors, Westpac has cooperated with ASIC after November 2020, and has cooperated with ASIC in the conduct of the present proceeding. Further, since November 2020, Westpac has taken a number of steps to resolve this issue, although I note that that work is ongoing. Further, Ms Kate Morgan, senior counsel for Westpac has expressed sincere and sufficient remorse for her client's offending.

173 Balancing all of these considerations and giving deterrence paramountcy in its 2 dimensions of specific deterrence and general deterrence, I will fix a penalty of $20 million and make the other orders and declarations sought.

VID 705 of 2021 (insurance in superannuation)

174 The present case involves the setting of a pecuniary penalty for multiple contraventions of the corporations legislation brought about by deficiencies in various systems and processes. The proceeding has been brought by ASIC against a wholly owned subsidiary of Westpac, namely, BT Funds Management Limited. BT Funds Management has admitted contraventions of ss 12DA and 12DB of the ASIC Act, and ss 912A, 963K and 1041H of the Corporations Act, in connection with insurance offered to members of the Asgard Independence Plan Division Two, a superannuation fund of which BT Funds Management is the trustee.

175 The parties have put a joint submission on the pecuniary penalties that they suggest ought to be payable by BT Funds Management for its contraventions of s 12DB of the ASIC Act and s 963K of the Corporations Act. They submit, jointly, that BT Funds Management should pay a pecuniary penalty of $20 million for the admitted contraventions. The parties have placed before me a statement of agreed facts and admissions, which sets out the facts agreed between the parties and also admissions made by BT Funds Management. They have also provided a supplementary statement of agreed facts and admissions, setting out further matters agreed between the parties and further admissions made by BT Funds Management. Such material provides me with a sufficient foundation on which to proceed, as is, of course, contemplated by s 191 of the Evidence Act.

176 Now the principles relevant to the determination of a pecuniary penalty are not in doubt, and for the present matter I accept the statements of principle set out in the joint outline of submissions on legal principles that has been filed by the parties, not only in this matter but in other related matters. I should say, though, that this is not an occasion to delve into the detail of the law concerning s 963K of the Corporations Act, and I will resist that temptation for the purposes of the present matter. I should say at the outset that, in my view, in respect of the admitted contraventions of s 12DB of the ASIC Act and s 963K of the Corporations Act, the proposed penalty of $20 million is within a reasonable range and is of a sufficient amount, such that it is appropriate for me to impose a penalty in that amount.

177 In summary, in my view, the material discloses that the contraventions of BT Funds Management were not deliberate, and importantly, they were not sanctioned by senior management within BT Funds Management. Further, once the relevant contravening conduct was identified by BT Funds Management, it was stopped and remediation action taken. Further, breach notifications were made to ASIC. Indeed, there has been a high degree of cooperation so far as I can tell by BT Funds Management with ASIC in relation to the matter, the investigation and, of course, culminating in these proceedings. And it hardly needs to be said that BT Funds Management has now ceased engaging in the infringing conduct. Nevertheless, BT Funds Management's contraventions were serious and effected numerous persons.

178 Let me elaborate. On the accepted factual foundation, BT Funds Management contravened ss 12DA(1) and 12DB(1) of the ASIC Act, and s 1041H of the Corporations Act, during the period 30 November 2015 to 21 September 2020 in relation to periodic statements provided to

members of the Asgard fund, who held insurance cover under the Asgard employer super account master policies, and during the period 30 November 2015 to 4 December 2020, in relation to periodic statements in respect of members of the Asgard fund who held insurance cover under the Asgard personal protection plan master policies, by representing that insurance fees had been properly deducted from the accounts of members who obtained insurance cover under the Asgard employer super account master policies on or after 22 October 2013, or who obtained insurance cover under the Asgard personal protection plan master policies on or after 1 July 2014, when in fact the insurance fees that were deducted included commissions that were not permitted to be deducted from the members' accounts.

179 BT Funds Management also contravened ss 12DA(1) and 12DB(1) of the ASIC Act and s 1041H of the Corporations Act during the period 30 November 2015 to 21 December 2020, for members who held insurance cover under the Asgard employer super account master policies, and during the period 30 November 2015 to 25 August 2021, for members who held insurance cover under the Asgard personal protection plan master policies, by representing that insurance fees had been deducted as permitted or required from the accounts of members who obtained insurance cover under either such master policies before 1 July 2013, and in respect of whom, after 1 July 2013, the arrangement pursuant to which insurance commissions were made to a financial advisor was terminated, when, following the termination of the arrangement, the insurance fees that were deducted included commissions that were not permitted or were not required to be deducted from the members' accounts.

180 BT Funds Management also contravened ss 12DA(1) and 12DB(1) of the ASIC Act and s 1041H of the Corporations Act during the period 30 November 2015 to 22 June 2020 in respect of persons who held insurance cover under the master policies, and returned a removal form to BT Funds Management, electing to remove a financial advisor from their account, on or after 30 November 2015, by representing that the insurance fees charged to those persons did not include any fee payable to the financial advisor whom the person sought to remove. But the systems and processes of BT Funds Management to process removal forms did not ensure that the fees charged to the account of a person who returned a removal form would be reduced by an amount equivalent to the commissions previously paid to the person's financial advisor in respect of the person's insurance cover.

181 BT Funds Management also contravened s 963K of the Corporations Act during the period 30 November 2015 to 25 August 2021 by giving conflicted remuneration to financial advisors or

their advice licensees in respect of insurance cover held by members of the Asgard fund, being the payment of commissions in respect of insurance cover obtained by members under the master policies.

182 BT Funds Management also contravened ss 912A(1)(b) and (c) of the Corporations Act, given the contraventions of ss 12DA and 12DB of the ASIC Act and ss 963K and 1041H of the Corporations Act.

183 Now BT Funds Management's conduct in contravention of s 12DB of the ASIC Act and s 963K of the Corporations Act is serious.

184 The s 12DB contravening conduct, namely, making false or misleading representations regarding the deduction of commissions from members' accounts is, self-evidently, of a serious nature. Indeed, such conduct extended over several years and arose through failures of BT Funds Management's processes and controls. The conduct involved BT Funds Management deducting amounts from members' accounts that it was not entitled to deduct, but nevertheless representing to members that it was entitled to do so. This inappropriate deduction of these amounts based on false and misleading conduct of course eroded the superannuation balances of affected members.

185 Further, the s 963K contravening conduct was also unacceptable. That conduct continued for many years, and involved, on each occasion, the payment of a commission which was deducted from the member's account. The amount of the conflicted remuneration paid to financial advisors and advise licensees represented, undoubtedly, a direct impact on each affected member. The acts and omissions giving rise to the contraventions involved, as I have indicated, a failure by BT Funds Management to introduce and maintain proper and sufficient systems and processes to prevent the charging of commissions to members' accounts.

186 Clearly, given that BT Funds Management's contraventions arose from such inadequacies in its systems and processes, such conduct is appropriately described as negligent. But I do accept that it did not involve any deliberate decision to mislead consumers. Rather, the conduct occurred as a result of system and processing errors and inadequacies, including an inadequate risk management framework. However, even though the deficiencies in conduct could be described as negligent, that should not understate the seriousness of these contraventions and their capacity to cause undetected loss over a significant period of time.

187 I have identified and characterised the contraventions. Let me at this point say something concerning the loss and damage suffered. Now there has been no direct quantification of this, but BT Funds Management's remediation of clients can be considered a reasonable proxy. So for the advisor commissions incident, BT Funds Management has or shortly will have paid around $9.8 million in remediation of over 9900 members, with, as Dr Ruth Higgins SC explained this morning, the balance to be completed shortly. Such payments, I should note, concern members affected on or after 30 November 2015. Lesser order of magnitude remediation payments have been made concerning the previously advised clients incident. It would seem that the penalty proposed is about twice the level of such payments.

188 Now as I have indicated, there are multiple contraventions, such that it is appropriate to apply the course of conduct principle as a tool of analysis. Now in respect of BT Funds Management's contraventions of s 12DB of the ASIC Act, the parties' preferred position was to suggest that they be looked at as three separate courses of conduct.

189 The first course of conduct is making false or misleading representations that insurance fees had properly been deducted from the accounts of members who obtained insurance cover after 22 October 2013 or 1 July 2014 as applicable, which accounted for a total of some $180,000 of improperly deducted commissions.

190 The second course of conduct is making false or misleading representations that insurance fees had been deducted as permitted or required from the accounts of members who obtained insurance cover before 22 October 2013 or 1 July 2014 as applicable, but in respect of whom the relevant fee arrangement was later terminated, which accounted for a total amount of more than $6 million of improperly deducted commissions.

191 And the third course of conduct suggested was the making of false or misleading representations arising from the "request to remove a financial advisor from an account" form, which accounted for a total amount which was a modest sum of improperly deducted commissions.

192 Now those are three separate courses of conduct suggested for the s 12DB contraventions. But I must say that I would prefer to view the first and second categories as one course of conduct so that, in essence, there are two courses of conduct and not three for this class of contraventions. As to the contraventions of s 963K of the Corporations Act, I will treat them as the parties suggested as the one course of conduct, whereby during the period from 30

November 2015 to 25 August 2021, the total amount of conflicted remuneration paid to financial advisors or advise licensees was more than $6 million.

193 Let me make two other points. First, there is little doubt as to the size and resources of BT Funds Management, particularly given that it is a subsidiary of Westpac, to pay a substantial penalty. Second, my attention has been drawn to past contravening conduct of BT Funds Management dealt with by the Court on prior occasions. I have taken such conduct and the treatment of such conduct by other judges into account.

194 In summary, I propose to fix a penalty of $20 million. Further, it is appropriate to fix a single penalty for all contraventions as the parties jointly submitted to me.

195 The penalty that I will impose reflects the seriousness of BT Funds Management's contravening conduct, including the number of members affected and the continuing nature of that conduct over an extended period. Further, in my view, a penalty of this order of magnitude should be sufficient to deter BT Funds Management and other participants in the market from engaging in similar conduct in the future. The penalty is adequate to address the dimensions of specific deterrence and general deterrence.

196 I should though note that the penalty would have been substantially higher, but for the fact that BT Funds Management, once it identified the improper deductions from members' accounts, took steps to stop engaging in the conduct, to identify affected members and then to remediate them. Further, BT Funds Management's level of cooperation with ASIC has been very substantial. So for those reasons, I will make orders and declarations to accord in summary with what I have just said.

VID 707 of 2021 (fees for deceased customers)

197 The present proceeding is one of 6 matters involving Westpac and other associated entities concerning breaches of the Corporations Act and the ASIC Act.

198 In the present proceeding I am asked to impose pecuniary penalties totalling $40 million against 7 of the 8 respondents.

199 The respondents have admitted contraventions of ss 12DI(3) and 12CB(1) of the ASIC Act and ss 962P and 912A(1) of the Corporations Act. The contraventions relate to the charging of fees for financial advice services to the accounts of thousands of deceased customers in

circumstances where the respondents have been notified of the customer's death and, due to their death, the financial advice services were not and could not be provided.

200 Westpac admits that it contravened ss 12DI(3) and 12CB(1), and ss 962P and 912A(1)(a) and (c). The parties contend that it is appropriate that Westpac pay a pecuniary penalty of $15.95 million.

201 The second respondent (Securitor) admits that it contravened ss 12DI(3) and 12CB(1), and ss 912A(1)(a) and (c). The parties contend that it is appropriate that it pay a pecuniary penalty of $7.6 million.

202 The third respondent (Magnitude) admits that it contravened ss 12DI(3) and 12CB(1), and ss 912A(1)(a) and (c). The parties contend that it is appropriate that it pay a pecuniary penalty of $4.45 million.

203 The fourth respondent (AAML) admits that it was knowingly involved in contraventions of s 12DI(3), and that it contravened ss 912A(1)(a) and (c). As to its knowing involvement in contraventions of s 12DI(3), the parties contend that it is appropriate that it pay a pecuniary penalty of $100,000.

204 The fifth respondent (ACML) admits that it was knowingly involved in contraventions of s 12DI(3), and that it contravened ss 912A(1)(a) and (c). As to its knowing involvement in contraventions of s 12DI(3), the parties contend that it is appropriate that it pay a pecuniary penalty of $1.8 million.

205 The sixth respondent (BTFM) admits that it was knowingly involved in contraventions of s 12DI(3), and that it contravened ss 912A(1)(a) and (c). As to its knowing involvement in contraventions of s 12DI(3), the parties have submitted to me that it is appropriate that it pay a pecuniary penalty of $7.2 million.

206 The seventh respondent (BTFM No. 2) admits that it contravened s 912A(1)(a). No pecuniary penalty is sought against that respondent.

207 The eighth respondent (BTPS) admits that it was knowingly involved in contraventions of s 12DI(3), and that it contravened ss 912A(1)(a) and (c). As to its knowing involvement in contraventions of s 12DI(3), the parties contend that it is appropriate that it pay a pecuniary penalty of $2.9 million.

208 Pursuant to s 191 of the Evidence Act, the parties have filed and rely upon an amended statement of agreed facts and admissions. Accordingly, I have a sufficient factual foundation to support the exercise of my power to impose the necessary penalties and to make the required declarations.

209 The parties have put before me a joint submission referable to this proceeding, and they have also put before me an outline as to the legal principles which has been used in all cases before me in the last week or so. I should say that the relevant legal principles are not contentious, and I do not propose to linger on them.

210 Now, I should also note, by way of a preliminary observation, that the conduct underlying the present contraventions that I am dealing with has been the subject of extensive public discussion elsewhere. But nevertheless, it is necessary for me to still say something briefly about the contravening conduct because, of course, what is put before me now in terms of the contravening conduct is a factual position which has been made with the agreement of the parties.

The conduct – an overview

211 In terms of the conduct, the proceeding concerns conduct of the respondents which has occurred within 2 overlapping periods where:

(a) the first period, which is the longer period, is from December 2008 to 9 October 2019 which the parties have referred to and I will call the relevant period; and

(b) the second period is shorter and is from 30 November 2015 to 9 October 2019 which the parties have referred to and I propose to call the penalty period.

212 Now all the respondents were at all relevant times part of the Westpac Group and at relevant times they all held Australian financial services licences.

213 During the relevant period, that is, the broader period, Westpac, Securitor and Magnitude, which for convenience the parties have referred to as the advice licensees and I will refer to in the same way, received and retained advice fees from deceased customers' accounts as held by the fourth to eighth respondents, which the parties have referred to as the SIPO entities. Further, not only were those fees from accounts as held by the fourth to eighth respondents, the SIPO entities, but they were also from accounts held by other entities outside of the Westpac group that issued and operated financial products; those other entities are non-group SIPOs.

This conduct also occurred within the penalty period which, as I say, is a subset of the broader relevant period.

214 Now in terms of the broader relevant period, the SIPO entities deducted advice fees from deceased customers' accounts and remitted the fees to the advice licensees, and to financial advice providers outside of the Westpac group (non-group advice licensees). For all of the SIPO entities, save for BTFM No. 2, this conduct also occurred within the penalty period.

215 Now the respondents engaged in such conduct after having been notified of the death of the customer. From at least April 2013 the respondents knew that advice fees ought to cease being charged upon receiving notification of a customer's death, and that fees charged after death ought to be refunded, and they gave consideration to steps to be taken to address the issue. Nevertheless and unfortunately, the impugned conduct continued through until 2019 and the fees were retained until the respondents implemented a remediation program. I might say that this remediation program commenced in November 2018 and is now largely complete. In terms of the principal cause of these contraventions and this conduct over the relevant period, clearly the principle cause essentially is not deliberate conduct, but deficiencies in the respondents' systems and procedures that I will come to later.

216 The relevant conduct is set out more fully in the statement of agreed facts, and I will incorporate its terms by reference into these reasons rather than referring to any further detail at the moment.

217 Let me turn then to the specific contraventions.

Contraventions of s 12DI(3) of the ASIC Act

218 Let me begin first with s 12DI(3). Westpac, Securitor, Magnitude, AAML, ACML, BTFM and BTPS admit that they contravened or at least were knowingly involved in contraventions of s 12DI(3).

219 Let me first focus on the advice licensees being Westpac, Securitor and Magnitude.

220 The advice licensees admit that they each accepted payments from affected members for the purposes of s 12DI(3)(a). These are customers who received financial advice services and whose accounts were charged advice fees even after notification of their death. The advice licensees further admit that the payments were for financial services, being financial product advice. Accordingly, s 12DI(3)(a) is satisfied for each contravention.

221 Each advice licensee admits that at the time of accepting a relevant payment there were reasonable grounds for believing that it would not be able to supply the financial services, being, of course, the financial product advice, to the affected member within a reasonable time or at all. At the time of acceptance of a payment, the advice licensee knew that the affected member was deceased. Upon the death of an affected member, the relevant advice licensee obviously could no longer provide the personal advice services to the affected member. The ongoing personal advice arrangement, predictably, terminated upon death.

222 In short, the advice licensees admit that they accepted the relevant payments, the payments were accepted in trade or commerce, the payments were for financial services and, at the time of accepting payments, there were reasonable grounds for believing that they would not be able to supply the financial services within the period specified or, if not specified, within a reasonable time.

223 Accordingly, by accepting an advice fee from the affected member's account (as deducted and remitted by either a SIPO entity or a non-group SIPO entity), the advice licensees contravened s 12DI(3).

224 In the penalty period, which is the shorter period, up to 1 July 2019, Westpac contravened s 12DI(3) on the 4,324 occasions that Westpac accepted payment of an advice fee after being notified of the customer's death. These fees amounted to $812,734.74, affecting the estates of 575 customers.

225 In the penalty period up to 1 March 2019, Securitor contravened s 12DI(3) on the 3,272 occasions that Securitor accepted payment of an advice fee after being notified of the customer's death. These fees amounted to $388,018.56, which affected the estates of 604 customers.

226 In the penalty period up to 9 October 2019, Magnitude contravened s 12DI(3) on the 1,214 occasions that Magnitude accepted payment of an advice fee after being notified of the customer's death. These fees amounted to $225,457.46, affecting the estates of some 237 customers.

227 Let me then turn to the SIPO entities.

228 Each of AAML, ACML, BTFM and BTPS admit that they were knowingly concerned in contraventions of s 12DI(3).

229 The SIPO entities, excluding BTFM No. 2, admit that up to and including 10 September 2018, they knew that the advice licensees accepted advice fees as payment for financial services after being notified of the customer's death.

230 The SIPO entities, excluding BTFM No. 2, further admit that up to and including 10 September 2018, they knew that after receiving notification of death, there were reasonable grounds for believing that the advice licensees would not be able to supply the financial services within a reasonable time or at all. In particular, when remitting the fees to the advice licensees, the SIPO entities knew that the fees were for the provision of ongoing financial advice services to the customer, but that the customer was deceased.

231 So, AAML, ACML, BTFM and BTPS admit that they knew that the principal contravener had accepted payments, they knew that the payments were for financial services and they knew, at the time of remitting the fees which the principal contravener accepted, that there were reasonable grounds for believing that the principal contravener would not be able to supply the financial services within the period specified or within a reasonable time if no period was specified.

232 Clearly, by reason of their knowledge and their remittance of the fees, they were, in my view, and as the parties quite properly put to me, intentional participants in the principal contravener's contravention and were therefore directly or indirectly knowingly concerned in the principal contravener's contravention.

233 The SIPO entities, excluding BTFM No. 2, accordingly admit that by remitting an advice fee to an advice licensee, they were, as to fees remitted during the penalty period, directly or indirectly knowingly concerned in the advice licensee's contraventions of s 12DI(3).

234 So, in the penalty period up to 10 September 2018, AAML was knowingly concerned in a contravention of s 12DI(3) on the 5 occasions that AAML remitted an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death. These fees amounted to $487.23, affecting the estates of 2 customers.

235 In the penalty period up to 10 September 2018, ACML was knowingly concerned in a contravention of s 12DI(3) on the 781 occasions that ACML remitted an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death. These fees amounted to $129,838.02, affecting the estates of 106 customers.

236 In the penalty period up to 10 September 2018, BTFM was knowingly concerned in a contravention of s 12DI(3) on the 3,948 occasions that BTFM remitted an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death. These fees amounted to $526,716.42, affecting the estates of 935 customers.

237 In the penalty period up to 10 September 2018, BTPS was knowingly concerned in a contravention of s 12DI(3) on the 717 occasions that BTPS remitted an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death. These fees amounted to $212,307.65, affecting the estates of 166 customers.

238 Let me turn now to the contraventions of s 12CB(1) of the ASIC Act.

239 Westpac, Securitor and Magnitude also admit that they contravened s 12CB(1).

240 Each of them admit that, having regard to their knowledge that advice fees ought to cease being charged upon receiving a notification that a customer was deceased and that the estates of affected members ought to be refunded, they engaged in unconscionable conduct, in connection with the supply of financial services, in contravention of s 12CB(1) by charging advice fees during the penalty period up to 12 November 2018 for Westpac and up to 19 November 2018 for the other two, Securitor and Magnitude, to affected member accounts after being notified of the customer's death, for financial advice that could not be and was not provided to the customer, and by retaining those fees.

241 From at least April 2013, and most unfortunately, the advice licensees well knew, including at a senior management level, that upon receiving notification that a customer was deceased, advice fees ought to no longer be charged yet they took years to do anything about that. They also knew that the estates of affected members ought to have been refunded any advice fees charged after death. So, knowledge was well known of that scenario as at 2013, and there seems to then have been a litany of process-type issues and procrastination before the matter was dealt with years later. I will just go through some highlights of the chronology, just to demonstrate some of those points.

242 Now the advice licensees did give consideration, including at senior management level, to steps to be taken to address the charging of advice fees to deceased customers, but nevertheless the impugned conduct continued.

243 In early 2013, apparently, a Securitor authorised representative raised the issue of advice fees being charged to deceased clients, commendably if I might say so. This prompted a series of

internal communications amongst employees of the respondents about the issue and the provision of legal advice. One of the internal email communications in February 2013 referred to the need for processes to be amended so that adviser fees ceased being charged upon notification of death. There was then a telephone conference in April 2013 between employees of the respondents during which they had a broad discussion about the issue of advice fees being charged to deceased customer accounts, including the business risks flowing from ceasing to charge the fees and from continuing to charge the fees. Throughout April 2013, those who attended the telephone conference engaged in further communications as to the review of platform processes with a view to continuing to charge advice fees upon the accounts of deceased clients.

244 From April 2013, the advice licensees also considered the issue of transacting upon the accounts of deceased clients in the context of the FOFA reforms. The advice licensees identified that the fees for deceased clients ought to be switched off. From in or around mid-2013, some controls, capable of addressing the deceased clients issue, were introduced at the St George financial planning business, a part of the BT Financial Advisory business unit within the Westpac group. But no such controls were otherwise introduced by the advice licensees.

245 In December 2013, a draft business process document was issued as part of the implementation of the FOFA reforms. The document proposed functional requirements that would have created exception reports as to deceased clients. The advice licensees did not introduce any of these functional changes, surprisingly.

246 From 2013 through to January 2018 there were 23 occasions on which the issue of fees being charged to deceased customers (relating to advice clients) was raised by advisers or support staff as part of the "business as usual" administration relating to advice clients. Typically, and apparently, the questions raised related to whether and how advice fees should cease to be charged to deceased customers. The adviser payments services team generally responded to the effect that any ongoing fees charged to a deceased person must cease. But despite this very clear position, the advice licensees continued to accept such fees. They failed to address the issue systematically and neither did they introduce a system for the provision of any refunds to affected members.

247 In June and July 2013, members of the advice licensees' management and staff considered rules and processes as to the continuation of advice fees in the context of deceased estates. A business analyst, FOFA, in the Westpac group was advised that ongoing arrangements and fees

must cease to be charged upon the death of a customer. He passed on that advice to senior managers at the Westpac group and also a business unit known as the BT Group licensees. As a result, the advice licensees considered updating the ongoing advice policy to provide that where an ongoing advice customer died, the adviser would be directed to cease the ongoing advice arrangement and terminate any ongoing advice fees. But notwithstanding all of this, the advice licensees made no amendments to the ongoing advice policy. Advice fees continued to be received from the accounts of deceased customers.

248 Let me jump forward a few years from 2013 and let me go to May 2017.

249 In May 2017, the advice licensees again considered the issue of charging fees to the accounts of deceased customers. What has been described as the BT Financial Advice Compliance Risk Council raised the question of whether there was a policy as to what to do upon the death of a customer, in respect of an ongoing advice service. The council made this a policy action item. In mid-2017, the issue was referred to a BTFG policy manager, BT Advice Compliance Policy, whose role included providing support in developing and updating BTFA policies, that is, BT Financial Advice policies. But despite the referral leading to no formal finding or report, the policy action item was closed later in the year.

250 In late 2017, the advice licensees considered the issue again. On 5 December 2017 a business process manager, Advice Service Delivery BT Customer Operations, Westpac group, sent an email querying the policy applicable to ongoing advice in relation to deceased estates. A BTFG policy manager, BT Advice Compliance Policy, responded to that email query. The response referred to an understanding that the agreement with the customer to provide ongoing advice ceases upon their death.

251 Over January 2018, the advice licensees had reference to legal advice on the issue from 2013, and sought further legal advice. In February 2018, the advice licensees were involved with an informal BT Financial Advice working group directed to approaches to the management of deceased estates, including the cancellation of ongoing advice fees upon notification of death.

252 At each stage that I have outlined through until the financial services royal commission, the advice licensees continued to accept advice fees from deceased customers' accounts, as deducted and remitted by the SIPO entities and the non-group SIPOs. The advice licensees continued to retain those fees despite knowing that they ought to be refunded.

253 This of course was unacceptable behaviour.

254 And notwithstanding their knowledge, during the relevant period until in or around September 2018, the advice licensees and the other respondents had neither a system of monitoring, nor a set of policies directed towards ensuring the obvious which was:

(a) that advice fees were not to be deducted from accounts following notification of the death of an accountholder;

(b) that there should have been timely notification of a client's death by advisers to appropriate persons within the respondents; and

(c) the return to affected accounts of advice fees deducted from an account following the death of an accountholder.

255 Prior to the introduction of specific policies in late 2018, any steps taken following notification of death were ad hoc.

256 It was not until after the royal commission that the advice licensees, along with the other respondents, introduced specific policies to address the issue of the steps to be taken upon receiving notification of the death of an accountholder.

257 Now of course ongoing advice arrangements terminated upon the death of an affected member. And inevitably if I might say so, the advice licensees had to accept that it was unconscionable, having been notified of an affected member's death, to then continue to receive advice fees in respect of the affected member's account when they knew from at least April 2013 that such fees ought not to have been charged. Clearly, it was incumbent upon the advice licensees in those circumstances to ensure that advice fees were no longer charged, or if they had been charged, that they were refunded promptly. This was especially so when the death of the affected member meant obviously that there was, to understate it, an asymmetry of power in relation to the charging of the advice fees.

258 Notwithstanding their knowledge and repeated consideration of the issue, the advice licensees failed to take steps which prevented the receipt of advice fees from the accounts of deceased customers. They also retained the fees and the payment of refunds began only after the remediation program was implemented.

259 The conduct of Westpac, Securitor and Magnitude was unconscionable, and even that is a fairly lightly touched description in the circumstances.

260 Let me say something about the contraventions of s 962P of the Corporations Act.

261 Westpac's admitted contraventions of s 962P concern certain members who received financial advice services from Westpac, and whose accounts were charged advice fees after their death.

262 In respect of each such affected member, there was until death an ongoing fee arrangement within the meaning of s 962A between such affected member and Westpac. The advice services for which such affected member accounts were charged were, of course, a financial service or financial services within the meaning of s 766A of the Corporations Act. The advice fees were ongoing fees within the meaning of s 962B.

263 In respect of each ongoing fee arrangement for which Westpac was the relevant advice licensee, Westpac was the fee recipient within the meaning of s 962C.

264 Westpac further accepts that s 962D was met as to the 962P affected members.

265 Moreover, Westpac admits that upon the death of such an affected member, their ongoing fee arrangement terminated within the meaning of s 962P.

266 So, it follows that by continuing to charge such an affected member advice fees after their death, Westpac contravened s 962P.

267 During the penalty period up to 1 July 2019, Westpac charged advice fees to such affected members after being notified of their death on 1,212 occasions in contravention of s 962P. These fees amounted to $301,928.35, affecting the estates of 179 customers.

268 Let me deal now with the contraventions of s 912A of the Corporations Act.

269 Westpac, Securitor, Magnitude, AAML, ACML, BTFM and BTPS admit that they contravened s 912A(1)(c) of the Corporations Act, by reason of their contraventions as I have outlined earlier.

270 Further, all of the respondents admit that they contravened s 912A(1)(a) during the penalty period up to various dates in late 2018. I note here, of course, that s 912A(1)(a) was not a civil penalty provision within this period, that is, during the penalty period, but up to various dates in late 2018. It became a pecuniary penalty provision in March 2019.

271 I will make relevant declarations based upon the contraventions that I have identified. These contraventions obviously concern deficient systems and the respondents each admit to having contravened s 912A(1)(a) by failing to have systems, practices and policies which were capable of preventing the charging of advice fees to affected member accounts after notification of the

customer's death and, as to the advice licensees, failing to have systems, practices and policies in place providing for the refund of advice fees back to the date of the customer's death.

272 By the deficiencies in their systems, and quite unacceptably, the respondents, who of course are financial services licensees by definition, failed to do all things necessary to ensure that the financial services covered by their licenses were provided efficiently, honestly and fairly.

273 Now the parties have sought declarations on all contravening conduct, not just the contraventions dealing with s 912A, and I have no difficulty in making the declarations sought. I do not need to linger on the question of jurisdiction or discretion and the appropriateness of making declarations in the present matter, particularly of course given their general deterrence effect.

274 Let me then turn more directly to the question of pecuniary penalties.

275 Undoubtedly in setting a pecuniary penalty, of course, one must take into account and be guided by the framework of and the content of the applicable statutory provisions.

276 In this context, let me say something about s 12GBA of the ASIC Act up to 12 March 2019.

277 That provision, in particular s 12GBA(1), as relevantly in force up until 12 March 2019, provides that the Court may order a person who has contravened ss 12DI(3) or 12CB(1) to pay a pecuniary penalty as is determined to be appropriate.

278 Section 12GBA(2) as in force up until that time requires the Court, in determining the appropriate penalty, to have regard to all relevant matters including:

(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission;

(b) the circumstances in which the act or omission took place; and

(c) whether the person has previously been found in proceedings under Subdivision G to have engaged in similar conduct.

279 I should say that the parties have provided me with extensive submissions on some of the relevant factors to consider in this context. I do not propose to go through them all, but I should say here that I have of course taken each such matter into account.

280 I also note that s 12GBA(3) as relevantly in force up until 12 March 2019 is to the effect that the maximum penalty for a body corporate for each contravention of ss 12DI(3) and 12CB(1) is 10,000 penalty units.

281 I do not need to linger on the arithmetic here, other than to say that in the circumstances of the present case, the maximum penalty for each contravention of ss 12DI(3) and 12CB(1) during the penalty period up to 12 March 2019 ranged between $1.8 million to $2.1 million per contravention.

282 Further, s 12GBC(2) as in force until 12 March 2019 is dealing with what the parties seek, which is civil penalties only as to contraventions of s 12DI(3) and 12CB(1) as occurring within six years of commencement of the present proceeding, that is, within the penalty period.

283 Let me now say something about s 12GBA as it appeared in its form from 13 March 2019. Relevantly, s 12DI(3) is a civil penalty provision. So, where the Court has made a declaration of contravention under s 12GBA, the Court can order a person to pay to the Commonwealth a pecuniary penalty that is considered to be appropriate.

284 Section 12GBB(5) as in force since 13 March 2019 provides a list of the factors to be taken into account when determining penalty. These factors are similar to those set out in the prior provision. I will say again that I have of course taken such matters in the parties' submissions into account to the extent that they address those specific factors.

285 Further, s 12GBCA(2), as in force from 13 March 2019, is to the effect that the maximum penalty for a body corporate for each contravention of s 12DI(3) is the greatest of:

(a) 50,000 penalty units, which transposes to $10.5 million per contravention;

(b) if the Court can determine the benefit derived and the detriment avoided because of the contravention, that amount multiplied by 3; and

(c) either:

(i) 10% of annual turnover for the prior 12 months of the relevant body corporate; or

(ii) if that amount is greater than an amount equal to 2.5 million penalty units, then 2.5 million penalty units, which comes out at $525 million.

286 Further as to s 12GBB(2) as in force from 13 March 2019, ASIC had to apply for the pecuniary penalty order within 6 years of the contravention.

287 Let me now say something about s 1317G of the Corporations Act up until 12 March 2019.

288 Section 1317G(1E)(b)(iv) and (1G)(b) as in force up until 12 March 2019 provides that the maximum penalty for a contravention of s 962P by a body corporate is $250,000. The relevant statutory provision provides no listing of factors to be taken into account.

289 Further to s 1317K, the parties seek civil penalties only as to Westpac's contraventions of s 962P as occurring within the penalty period.

290 And as to s 1317G from 13 March 2019 the following may be noted.

291 Section 1317G(4), as in force from 13 March 2019, is relevantly to the effect that the maximum penalty for a contravention of s 962P by a body corporate is the greatest of 50,000 penalty units, again, equivalent to $10.5 million per contravention, the benefit derived multiplied by 3, if that amount can be determined, and what I indicated previously in terms of either the 10% of annual turnover or the 2.5 million penalty units (if the latter is less).

292 The statute lists factors to be taken into account when considering penalty. Those factors are identical to those set out in the ASIC Act, and again I have taken those factors into account.

Application of principles

293 Let me now say something about the nature and extent of the contravening conduct targeted more at the penalty framework and the matters to be considered.

294 Westpac admits to 4,324 contraventions of s 12DI(3), with wrongly accepted fees in the amount of $812,734.74, affecting the estates of 575 customers. Of these contraventions, 155 occurred after 13 March 2019, affecting 47 affected members in the amount of $48,624.39.

295 The contraventions of s 12DI(3) occurred during the penalty period up to 1 July 2019 when Westpac ceased providing personal advice through employed advisers. This was over 7 months after Westpac had notified ASIC of the conduct pursuant to s 912D.

296 Westpac also engaged in unconscionable conduct in contravention of s 12CB(1) by charging advice fees during the penalty period up to 12 November 2018, to affected members accounts after being notified of the customer's death, for financial advice that could not and was not provided to the customer, and by retaining those fees.

297 Further, in contravention of s 962P, during the penalty period up to 1 July 2019, Westpac charged advice fees to affected members that I have already addressed in terms of s 962P, after

being notified of their death on 1,212 occasions in contravention of s 962P. These fees amounted to $301,928.35, affecting the estates of 179 customers. Of these contraventions, 63 occurred after 13 March 2019, affecting 18 affected members in the amount of $35,939.78.

298 Let me turn to Securitor. Securitor admits to 3,272 contraventions of s 12DI(3), with wrongly accepted fees in the amount of $388,018.56, affecting the estates of 604 customers. The contraventions occurred during the penalty period up to 1 March 2019. This was over 3 months after Securitor had notified ASIC of the conduct, pursuant to s 912D. Securitor also engaged in unconscionable conduct in contravention of s 12CB(1) by charging advice fees during the penalty period, up to 19 November 2018.

299 Let me turn to Magnitude. Magnitude admits to 1,214 contraventions of s 12DI(3), with wrongly accepted fees in the amount of $225,457.46, affecting the estates of 237 customers. Of these contraventions, 14 occurred after 13 March 2019, affecting 3 affected members in the amount of $5,828.50. The contraventions of s 12DI(3) occurred during the penalty period up to 9 October 2019, shortly after Magnitude had ceased to provide personal financial advice. This was about 10 months after Magnitude had notified ASIC of the conduct pursuant to s 912D. Magnitude also engaged in unconscionable conduct in contravention of s 12CB(1) by charging advice fees during the penalty period, up to 19 November 2018.

300 During the penalty period up to 10 September 2018, AAML was knowingly concerned in a contravention of s 12DI(3) on the 5 occasions that AAML remitted an advice fee to Westpac, Securitor or Magnitude after being notified of the customer's death. These fees amounted to $487.23, affecting the estates of two customers.

301 During the penalty period up to 10 September 2018, ACML was knowingly concerned in a contravention of s 12DI(3) on 781 occasions. The remitted fees amounted to $129,838.02, which affected the estates of 106 customers.

302 During the penalty period up to 10 September 2018, BTFM was knowingly concerned in a contravention of s 12DI(3) on 3,948 occasions. The remitted fees amounted to $526,716.42, affecting the estates of 935 customers.

303 During the penalty period up to 10 September 2018, BTPS was knowingly concerned in a contravention of s 12DI(3) on 717 occasions. The remitted fees amounted to $212,307.65, affecting the estates of 166 customers.

304 Let me turn now and make some general observations.

305 Now clearly the contravening conduct that I have just briefly outlined was extensive and very serious.

306 The contraventions occurred over a protracted period of time, including over the wider relevant period, which as I have previously said was a period from December 2008 to 9 October 2019.

307 Over that broader period, Westpac charged and received fees from affected members' accounts, in circumstances where it had been notified of the customer's death on 16,441 occasions, in the amount of $2,179,305.64, and affecting the estates of 1,575 affected members.

308 Over this broader period, Securitor charged and received fees from affected members' accounts, in circumstances where it had been notified of the customer's death, on 15,983 occasions, in the amount of $1,190,138.84, and affecting the estates of some 1,377 affected members.

309 Magnitude charged and received fees over this broader period from affected members' accounts, in circumstances where it had been notified of the customer's death, on 3,177 occasions, in the amount of $565,369.35, and affecting the estates of 434 affected members.

310 Further, in terms of the penalty period contraventions, being the narrower period of 30 November 2015 to 9 October 2019, these occurred and continued to occur in circumstances where the advice licensees knew from at least around April 2013, including at senior management level, that advice fees ought not to be charged after receiving notification that a customer was deceased, and that advice fees charged after death ought to be refunded back to the date of death. The advice licensees considered taking steps to address these issues, but no proper steps were really taken at all.

311 As to the SIPO entities, save for BTFM No. 2, let me deal with their position during the broader relevant period, being from December 2008 to 9 October 2019.

312 AAML deducted a total of $1,150.54 on 64 occasions, from affected member and non-group-member accounts and remitted the fees to advice licensees and non-group licensees, in circumstances where AAML had been notified of the customer's death. The estates of 6 customers were affected.

313 ACML deducted a total of $1,365,646.45, on 12,359 occasions, from affected member and non-group member accounts and remitted the fees to advice licensees and non-group licensees,

in circumstances where ACML have been notified of the customer's death. The estates of 740 customers were affected.

314 BTFM deducted a total of $5,277,636.81, on 68,601 occasions, from affected member and non-group member accounts and remitted the fees to advice licensees and non-group licensees, in circumstances where BTFM had been notified of the customer's death. The estates of 8,868 customers were affected.

315 BTPS deducted a total of $2,978,509.61, on 11,022 occasions, from affected member and non-group member accounts and remitted the fees to advice licensees and non-group licensees, in circumstances where BTPS had been notified of the customer's death. The estates of 1,772 customers were affected.

316 From around April 2013 these SIPO entities knew, including at senior management level, that advice fees ought not to have been charged after receiving notification that a customer was deceased, and that advice fees charged after death ought to be refunded back to the date of death. The SIPO entities also considered taking steps to address these issues, but again, no sufficient steps were taken.

Harm

317 Let me turn to the question of harm, although it should be obvious. Of course, I am dealing with the question of harm in focusing here only on the narrower penalty period being between 30 November 2015 to 9 October 2019.

318 Of course, as a result of the contravening conduct, affected members and non-group affected members suffered harm as to their estates. This harm occurred over a significant period, obviously.

319 During the penalty period up to 9 October 2019, 1,416 affected members were as to their estates harmed as follows:

(a) Westpac on 4324 occasions charged advice fees of $812,734.74 after being notified of the customer's death and, prior to the remediation of those amounts, had the benefit of those fees;

(b) Securitor on 3,272 occasions charged advice fees of $388,018.56 after being notified of the customer's death and, prior to remediation, Securitor's authorised representatives generally had the benefit of those fees; and

(c) Magnitude on 1,214 occasions charged advice fees of $225,457.46 after being notified of the customer's death and, prior to remediation, Magnitude's authorised representatives generally had the benefit of those fees.

320 During the penalty period up to 10 September 2018, affected members and non-group affected members were also occasioned harm as to their estates by the conduct of the SIPO entities, excluding BTFM No. 2, in deducting fees for advice after being notified of the customer's death and remitting the fees to the relevant advice licensee or non-group advice licensee:

(a) AAML on 5occasions;

(b) ACML on 3,102 occasions;

(c) BTFM on 19,783 occasions; and

(d) BTPS on 3,748 occasions.

321 Of course, the estates of the affected members and non-group affected members suffered financial loss, up until the date of remediation, and inconvenience as a result of the conduct because of course they did not have the benefit of the funds that were deducted from the customer's account. In being kept out of their money, those estates suffered economic loss.

Deterrence

322 Let me at this point say something about deterrence. In my view, the proposed penalties are sufficient to address both specific and general deterrence.

323 As to general deterrence, the penalties I intend to impose should create disincentives for large financial institutions to fail to maintain adequate processes and systems.

324 As to specific deterrence, clearly the respondents' policies and systems were inadequate to prevent wrongdoing. The penalties that the parties seek before me and that I propose to impose will serve to encourage each of the relevant respondents to ensure that their systems are adequate and to proactively identify and address the question of rectification and compliance issues, so as to prevent or at least mitigate the prospect of further contraventions. The penalties that I intend to impose will encourage the respondents to address compliance problems promptly when they first arise rather than allowing them to fester.

325 Now thus far I have said a lot against the respondents. Let me now address what might be said to be mitigating factors.

326 First, before me and by their conduct in recent times, the respondents have demonstrated contrition and have acknowledged the seriousness of their conduct, although, of course, they did accept and had to accept that they fell well short of meeting their responsibilities and obligations, whether legally or if I might say so ethically.

327 Second, the problem arose from system failures rather than necessarily intentional wrongdoing.

328 Third, the estates of affected members have now largely been remediated, and the respondents' remediation program has involved the review of all deceased estates who were charged fees since 1 January 2011. That process is now largely complete. Just to give some of the relevant figures, as at the date upon which the amended statement of agreed facts was produced, the estates of 11,848 SIPO entity affected members and non-group affected members have been remediated in the amount of $19,449,584, comprising $13,716,416 in fees and the balance in interest.

329 Fourth, the respondents at least now have taken steps to rectify the conduct, having implemented policies, processes and controls designed to stop advice fees being deducted from an account following notification of the death of the account holder. Moreover, Westpac has ceased providing personal financial advice services through employed advisors on 1 July 2019, and both Securitor and Magnitude ceased providing personal financial advice from 1 October 2019.

330 Fifth, the respondents have co-operated with ASIC throughout the proceeding. And the respondents have made full admissions, and indeed did so and agreed to a statement of agreed facts prior to ASIC commencing proceedings.

331 Taking into account all of the above matters and factors, including the other factors dealt with in the written submissions that I have not expressly mentioned, in my view it is appropriate to impose pecuniary penalties totalling $40 million.

332 Let me break this down.

333 A penalty of $15.95 million will be imposed upon Westpac. Westpac is to be penalised for a large number of contraventions of s 12DI(3) and s 962P. Some of these contraventions fall to be penalised under the strengthened penalty regime that has been in place from 13 March 2019. Westpac is also to be penalised for contravening s 12CB(1). Westpac wrongly accepted over $800,000 in fees. The contraventions occurred despite Westpac knowing at senior levels that advice fees could not be charged or should not have been charged following the death of

affected members, and that any fees so charged ought to have been refunded. The contraventions occurred over many years, affecting many hundreds of customers. Policies were only introduced by Westpac and the other respondents to stop this type of conduct belatedly.

334 As to Securitor, in my view it is appropriate to impose on it a penalty of $7.6 million. Securitor is to be penalised for a large number of contraventions of s 12DI(3). It is also to be penalised for contravening s 12CB(1). It wrongfully accepted over $380,000 in fees. The contraventions occurred despite senior management and indeed a board member knowing that advice fees were being received after Securitor had received notice that a customer was deceased and that, accordingly, fees should no longer be charged and that the estates of affected members ought to be refunded the fees so charged after death. The contraventions occurred over many years, affecting many hundreds of customers.

335 As for Magnitude, it is appropriate to impose a penalty of $4.45 million on it. It is to be penalised, again, for a significant number of contraventions of s 12DI(3). A small number of those contraventions also fall to be penalised under the strengthened penalty regime in place from 13 March 2019. It is also to be penalised for contravening s 12CB(1). It wrongly accepted over $225,000 in fees and the contraventions occurred despite Magnitude knowing at senior levels that advice fees could not be charged following the death of affected members, and that any fees so charged ought be refunded. The contraventions occurred over many years, affecting over 200 customers.

336 As for AAML, a penalty of $100,000 is the appropriate penalty that I will impose. It is to be penalised for 5 instances of being knowingly concerned in a contravention of s 12DI(3). The contraventions occurred despite AAML's knowledge that I have briefly discussed earlier.

337 Turning to ACML, in my view a penalty of $1.8 million is an appropriate penalty to impose upon it. It is to be penalised for hundreds of instances of being knowingly concerned in a contravention of s 12DI(3). It wrongfully deducted and remitted over $125,000 in fees, and again, the contraventions occurred despite ACML's knowledge, including at a senior level.

338 As to BTFM, a penalty of $7.2 million is an appropriate penalty. It is to be penalised for thousands of instances of being knowingly concerned in a contravention of s 12DI(3). It wrongfully deducted and remitted over $525,000 in fees, and this conduct occurred despite BTFM's knowledge, including at the senior management level.

339 Finally, as to BTPS, a penalty of $2.9 million will be imposed. It is to be penalised for hundreds of instances of being knowingly concerned in a contravention of s 12DI(3). It wrongfully deducted and remitted over $200,000 in fees. The contraventions also occurred despite the knowledge that I have previously outlined, including at the senior management level.

340 I will make declarations and orders to accord with these reasons.

NSD 1239 of 2021 (Westpac debt sale)

341 The present matter involves the setting of a pecuniary penalty concerning conduct engaged in by Westpac concerning sales of debt to third parties.

342 The proceedings concern Westpac's false and misleading conduct concerning 16,535 impacted customers with customer credit contracts with Westpac. The conduct relates to misrepresenting to debt purchasers the interest rates applicable to impacted customers' debts on Westpac-branded cards and loans and St George-branded cards, including Bank of Melbourne and Bank SA cards.

343 Between 1 March 2010 and 10 May 2018 (the relevant period) Westpac operated under several brands including Westpac, St George, Bank of Melbourne and Bank SA.

344 Westpac's financial services business included supplying financial services to consumers in connection with:

(a) Westpac-branded cards and Westpac-branded loans; and

(b) St George-branded credit cards.

345 As at the end of the relevant period, there were a total of 2,596,544 Westpac-branded consumer cards and St George-branded consumer cards on issue, and 163,359 Westpac-branded flexi loans written.

346 As a financial services licence holder and provider of financial services, Westpac was obliged to comply with financial services laws, including s 912A of the Corporations Act and ss 12DA and 12DB of the ASIC Act including with respect to Westpac and St George-branded cards and loans.

347 Westpac admits that it contravened ss 12DB(1) and 12DA of the ASIC Act and, as a result, s 912A(1)(c) of the Corporations Act, based upon the facts and admissions set out in an agreed

statement of facts which has been tendered in these proceedings for the purposes of s 191 of the Evidence Act.

348 That statement and its annexures provides a sufficient factual foundation for the admitted contraventions.

349 The parties have also provided to me joint submissions specific to this matter and also a separate submission concerning the relevant legal principles which are not contentious.

350 The parties jointly seek a pecuniary penalty of some $12 million.

351 That penalty is for conduct over the period 1 December 2015 to 10 May 2018 which I will refer to as the penalty period.

352 I am empowered to impose a civil penalty under the then applicable provisions of ss 12GBA and 12GBC of the ASIC Act for conduct during the penalty period in respect of the s 12DB contraventions.

353 But of course there was conduct over a broader period from 1 March 2010 through to 10 May 2018. In that regard, the parties seek, and I am empowered to make, declarations of contraventions of ss 12DA(1) and 12DB(1)(a) and (i) of the ASIC Act and s 912A(1)(c) of the Corporations Act in respect of conduct that took place during that broader period being 1 March 2010 through to 10 May 2018.

354 Let me at this point say something about the context and conduct underpinning the admitted contraventions.

355 Part of Westpac's business involved the sale of bad debts, relevantly consumer debts that it had written off, specifically on Westpac-branded cards and loans and St George-branded cards.

356 The sale of bad debts involved Westpac assigning to certain commercial debt purchasers the customer accounts for Westpac-branded cards and loans and St George-branded cards, including assigning all of the right and interest in those accounts and the credit contracts with the relevant consumers.

357 The mechanics of each transaction, and I won't linger on the details too much, involved Westpac sending an electronic sale file to the relevant debt purchaser containing information regarding each customer account and debt, including interest rate(s) and account balance(s) information.

358 From 17 March 2011 to the end of the pre-penalty period, which ended on 1 December 2015, 737 impacted customers' Westpac-branded card and loan debts were sold to debt purchasers under 18 debt sales agreements and 148 sales files.

359 In addition, during the pre-penalty period, 7,290 impacted customers' St George-branded card debts were sold to debt purchasers consisting of and being embodied in 148 sales files under 18 debt sale agreements.

360 During the penalty period:

(a) 3,639 impacted customers' Westpac-branded card and loan debts were sold to debt purchasers in 98 sales files under 13 debt sale agreements; and

(b) 4,869 impacted customers' St George-branded card debts were sold to debt purchasers in 79 sale files under 11 debt sale agreements.

361 Many of these customers had concessional interest rates or promotional interest rates which were not in or recorded on the sale files. This was most unfortunate.

362 Now Westpac made a representation to the debt purchasers in respect of each impacted customer's Westpac-branded loan that the percentage rate set out in the "Interest_rate cash" field in the sales files was the interest rate that applied to the balance owing on the Westpac-branded loan as at the date of debt sale. I might say these fields were quite inadequate in terms of the sales files. They didn't actually have sufficient fields for identification of all relevant information, including fields that might have specifically been filled in, for example, for concessional interest rates or promotional interest rates.

363 Westpac made the following representations to the debt purchasers in respect of each impacted customer's Westpac-branded card, in relation to the sales files referred to,:

(a) that where a percentage rate was set out in the "Interest_rate purchase" field, that was the interest rate that applied to the customer's purchase balance at the date of the debt sale; and

(b) that where a percentage rate was set out in the "Interest_rate cash" field, that was the interest rate that applied to the customer's cash advance balance at the date of the debt sale.

364 Westpac also represented that no other interest rates, namely, promotional, balance transfer, honeymoon or concessional rates, applied to the customer's account.

365 Westpac made the following representations to the debt purchasers in respect of each impacted customer's St George-branded card, in relation to the sales files referred to,:

(a) that the single interest rate supplied was the interest rate that applied to the whole of the impacted customer's account as at the date of the debt sale; and

(b) that no other interest rates, namely, purchase, cash, promotional, balance transfer, honeymoon or concessional rates, applied to the impacted customer's account.

366 In relation to the impacted customers, the information in the sales files concerning the interest rate(s) applicable to their account balance(s) was false and misleading or deceptive, given that the customers were on lower interest rates such as concessional or promotional rates.

367 Debt purchasers were misled by these representations. This obviously, in turn, caused damage to impacted customers whose accounts had been sold by Westpac to the debt purchasers in that the debt purchasers in fact charged impacted customers at higher interest rates than they were entitled to apply to the relevant account balance(s).

368 In engaging in conduct involving the debt sales to the debt purchasers, Westpac supplied financial services by dealing in credit facilities (that are financial products) by disposing of those facilities which it had supplied to impacted customers.

369 Westpac contravened ss 12DA and 12DB(1) of the ASIC Act on 8,027 occasions during the pre-penalty period and 8,508 occasions during the penalty period.

370 Let me at this point also say something concerning s 912A of the Corporations Act.

371 Section 912A prescribes general obligations for the holders of an Australian Financial Services Licence. Westpac of course was such a holder. Section 912A(1)(c) provides that the holder must "comply with financial services laws". Accordingly, it follows that a contravention of either s 12DA or s 12DB of the ASIC Act is a failure to comply with financial services laws and therefore is, itself, a contravention of s 912A(1)(c). Westpac has admitted such a contravention.

372 It is important at this point to say something concerning loss and damage and the impacts on third parties resulting from Westpac's contravening conduct.

373 As I have indicated, there were 8,027 impacted customers in the pre-penalty period and 8,508 impacted customers in the penalty period. Of the 8,508 impacted customers in the penalty period:

(a) 3,639 were Westpac-branded card and loan customers; and

(b) 4,869 were St George-branded card customers.

374 As I have said, the nature of Westpac's conduct involved misrepresenting the interest rates applicable to impacted customer accounts sold to debt purchasers over a number of years and, as I have said, this led to debt purchasers relying on Westpac's misrepresentations and the over-charging of interest to impacted customers.

375 Now it is not possible to accurately ascertain the full extent of the loss and damage suffered by impacted customers as a result of Westpac's acts or omissions. However, and as the parties submitted to me, and as I am prepared to accept, there is a reasonable proxy available concerning Westpac's remediation of impacted customers and its quantification.

376 So, by reason of the misrepresentation of interest rates on the balances of 8,508 impacted customers accounts during the penalty period and 8,027 impacted customers accounts in the pre-penalty period, impacted customers were remediated in the following amounts.

377 For Westpac-branded loans:

(a) during the penalty period, there were $463,994.68 in balance adjustments and $7,573.55 in interest refunds; and

(b) during the pre-penalty period, there were $121,396.72 in balance adjustments and $11,165.96 in interest refunds.

378 For Westpac-branded cards:

(a) during the penalty period, there were $3,575,555.54 in balance adjustments and $218,840.18 in interest refunds; and

(b) during the pre-penalty period, there were $3,348,002.09 in balance adjustments and $340,621.81 in interest refunds.

379 For St George-branded cards:

(a) during the penalty period, there were $3,641,484.08 in balance adjustments and $341,581.70 in interest refunds; and

(b) during the pre-penalty period, there were $4,719,117.22 in balance adjustments and $930,828.51 in interest refunds.

380 In summary, the aggregate remediated loss and damage to impacted customers was:

(a) in respect of the penalty period, $8,249,029.73; and

(b) in respect of the pre-penalty period, $9,471,132.31.

381 This totalled $17.72 million in remediated loss and damage.

382 Now I have dealt with what has been put forward as a reasonable proxy in terms of the quantification of loss. Let me now address a separate dimension in terms of impacts on third parties which gave rise to another problem.

383 In the penalty period, Westpac sold customer bad debts totalling $83,613,079.50, being the debts of course of the 8,508 impacted customers. And in return, Westpac received a total of $19,874,963.71 from the sale of these written-off debts to debt purchasers.

384 Those debt purchasers then took recovery action against many of the impacted customers to recover debts that included interest charges that due to the relevant misrepresentations made by Westpac were higher than the customer was contractually obliged to pay. Debt purchasers sued impacted customers for the recovery of the relevant debts, including interest charges. And sometimes the debt purchasers were the petitioning creditors for some of these impacted customers. Some of the ultimately bankrupted customers had, of course, concessional interest rates that ought to have been applied to their accounts but weren't.

385 Further, adverse credit ratings reports were also filed with credit ratings agencies by these debt purchasers for what the parties submitted to me was an unknown number of impacted customers. This would have been likely to impact the ability of customers to obtain credit at all or to obtain credit on favourable terms.

386 Undoubtedly, the customers impacted by Westpac's conduct were likely to be customers who could least afford to be overcharged with interest and who faced financial hardship.

387 Clearly, the extent and consequences of Westpac's contraventions were serious to say the least.

388 Let me turn then to address the factors relevant to the assessment of penalty, bearing in mind that deterrence is the paramount objective, with its dual dimensions of specific deterrence and

general deterrence. Now the parties have identified various matters that I have taken into account. But let me focus on the following points.

389 First, I have considered the theoretical arithmetic maximum penalty for the 8,508 contraventions, but it is not a useful touchstone in the present context, given that this comes in at something around $15.8 billion. That theoretical maximum can be put to one side.

390 Second, I have already addressed the nature of the contravening conduct and its impact. It is serious to say the least.

391 Third, I accept that the contraventions were brought about by systems errors.

392 Fourth, I accept that these errors did not directly involve the senior management of Westpac.

393 Fifth, it is apparent that the contraventions were not brought about by deliberate or reckless conduct on the part of Westpac. I am also not able to conclude that Westpac gained from its wrong-doing, although I did raise one possibility with counsel concerning the price struck for the debt sales that did not take the matter very far, if I might say so.

394 Sixth, Westpac has comprehensively provided remediation to its customers to the extent feasible. As I have indicated, this totals $17.72 million for 16,535 impacted customers, both in terms of the pre-penalty period and the penalty period.

395 Seventh, Westpac has now put in place various measures to mitigate the risk of repetition of misrepresentations in respect of interest rates on Westpac written-off accounts and St George written-off accounts. Westpac has reviewed upcoming debt sales for other products, including Westpac personal loans and St George auto loans, to ensure those products were not impacted by the same issue. Further, Westpac has conducted a review of upcoming debt sales for other products to identify any other potential issues in relation to hardship arrangements.

396 Eighth, I do note however that there were delays in addressing these systems deficiencies once they had been brought to Westpac's attention, particularly between 2016 and 2018.

397 When the issue of incorrect interest rates was first drawn to Westpac's attention in February 2016, this was, unfortunately, not escalated to senior management at that time. However, in October 2017, the matter was escalated to Westpac's collections leadership team, including the head of group collections. But unfortunately again, no action was taken by the collections leadership team until early 2018, when the head of group collections directed an investigation to occur. During those investigations, in around mid-April 2018, Westpac also became aware

that, in addition to interest rate issues affecting St George-branded cards, the issue extended to include Westpac-branded cards and loans. It was then that the issue was escalated to other members of what has been described to me as Westpac leadership. In May 2018, the chief compliance officer and other executives were informed. In June 2018, Westpac lodged relevant breach reports. But such delays between 2016 and 2018 were hardly satisfactory.

398 Now all of these matters justify a substantial penalty. But there are several mitigating factors. Westpac has co-operated with ASIC during its investigation. Further, Westpac has expressed remorse through its counsel. Moreover, as I have said, comprehensive remediation has now taken place.

399 In my view a penalty of $12 million is appropriate taking into account the above matters and also having regard to previous occasions on which Westpac and its subsidiaries have been found to have engaged in analogous contraventions and the penalties set in those cases.

400 The $12 million penalty reflects the seriousness and impact of the contraventions on a large number of vulnerable consumers. It reflects the period over which the contraventions took place and it of course reflects the failure of Westpac to detect these matters earlier. In my view, overall, the $12 million penalty satisfies the objectives of both specific and general deterrence.

401 In all the circumstances then, I will impose that penalty and I will also make declarations and orders to accord with these reasons.

NSD 1240 of 2021 (contribution fees)

402 The matter before me concerns the setting of a pecuniary penalty against 3 defendants concerning contraventions of ss 912A(1)(a) and (5A) of the Corporations Act.

403 The defendants are Westpac Banking Corporation, Magnitude Group Pty Ltd and Securitor Financial Group Pty Ltd, each of whom have held an Australian Financial Services Licence and carried on a financial services business. Magnitude and Securitor are subsidiaries of Westpac.

404 The parties jointly seek declarations that each of the defendants have so contravened s 912A.

405 Further, they jointly submit that I should impose penalties of $2 million for each defendant, totalling $6 million.

406 The factual foundation is set out in a statement of agreed facts and admissions and supplementary statement of agreed facts and admissions. These set out facts which are agreed by the parties for the purposes of this proceeding pursuant to s 191 of the Evidence Act.

407 The parties have also put before me joint submissions specific to this case.

408 Further, the parties have separately put forward joint submissions on legal principles in the context of the 6 separate proceedings between ASIC and Westpac group entities which I am presently dealing with. The legal principles are non-contentious as between the parties.

Penalty period

409 In terms of the relevant penalty period, the defendants have admitted engaging in the contravening conduct in the period being from 13 March 2019 to 30 June 2019 for Westpac, and from 13 March 2019 through to 30 September 2019 in the case of Magnitude and Securitor.

410 The penalty period commences on the date when s 912A(1)(a) became a civil penalty provision, and finishes on the date when each of the defendants ceased operating its respective financial services business.

411 The conduct which is the subject of the contraventions are the acts of charging contribution fees, and the failures to maintain appropriate systems and processes, during the penalty period only. Now in the material there is reference to other conduct, including conduct which occurred prior to the penalty period. But this is only provided for context. The penalty that I am asked to impose only relates to conduct over a limited window, being confined to 2019 as I say. But the defendants have undertaken a broader remediation exercise concerning the charging of relevant fees over the period 2011 through to 2019.

412 There are two types of contact with which I am concerned:

(a) One type of conduct concerns the charging of contribution fees.

(b) The other type of conduct concerns systems and process deficiencies.

413 Let me deal with the charging of contribution fees first.

414 The defendants engaged in conduct in charging contribution fees to retail clients as part of the financial advice businesses operated by each of them.

415 These contribution fees were not linked to the provision of ongoing advice or other services. They were charged to a client by reference to the amounts contributed by or on behalf of that client to an investment or superannuation product. They included fees charged on:

(a) regular contributions made by clients or their employer, such as superannuation guarantee contribution fees from an employer; and

(b) fees charged on an irregular basis in terms of irregular contributions into investment or superannuation products made by clients.

416 It is admitted by each of the defendants that during the penalty period a significant number of their retail clients were charged contribution fees in the following circumstances. Those fees were deducted from the superannuation and investment accounts of those clients whenever those clients made contributions to those accounts. Each defendant or their financial advisor employees or authorised representatives received and retained the fees. Those fees were charged unsatisfactorily without having been disclosed in statements of advice and/or records of advice or without having been adequately disclosed in relevant disclosure documents. The amount or basis upon which the fees would be charged had not been identified in adequate or precise terms and without adequate information. So, given the absence of any adequate disclosure, those fees ought not to have been charged.

417 In terms of disclosure obligations, let me elaborate by reference to the statement of agreed facts concerning fee disclosure.

418 Now the retail clients who were charged the contribution fees were provided with personal financial product advice by Westpac salaried advisors or authorised representatives of Securitor or Magnitude.

419 In providing that personal financial product advice, Westpac as the "providing entity" or the authorised representatives as the "providing entity" pursuant to s 944A of the Corporations Act were required to comply with a number of disclosure obligations pursuant to that Act, including the provision of a disclosure document to the retail client, being a statement of advice, or in certain instances, such as where further advice was being provided which was not significantly different from previous advice given, a statement required by s 946B(3).

420 During the penalty period, pursuant to ss 947B and 947C, statements of advice were required to include, inter-alia:

(a) the advice itself;

(b) the basis on which the advice was given;

(c) information about remuneration (including commissions) or other benefits that various entities were to receive that might reasonably be expected to be capable of influencing the entity providing the advice;

(d) any warning that the advice was based on incomplete or inaccurate information; and

(e) any information required by the regulations.

421 During the penalty period, a statement of advice was defective for the purposes of Chapter 7, Division 7 Sub-division A, if:

(a) it contained a misleading or deceptive statement (s 952B(1)(b)(i)); or

(b) it omitted material required by ss 947B, 947C or 947D;

being a statement, or an omission, that is or would be materially adverse from the point of view of a reasonable person considering whether to act in reliance on the advice concerned.

422 Let me turn to the other category of conduct concerning systems and processes.

423 Each of the defendants also admits a failure to maintain appropriate systems and processes during the penalty period. Let me deal with five matters.

424 First, there was a failure to maintain systems and processes which ensured that the contribution fees were not charged to clients, in circumstances where those fees ought not to have been charged, and a failure to maintain systems and processes which ensured that the defendants or their financial advisors or authorised representatives did not receive or retain contribution fees for their benefit, in circumstances where those fees ought not to have been received and retained.

425 Second, there was a failure to maintain systems and processes which ensured that contribution fees to be charged to clients were disclosed to them in disclosure documents, and a failure to maintain systems and processes which ensured that in instances where there had been a failure to disclose contribution fees in the disclosure documents, clients were provided with information about the fees, in order to allow such clients to make an informed decision as to whether to agree to the deduction of those fees from their superannuation or investment account.

426 Third, there was a failure to retain adequate records of disclosure documents to enable the ready identification of what fees had been disclosed to clients in their disclosure documents.

427 Fourth, there was a failure to adequately train staff as to the requirements accurately to disclose fees such as contribution fees to their clients.

428 Fifth, there was a failure to maintain systems and processes which were capable of ensuring that the application and fee loading processes used by financial advisors in implementing the personal financial product advice accurately reflected the terms of disclosure documents.

429 The defendants admit that the charging conduct and the systems and processes failures during the penalty period constituted a contravention of s 912A(1)(a) and therefore s 912A(5A) of the Corporations Act, whereby each defendant failed to do all things necessary to ensure that the financial services covered by their license were provided efficiently, honestly and fairly.

430 Let me at this point say something about the effect of this contravening conduct.

Number of affected clients unknown

431 According to the parties, and the material before me, the precise number of clients who were affected by the charging conduct during the penalty period is not known.

432 Significantly, the defendants did not retain adequate records of disclosure documents or their contents. Further, the defendants did not have systems in place to monitor, review or ascertain whether the charging of contribution fees had been disclosed to clients or to ensure that the clients were not charged contribution fees unless they had been disclosed. Accordingly, the defendants are unable readily to specify the precise number of clients who in the penalty period were charged contribution fees where those contribution fees were not at least adequately disclosed.

433 Estimates have had to be made against a sample of client files. The methodology used to calculate the estimates of affected client accounts involved the review of a sample of customer accounts against the following criteria:

(a) whether there was a disclosure document on the client file, and in the case of ad-hoc contribution fees, the disclosure document was contemporaneous with the fees charged;

(b) whether the contribution fee was disclosed in both percentage and dollar terms using appropriate examples; and

(c) whether the contribution fee charged was equal to or less than the fee disclosed.

434 The defendants concede that where the criteria were met, in many cases the charging conduct would or is likely to have occurred.

435 It is estimated that in the penalty period, ad hoc contribution fees were charged to at least 171 client accounts, and regular contribution fees were charged to at least 768 client accounts.

436 It is estimated that in the broader remediation periods, ad hoc contribution fees were charged to at least 7,664 client accounts, and regular contribution fees were charged to 17,600 client accounts.

437 I should note that the broader remediation period is 1 November 2011 through to September 2019.

438 The sampling review identified that over the remediation period, which is the broader period:

(a) 59.88% of 7,545 accounts were charged ad hoc contribution fees in the sample group, accounting for 23.07% of ad hoc contribution fees charged in that group; and

(b) 63.4% of 101 accounts were charged regular contribution fees in the sample group, accounting for 55% of regular contribution fees charged in that group.

439 These charged fees had not been disclosed, or adequately disclosed, and ought not to have been charged.

440 The defendants accept that it is likely that this failure rate would be approximately the same for those accounts which did not form part of the sample group.

Penalty

441 Let me turn to the question of penalty specifically.

442 The contraventions relate to the standard of conduct required by s 912A(1)(a), which requires that a financial services licensee must do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly.

443 Now of course a contravention of s 912A(1)(a) may occur in a broad range of circumstances including, as here, where there is a serious departure from reasonable standards of performance. As I say, the contravening conduct here can be so categorised, particularly in relation to its failure to meet appropriate standards of performance when dealing with retail clients.

444 A significant penalty is obviously called for to meet the paramount objective of deterrence, in its 2 dimensions of general deterrence and specific deterrence.

445 Now given that the defendants have ceased operating their personal and financial advice businesses, there is a reduced need for the penalty to be directed towards specific deterrence, as compared with a scenario where the defendants were still operating such businesses. But of course the fact that the defendants have ceased operating financial advice businesses does not mean that the consideration of specific deterrence is not applicable.

446 The parties have put before me helpful submissions on the various factors to consider. Let me focus on several of them and begin with the nature and extent of the conduct.

447 In terms of the charging conduct, that conduct was engaged in by the defendants in the conduct of financial services businesses with respect to retail clients who usually can be taken to be, or are expected to be, in a position of vulnerability relative to the particular licensee. The charging conduct occurred with respect to contributions into superannuation or other investment products, which were products in respect of which the relevant clients had previously sought and in fact paid for personal financial product advice, and which might be expected to be long term and passive investments. Section 912A(1)(a), which relates of course to the conduct of licensees in the provision of financial services, will usually be directed, as in this case, to persons in a position of vulnerability to the licensee, and requires of that licensee a standard of conduct which is, at a minimum, efficient, honest and fair. In my view, any penalty should be sufficient to deter the defendants and other licensees from engaging in conduct below the expected standard in relation to the charging of fees to such persons.

448 Moreover, as is plain, the charging conduct was not isolated. The defendants admit that there were many cases in the penalty period where charging conduct occurred to the benefit of the defendants and/or their financial advisers or authorised representatives.

449 Let me say something about the systems failures.

450 During the penalty period, the systems and process failures related to charging, disclosure, record-keeping, training and application and fee loading processes. The number and breadth of these systems and process failures are clearly relevant to the assessment of an appropriate penalty.

451 These failures applied to each of the defendants and occurred and were not rectified throughout the penalty period.

452 The systems and process failures are likely to have caused or contributed to the unacceptable charging conduct during the penalty period. The defendants did not have systems in place to monitor, review or ascertain whether the charging of contribution fees had been disclosed to clients, or to ensure that the clients were not charged contribution fees unless they had been disclosed.

453 Further and significantly, the charging conduct and the systems and process failures occurred in the penalty period against a background where contribution fees had been the subject of internal discussion and investigation within Westpac since at least 2017.

454 Moreover in August 2018, Westpac had become aware of instances where customers had been charged contribution fees which had not been disclosed. Westpac had decided to stop charging contribution fees to new and existing clients in August 2018 by which time apparently it was industry practice to no longer charge contribution fees. Further, internal investigations in November and December 2018, and February and May 2019 identified further and continuing instances of contribution fees being improperly charged.

455 Let me turn to the question of remediation.

456 Westpac is currently undertaking a remediation program which includes the repayment of contribution fees with interest, including repayments to some groups of customers irrespective of whether those customers were affected by the charging conduct.

457 Specifically, for those customers for whom it is possible to determine the total amount of contribution fees charged on their accounts, all regular contribution fees and all ad hoc contribution fees that are less than $450 in total, increased to $1500 in the latter stages of the remediation, are to be or will be refunded. Where customers were charged contribution fees of more than $450, increased to $1500 in the latter stages of the remediation, contribution fees will be refunded unless it is established that those fees were properly disclosed. The remediation program, as I have indicated, is not just limited to the charging of contribution fees in the penalty period. It extends from 1 November 2011 to 30 June 2019 for Westpac, and from 1 November 2011 to 30 September 2019 for each of Magnitude and Securitor. The remediation program has also been subject to ongoing independent assessment and assurance by BDO Services Pty Ltd and Westpac has, of course, as to be expected, liaised closely with ASIC in relation to the processes and methodology of the remediation program and its progression.

458 I have been informed that as at 25 October 2021, about $12 million had been refunded to clients as part of this remediation program. And importantly and in favour of the defendants, an accounting provision of some $58 million has been made to cover any necessary payouts. As at 3 March 2022, about $18 million had been refunded to clients. Because the remediation program extends substantially beyond the penalty period and includes the repayment of contribution fees to large groups of customers irrespective of whether those customers were subject to the charging conduct, the remediation figures were not that useful as a proxy either for the loss that the defendants' conduct caused to customers, or that much of a proxy for the profit the defendants earned from the charging conduct. But the broad scope of the remediation program assures me that the defendants have not retained as profit, contribution fees that ought not to have been charged.

459 Let me turn more broadly to the question of mitigation.

460 Dr Ruth Higgins, senior counsel for Westpac and the other defendants, put 8 matters to me in mitigation of penalty, each of which I accept.

461 First, she has expressed contrition on behalf of her clients for the contravening conduct, which I accept is sincere.

462 Second, there is no evidence that the conduct was deliberate. It seems to have been brought about by systems failures.

463 Third, the conduct was not engaged in or sanctioned by senior management of the defendants.

464 Fourth, disclosure failure notifications were given to ASIC under s 912D of the Corporations Act, the detail of which is set out in the statement of agreed facts at [88] to [90]. Further, updates have also been given on a regular basis to ASIC.

465 Fifth, once the defendants identified that improper deductions were occurring they took steps to stop engaging in the conduct, although the steps were not as immediate as they should have been and they should have occurred earlier. Further, as I have mentioned, there has been an extensive remediation program, including for a period much broader than the penalty period.

466 Sixth, the defendants have co-operated with ASIC throughout ASIC's investigation and, of course, during this proceeding.

467 Seventh, the defendants have invested significant time and analysis in seeking to identify and rectify the systemic sources of the failings at the heart of the present problem.

468 Eighth, and as I have already touched on, Magnitude and Securitor no longer operate the businesses the subject of this proceeding. Further, on 30 June 2019, Westpac ceased providing personal financial advice through salaried financial advisors to clients of BT Financial Advice.

469 Of course though, and as I have previously said, this last point does not remove some need for specific deterrence but it certainly lessens that particular factor.

470 In summary, and taking into account all of these matters and in the context of the maximum penalties that could otherwise be imposed for this conduct and having regard, obviously, to the statutory purpose of s 912A(1)(a), in my view a penalty of $2 million for each defendant, totalling $6 million overall, is appropriate in the present case and satisfies the principal object of deterrence.

471 Moreover, for completeness, I should say that in setting these penalties at $2 million each for each defendant, there are no material differences in the position of the individual defendants with respect to the contravening conduct that, in my view, would warrant the imposition of different penalties for each defendant.

472 In those circumstances and for these reasons, I will make the orders and declarations sought.

NSD 1241 of 2021 (general insurance)

473 The present matter concerns the setting of a pecuniary penalty and the making of other necessary orders to deal with the contraventions of the ASIC Act and the Corporations Act by Westpac concerning various insurance policies.

474 The conduct occurred during the period 30 November 2015 to 30 June 2021 and involved two categories of conduct.

475 The first category, which the parties described as the duplicate policy issue, involved Westpac distributing home and contents insurance policies and landlord insurance policies issued by Westpac General Insurance Limited to certain customers, where the customer already held a home and/or contents insurance policy or a landlord insurance policy in respect of the same risk address and for an overlapping period. So, premiums were collected for overlapping periods in respect of both policies, and annual renewal documents were sent out in relation to both policies.

476 Westpac has admitted in connection with the duplicate policy issue in relation to 3,899 customers, contraventions of ss 12DA(1) and 12DB(1)(b), (h) and (i) of the ASIC Act and ss 912A(1)(a), (c), (ca) and (5A) and s 1041H of the Corporations Act.

477 The second category of conduct which the parties described as the non-consent issue, involved Westpac distributing such policies issued by Westpac General Insurance Limited to certain customers who did not consent to being issued with the relevant policy.

478 Westpac has admitted in connection with the non-consent issue, in relation to 329 customers, contraventions of ss 12DA(1), 12DB(1)(b) and (i) and also 12DM(1) of the ASIC Act and ss 912A(1)(c) and 1041H of the Corporations Act.

479 I should say at this point that Mr David Thomas, senior counsel for Westpac, drew my attention to the fact that for the non-consent issue, no contraventions were being admitted or asserted concerning ss 912A(1)(a) or (ca). But that point impressed him more than it impressed me.

480 In terms of the policy issuer, I have made reference to Westpac General Insurance Limited, but I should make two points before proceeding further. First, it is not a party to the present proceeding. Second, it ceased to be a subsidiary of Westpac on 1 July 2021.

481 Now the parties have put before me a joint position concerning penalties and other relief, including declarations and compliance orders.

482 The factual foundation is provided in a statement of agreed facts and admissions tendered for the purposes of s 191 of the Evidence Act. I have also been provided with joint submissions specific to this matter and a broader submission as to the relevant legal principles, none of which are contentious for present purposes.

483 ASIC and Westpac have jointly submitted that pecuniary penalties in a total aggregate amount of $15 million are warranted, comprising:

(a) $13 million for Westpac's contraventions of civil penalty provisions in the ASIC Act in relation to the duplicate policy issue and also the non-consent issue, and

(b) $2 million for Westpac's contraventions of civil penalty provisions in the Corporations Act in relation to the duplicate policy issue for conduct from 13 March 2019.

484 As I have said, declarations and compliance orders are also sought.

485 I would say at the outset that I have no difficulty with the declarations sought, and they will be made.

486 It is necessary to go into more detail however concerning the pecuniary penalty orders and the compliance orders.

487 In this regard, what is sought are:

(a) pecuniary penalty orders pursuant to ss 12GBA as in force before 13 March 2019 and s 12GBB as in force on and from 13 March 2019 of the ASIC Act, with respect to Westpac's contraventions of ss 12DB(1)(b), (h) and (i) and also s 12DM(1) of the ASIC Act;

(b) pecuniary penalty orders pursuant to s 1317G of the Corporations Act, with respect to each of Westpac's contraventions of s 912A(5A) of the Corporations Act; and

(c) compliance orders pursuant to s 1101B(1) of the Corporations Act and s 12GLA(1) of the ASIC Act.

488 Let me go into some of the background.

489 Westpac is the holder of an Australian financial services licence which authorised Westpac to carry on a financial services business to provide the services referred to in the licence, including to deal in a financial product by:

(a) varying or disposing of the financial product which was a general insurance product; and

(b) varying or disposing of a financial product on behalf of another person in respect of general insurance products.

490 As I have said, during the relevant period Westpac General Insurance Limited was the issuer of the policies. In connection with the distribution arrangements between Westpac General Insurance Limited and Westpac in respect of the policies, Westpac General Insurance Limited appointed Westpac to provide services as agent of Westpac General Insurance Limited, including entering into policies, varying or renewing policies and collecting premiums from customers.

491 Westpac's distribution of the policies issued by Westpac General Insurance Limited was authorised by Westpac's AFSL.

492 Let me turn first to the duplicate policy issue. During the relevant period, Westpac caused Westpac General Insurance Limited to issue to the relevant Westpac customers a policy in circumstances where the customer already had a policy in respect of the same risk address and for the same or similar risk.

493 During the relevant period, 8,049 duplicate policies were issued to 3,899 customers.

494 And of the 8,049 duplicate policies issued to those customers:

(a) 1,189 policies had duplicate coverage commencing after 13 March 2019;

(b) approximately 571 customers had duplicate coverage commencing after 13 March 2019;

(c) 1,390 policies had duplicate coverage commencing before 13 March 2019 and ending after 13 March 2019; and

(d) approximately 637 customers had duplicate coverage commencing before 13 March 2019 and ending after 13 March 2019.

495 Those dates are relevant in terms of the way certain contraventions and remedies can be dealt with.

496 Westpac's contravening conduct in relation to the duplicate policy issue arose in the following circumstances in respect of each customer. The material that I am referring to in my reasons comes, of course, from the statement of agreed facts. Apparently the customer went into a branch, or telephoned Westpac, and requested a change to their policy. Due to Westpac's system limitations, the changes requested by these customers required a new policy to be issued which, once a new policy was created, required a cancellation request to be made by the Westpac staff member for the original policy. Repeatedly though, the cancellation request was not made, with the result that the customer ended up with two policies in place, the first being the policy that the customer asked to be changed, and the second being the new policy that was created with the changes that the customer was asking for. Thereafter, Westpac collected premiums for an overlapping period in respect of both policies and sent annual renewal documents in relation to both policies.

497 The limitations in Westpac's systems that led to the creation of new policies without the original policy being cancelled and the failure to detect duplicate policies with no genuine reason for that duplication can be categorised in at least four different ways.

498 First, where a customer requested a change to a policy, Westpac's systems did not permit the change to be made as an amendment to the policy. Rather, a new policy was issued that has been described in the material before me as system-driven churn. It was then up to the relevant staff member responding to the customer's request to cancel the existing policy. Westpac's underwriting manual apparently directed Westpac staff to the circumstances in which an existing policy had to be cancelled before a new policy could be issued.

499 Second, requests to issue new policies processed though the assisted channels were not escalated to the underwriting team of Westpac General Insurance Limited for review and approval. There was therefore no manual review or automatic review of whether a duplicate policy already existed for the same risk address.

500 Third, Westpac staff did not always cancel the policy where required by the underwriting manual. This was a particular issue apparently in the assisted channels where there was not a mandatory process or procedure in place to ensure the cancellation of an existing policy after issuing a new policy for the same risk address. Nor apparently did Westpac's systems trigger any warning requiring a staff member to confirm that they were not creating a duplicate policy without a genuine reason.

501 Fourth, Westpac's system did not detect where a new policy had been created by system-driven churn but the original policy had not been cancelled by Westpac staff. As a consequence, customers came to be charged premiums for both policies issued in respect of the same risk address.

502 The failure to cancel policies, and the lack of controls in place to prevent or detect the duplicate policy issue, was apparently identified by Westpac's group audit during the course of its annual audit in 2017. An audit report apparently was produced on 25 August 2017 but the Westpac group executive risk committee was only first notified of the duplicate policy issue on 17 July 2018.

503 Let me at this point say something about customer remediation.

504 Commencing in March 2018, Westpac General Insurance Limited conducted a remediation process to refund customers affected by the issuance of duplicate policies without a genuine reason. That process included historical and in-force policies. Apparently this process also covered duplicate policies outside the relevant period, and included a cohort of customers with

a period of insurance prior to 30 September 2007. The initial methodology employed was revised in March 2020 to address some deficiencies.

505 Under this remediation process, attempts were made to contact all customers who potentially had a duplicate policy with a view to determine if any of the policies that they still held or had held were duplicate policies that were not issued for a valid reason. Apparently a desktop review was conducted to determine what has been described as the validity of the duplicate policies. If the desktop review failed to identify the validity of the duplicate policy, an attempt was then made to contact the customer to confirm whether the policy was a duplicate policy. If the policy was confirmed as a duplicate policy, then a refund for the overlapping period apparently was provided to the customer together with an interest payment.

506 In relation to the remediation process:

(a) as at 23 September 2021, Westpac had remitted remediation to 4,159 customers totalling $7,630,773.74;

(b) as at 23 September 2021, Westpac had been unable to contact 3,093 customers, but had attributed to them remediation refund entitlements in the total amount of $3,980,810.97 and paid this amount into an unclaimed monies provision;

(c) Westpac processed refunds for 57 customers in the pre-October 2007 cohort using the average refund methodology, but 56 of those customers could not be contacted and the refunds were also applied into an unclaimed monies provision; and

(d) 330 customers who held current duplicate policies could not be contacted and an automated stop was put in place for those customers to ensure no renewal was processed.

507 It would seem that Westpac's remediation process was completed as at 30 September 2021.

508 Let me turn to the contraventions concerning the duplicate policy issue.

509 As a consequence of Westpac's conduct in connection with the supply of the services, and the supply of financial services by Westpac General Insurance Limited, during the relevant period Westpac represented to each customer that:

(a) Westpac had arranged or would arrange for the cancellation of the original policy, which was a representation concerning the existence of a right, within the meaning of s 12DB(1)(i) of the ASIC Act;

(b) the customer had agreed to continue to acquire services provided by the original policy, within the meaning of s 12DB(1)(b);

(c) the customer had a continuing need for the original policy upon the issuance of the new policy, which was a representation within the meaning of s 12DB(1)(h); and

(d) the customer was liable to pay the premiums for the original policy and that Westpac and/or Westpac General Insurance Limited had a continuing right to collect amounts for premiums in respect of the original policy, which were representations concerning the existence of a right within the meaning of s 12DB(1)(i).

510 These representations were false or misleading because:

(a) Westpac did not arrange for the cancellation of the original policy;

(b) each customer had not agreed to the original policy continuing from the time of the change;

(c) each customer did not have a need for the original policy upon the issuance of the new policy; and

(d) having conveyed to the customer that the original policy would be cancelled, Westpac did not have a right to seek and collect the premiums for the original policy.

511 As a consequence, during the relevant period, in relation to each of what has been described as the duplicated policy customers, Westpac committed at least one contravention of each of ss 12DB(1)(b), 12DB(1)(h) and 12DB(1)(i).

512 Further, during the relevant period, Westpac also engaged in conduct that was misleading or deceptive or likely to mislead or deceive and so contravened s 12DA(1) of the ASIC Act and s 1041H of the Corporations Act. These provisions are not civil penalty provisions, and so only declarations are sought.

513 Further, contraventions of s 912A(1) of the Corporations Act have been made out.

514 During the relevant period until 24 May 2021, Westpac failed to do all things necessary to ensure that the services were provided efficiently, honestly and fairly and so contravened s 912A(1)(a), in that Westpac failed to have in place or failed to take adequate steps to ensure that Westpac General Insurance Limited had in place any or adequate:

(a) risk management procedures the objectives of which were to detect breaches of the financial services laws in relation to the issuance of duplicate policies;

(b) risk management procedures the objectives of which were to prevent breaches of the financial services laws in relation to the issuance of duplicate policies; and

(c) risk management procedures the objectives of which were to monitor the success or otherwise of the relevant detective controls and preventative controls.

515 Further, during the relevant period until 24 May 2021, Westpac failed to take reasonable steps to ensure that its representatives complied with financial services laws, and thereby contravened s 912A(1)(ca).

516 The contraventions of ss 912A(1)(a) and (ca) gave rise to contraventions of s 912A(5A), which is of course a civil penalty provision but only coming into force from 13 March 2019.

517 For the duration of the relevant period prior to 13 March 2019, in relation to the contraventions of ss 912A(1)(a) and 912A(1)(ca) those were not civil penalty contraventions and so as I have indicated only declarations are sought.

518 At this point let me turn to the non-consent issue. Westpac's contravening conduct in relation to the non-consent issue arose in the following circumstances in respect of each non-consent customer. The non-consent customer engaged in a conversation apparently with a Westpac or Westpac brand staff member either in a branch or at a call centre during which the customer, either expressly or by implication, demonstrated that the customer did not consent to being issued with a policy. The example was given of some of the affected customers only perhaps requesting a quote. Nevertheless, the customer was subsequently issued with a policy and was sent a pack of documents provided to new customers at or around the time when the new policy was issued. This has been described as the new business welcome pack. The new business welcome pack informed the customer that he or she had been issued with a policy. And documents in the new business welcome pack included statements regarding the premium that would be payable by the customer on either a monthly or an annual basis.

519 In this context, 329 customers:

(a) were issued polices that had been initiated through either a branch or a call centre;

(b) were sent a new business welcome pack which informed the customer that they had been issued with a policy and which contained relevant policy documents with relevant representations as to payment; and

(c) had called apparently to cancel their policy within 90 days of inception.

520 Those 329 customers did not consent to the issuing of a policy.

521 In this respect, during the relevant period Westpac's controls were ineffective in preventing the issue of and detection of what has been described as non-consent polices.

522 Let me say something about the contraventions relevant to the non-consent issue.

523 By sending the new business welcome packs, Westpac represented to each non-consent customer that the customer had agreed to acquire the policy from Westpac in circumstances where they simply had not. These representations each constituted a false or misleading representation in connection with the supply of the services, that a particular person had agreed to acquire services, in contravention of s 12DB(1)(b).

524 Each of the representations was false or misleading because each non-consent customer had not agreed to acquire the policy from Westpac.

525 In addition, in respect of the non-consent customers, by each of the new business welcome packs that were provided to the customer during the period 30 November 2015 to approximately 30 October 2020, Westpac represented to the customer that Westpac was entitled to be paid the amount of premium set out in the new business welcome pack.

526 These entitlement to payment statements each constituted a false or misleading representation, in connection with the supply of services, that each non-consent customer was liable to pay the premiums for the policy set out in the new business welcome pack, and that Westpac had a continuing right to collect amounts for those premiums in respect of the policy, which were representations concerning the existence of a right within the meaning of s 12DB(1)(i).

527 Each of the entitlement to payment statements was false or misleading because Westpac was not entitled to be paid the amount of premium set out in the new business welcome pack because the non-consent customer had not consented to the policy being issued.

528 As a consequence of these matters, during the relevant period, with respect to each of the non-consent customers, Westpac committed at least one contravention of each of ss 12DB(1)(b) and 12DB(1)(i).

529 Further, during the relevant period, Westpac also engaged in conduct that was misleading or deceptive or likely to mislead or deceive, and so contravened s 12DA(1) and s 1041H. Only declarations of these contraventions are sought.

530 Let me say something about s 12DM(1).

531 In my view, contraventions of s 12DM(1) have also been established. Westpac asserted a right to payment which was unsolicited.

532 The entitlement to payment statements each constituted an assertion by Westpac to a right to payment from the non-consent customer for a policy which was issued without any request made by the person or on the person's behalf. By making the entitlement to payment statements, Westpac asserted a right to payment from another person for unsolicited financial services, in contravention of s 12DM(1).

533 Finally, as a consequence of the contraventions of s 12DB and 12DM of the ASIC Act, which are of course financial services laws, Westpac contravened s 912A(1)(c) of the Corporations Act.

534 Let me turn to the assessment of penalty. The parties have made extensive submissions concerning various factors, but let me focus on the following. And for the moment, let me focus on the duplicate policy issue.

535 First, I accept that Westpac's conduct was not deliberate.

536 It was the result of inadequate risk management and systems failures, including inadequate or absent detective, preventative and monitoring controls, mandatory processes and procedures, appropriate technology systems, recordkeeping and staff training. Each of those subject areas were demonstrated to be inadequate and quite deficient in the circumstances.

537 Moreover, Westpac knew of the duplicate policy issue from at least 2015 but did not implement effective steps to address the issue until, on the material, it seems May 2021. This was unsatisfactory to say the least.

538 In elaboration of that observation, let me say this. Westpac did not take action to rectify its failures until March 2018 and such action was not rated as effective until at least May 2021, despite individuals holding senior roles having been provided with copies of the branch issue register identifying complaints from customers regarding the duplicate policy issue since at least December 2015, and the general insurance audit identifying the duplicate policy issue in August 2017.

539 Further, the monthly reporting process, being the primary detective control, was apparently suspended between November 2019 and November 2020. Further detail about that matter is set out in the statement of agreed facts.

540 In my view, Westpac's approach to prevention was unsatisfactory, and I will not elaborate further on that matter for present purposes. That is the first matter that I wanted to raise.

541 Second, the duplicate policy issue was partly the result of the failure of Westpac staff, who were not very senior, to cancel an original policy, and partly the result of a lack of preventative, monitoring and detective controls, which were matters for which clearly senior officers of Westpac were responsible.

542 Individuals who held senior roles within Westpac were aware that complaints by customers were being received in connection with the duplicate policy issue.

543 Third, Westpac's records do not allow it to determine the total premiums collected in connection with duplicate policies.

544 Now the Westpac customer remediation program has returned $7,630,773.74 to 4,159 customers. Westpac has been unable to contact 3,093 customers, but has attributed to them remediation refund entitlements in the total amount of $3,980,810.97. There is an unknown number of customers from the cohort of relevant customers who had one or more duplicate policies without a genuine reason, but due to the limitations of its systems Westpac is not able to identify whether those customer's premiums have been refunded in full, nor can it confirm if those customers have received interest payments.

545 But the information available to Westpac records refunds and interest in relation to policies held by the customers relevant to the duplicate policy issue which totalled at least $7,373,930.25 of refunds and $608,367.51 of interest.

546 I should note that I accept that the nature of the contraventions means that the amount of premiums that are remediated effectively reflect the profit to Westpac derived from the conduct prior to remediation. At the least I am prepared to accept that that is a suitable proxy and I have said so in other analogous cases in the last few days.

547 Fourth, Westpac's compliance systems have been improved since these contraventions, but Westpac's systems should have been improved much earlier when Westpac became aware of issues with duplicate policies. Further, Westpac should have implemented risk controls as it

updated its systems to ensure that it was not possible to issue duplicate policies for no genuine reason and that, in the transitional period, any duplicate policies were detected and cancelled in a timely fashion. Further, the preventative control system as recently as May 2021 apparently did not prevent all duplicate policies.

548 Fifth, I should note various mitigating factors in favour of Westpac in terms of the duplicate policy issue:

(a) Westpac voluntarily disclosed certain breaches to ASIC in 2018 and since that time has fully assisted ASIC in its investigation.

(b) Further, Westpac has admitted the contraventions in a timely fashion.

(c) Further, Westpac has comprehensively remediated its customers.

549 Let me turn to the non-consent issue and just focus on the following points.

550 First, the non-consent issue was partly the result of the failure of non-senior staff to appropriately create policies, or monitor policies which had been created, but it was also partly the result of a lack of preventative, monitoring and detective controls which as I have said in the duplicate policy question and so too here were matters for which senior officers of Westpac were responsible.

551 Individuals who held senior roles within Westpac were aware from no later than July 2016 apparently that customer complaints were being received in connection with the non-consent issue.

552 Second, it is well apparent that Westpac's compliance systems were not adequate to prevent the contraventions.

553 Third, for the 329 non-consent customers Westpac refunded premiums paid totalling at least $188,503.76. It can therefore be assumed that Westpac inappropriately charged premiums in at least that amount.

554 Fourth, similar mitigation factors apply as for the duplication question, save that the non-consent issue was identified by ASIC following a production of material by Westpac on 12 February 2021. Westpac provided further information to ASIC about the non-consent issue in response to a 912C notice issued on 6 April 2021 and co-operated thereafter. It seems on the material that it co-operated more comprehensively with ASIC on the duplication issue than perhaps on the non-consent issue, although I do not need to elaborate further about that.

555 Now let me make some general points applicable to both the duplication issue and the non-consent issue. As I have indicated, in aggregate the parties have put to me a figure of $15 million, $13 million for the ASIC Act contraventions and $2 million for the Corporations Act contraventions.

556 First, I have considered the theoretical maximum for the admitted contraventions, but it is not a useful yard-stick in the present case, given that the bare arithmetic throws up some billions of dollars.

557 Second, in terms of the contraventions under the ASIC Act, in my view the duplicate policy issue should be seen as one course of conduct, and the non-consent issue should be seen as one course of conduct. On this aspect, $10.5 million is appropriate for the duplicate policy issue, and $2.5 million is appropriate for the non-consent issue. So that for the ASIC Act contraventions, $13 million is the appropriate aggregate amount. And for the contraventions of s 912A(5A) of the Corporations Act concerning the duplicate policy issue, $2 million is an appropriate amount.

558 Third, I have applied the totality principle both in considering the $10.5 million for the ASIC Act contraventions concerning the duplicate policy issue, together with the $2 million for the Corporations Act contraventions concerning the duplicate policy issue. And I have also looked at a second dimension to the totality principle overall in terms of aggregating the $13 million for all ASIC Act contraventions together with $2 million for the Corporations Act contraventions.

559 Fourth, and most importantly, I consider that the paramount objective of deterrence, in the 2 dimensions of specific deterrence and general deterrence, will be met by imposing an aggregate penalty of $15 million. And in saying that I have, of course, had regard to findings against Westpac and its subsidiaries in other cases concerning past contraventions of the statutory provisions, outside the 6 proceedings before me.

560 In summary then, $15 million in aggregate is to be imposed as the pecuniary penalty, particularly where I will also make compliance orders. Now I had an interesting discussion with counsel this morning on their scope. But I do not need to linger further on this aspect. The compliance orders appear to me to be adequate. Indeed, they go beyond the scope of the duplicate policy issue and the non-consent issue.

561 I will make declarations and orders consistent with these reasons.

Conclusion

562 Let me address four final matters.

563 First, before embarking on the hearings I assured myself that there had been a prima facie calibration of the penalties sought in any one of the six proceedings against the penalties sought in any one or more of the other proceedings. This was also confirmed from time to time in the running of the proceedings by ASIC's varying senior counsel.

564 Second, the parties before me agreed that whatever the sequencing of the hearings and their timing of disposition, no finding in one proceeding should be used as a prior finding of past misconduct in any other proceeding.

565 Third, it should be obvious given how I sequenced and disposed of the matters that although I applied the totality principle in the context of each particular proceeding, I did not apply any meta-totality principle over all proceedings. To do otherwise was neither practical nor principled.

566 Fourth, although the cases before me did not involve any forensic contest requiring my resolution, it should be appreciated that the extensive statements of agreed facts, and in some cases voluminous annexures, were the end-point of lengthy investigations both by ASIC and Westpac, the synthesis of the substantial material gathered, and negotiation between very well resourced parties, one promoting the public interest and the other promoting its private interest. Given this competing tension that ultimately generated the comprehensive factual narratives in each case, one can be confident that the essential factual propositions agreed to were well informed and comprehensive, rather than skewed and incomplete, even accepting that there may have been an element of compromise on both sides.

567 In summary, I have sought to succinctly explain my disposition of the six proceedings before me. I should conclude by acknowledging that I was only able to deal with these cases in the fashion that I indicated at the outset of these reasons because of the notable efficiency with which they were prepared and presented by the teams of counsel and instructing solicitors involved.

I certify that the preceding five hundred and sixty-seven (567) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach.

Associate:

Dated: 6 May 2022

SCHEDULE OF PARTIES

VID 707 of 2021

Respondents

Second Respondent	SECURITOR FINANCIAL GROUP PTY LIMITED (ACN 009 189 495)
Third Respondent	MAGNITUDE GROUP PTY LTD (ACN 086 266 202)
Fourth Respondent	ADVANCE ASSET MANAGEMENT LIMITED (ACN 002 538 329)
Fifth Respondent	ASGARD CAPITAL MANAGEMENT LIMITED (ACN 009 279 592)
Sixth Respondent	BT FUNDS MANAGEMENT LIMITED (ACN 002 916 458)
Seventh Respondent	BT FUNDS MANAGEMENT NO. 2 LIMITED (ACN 000 727 659)
Eighth Respondent	BT PORTFOLIO SERVICES LIMITED (ACN 095 055 208)