

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd [2014] FCA 1387

Citation: Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd [2014] FCA 1387

Parties: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v MONARCH FX GROUP PTY LTD (ACN 155 691 786) and JAMES SONNY QUINTEN HUNTER**

File number: VID 564 of 2014

Judge: **GORDON J**

Date of judgment: 17 December 2014

Catchwords: **CORPORATIONS** – contravention of the *Corporations Act 2001* (Cth) – carrying on a financial services business without holding an Australian financial services licence

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth)
Corporations Act 2001 (Cth)
Evidence Act 1995 (Cth)
Federal Court of Australia Act 1976 (Cth)
Superannuation Industry (Supervision) Act 1993 (Cth)

Cases cited: *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378
Australian Competition and Consumer Commission v Powerballwin.com.au Pty Ltd [2010] FCA 378
Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW) [2014] FCA 1135
Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2) [2005] NSWSC 267
Australian Securities and Investments Commission v Adler [2002] NSWSC 483
Australian Securities and Investments Commission v Axis International Management Pty Ltd (2009) 178 FCR 485
Australian Securities and Investments Commission v Cyclone Magnetic Engines Inc [2008] QSC 158
Australian Securities and Investments Commission v

Lindberg [2012] VSC 332
Briginshaw v Briginshaw (1938) 60 CLR 336
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421
In the matter of Melinda Scott and Roach Graham Scott Pty Ltd [2012] NSWSC 1643
In the matter of Vault Market Pty Ltd [2014] NSWSC 1641
Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs [2013] NSWSC 106
Re PFS Wholesale Mortgage Corporation Pty Ltd; Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd (2006) 57 ACSR 553
Rich v Australian Securities and Investments Commission (2004) 220 CLR 129
Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2) (1993) 41 FCR 89
Yorke v Lucas (1985) 158 CLR 661

Date of hearing:	21 November and 5 December 2014
Date of last submissions:	8 December 2014
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	106
Counsel for the Plaintiff:	Mr CM Archibald
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
The Defendants:	Appeared in person

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 564 of 2014

IN THE MATTER OF MONARCH FX GROUP PTY LTD (ACN 155 691 786)

**BETWEEN: AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION
Plaintiff**

**AND: MONARCH FX GROUP PTY LTD (ACN 155 691 786)
First Defendant**

**JAMES SONNY QUINTEN HUNTER
Second Defendant**

JUDGE: GORDON J

DATE OF ORDER: 17 DECEMBER 2014

WHERE MADE: MELBOURNE

THE COURT DECLARES THAT:

1. Between 19 November 2012 and 2 September 2014, the first defendant, by:
 - (a) Providing a service where it had the discretion and power to execute trades (such as entering into foreign exchange contracts) using a client's funds without obtaining instructions for each and every trade from the client, (described as managed discretionary account services or MDA services); and
 - (b) Making recommendations in relation to superannuation products, contravened:
 - (c) Section 911A of the *Corporations Act 2001* (Cth) (**Corporations Act**), by carrying on a financial services business in this jurisdiction without holding an Australian financial services licence (**AFSL**) covering the provision of the financial services; and
 - (d) Section 911B of the *Corporations Act*, by providing a financial service in this jurisdiction on behalf of another person who carried on a financial services business, in circumstances where:

- (i) That other person did not hold an AFSL covering the provision of the service; or
- (ii) That other person held an AFSL covering the provision of the service but the first defendant was not an authorised representative of that other person for the provision of that service.

AND THE COURT ORDERS THAT:

2. Pursuant to s 1101B of the Corporations Act, the first defendant is restrained for a period of 4 years commencing on the date of the making of this order, whether by itself, its servants, agents, and employees or otherwise from carrying on, either directly or indirectly, a financial services business within the meaning of s 761A of the Corporations Act.
3. Pursuant to s 1324(1)(e) of the Corporations Act, the second defendant is restrained for a period of 4 years commencing on the date of the making of this order, whether by himself, his servants, agents, and employees or otherwise from carrying on, either directly or indirectly, a financial services business within the meaning of s 761A of the Corporations Act.
4. No order as to costs.

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

**IN THE FEDERAL COURT OF AUSTRALIA
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VID 564 of 2014

IN THE MATTER OF MONARCH FX GROUP PTY LTD (ACN 155 691 786)

**BETWEEN: AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION
Plaintiff**

**AND: MONARCH FX GROUP PTY LTD (ACN 155 691 786)
First Defendant**

**JAMES SONNY QUINTEN HUNTER
Second Defendant**

JUDGE: GORDON J

DATE: 17 DECEMBER 2014

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1. INTRODUCTION

- 1 The Australian Securities and Investments Commission (**ASIC**) conducted an investigation pursuant to s 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) into contraventions by Monarch FX Group Pty Ltd (ACN 155 691 786) (**Monarch FX**) and its officers, agents, employees and / or representatives, of provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the ASIC Act.
- 2 The second defendant, **Mr Hunter**, was the sole director of Monarch FX from 1 June 2012 until 5 December 2013, and is now the General Manager. His mother, Ms Amanda Hann, was the sole director from 14 February 2012, when the company was registered, to 1 June 2012, when Mr Hunter was appointed. Ms Hann became the sole director again on 5 December 2013 and remains in that position. Ms Hann has been the sole shareholder and secretary since Monarch FX was first registered.

3 At an interlocutory hearing on 10 October 2014, Mr Hunter advised the Court that he had
“the majority of the running of the company” and that Ms Hann had limited involvement.
At that hearing, the defendants agreed to the imposition of interim restraining orders.

4 The final hearing was listed for 21 November 2014. Before that hearing, the Court was
informed that ASIC and the defendants had reached an agreement whereby certain
declarations and restraining orders (for a period of four years) would be sought by consent
with no costs order. The Court then received a written submission from ASIC and a further
written submission filed on behalf of the defendants. The defendants were not represented.

5 The final hearing was adjourned to enable pro bono counsel, Ms C Klemis, to provide advice
to the defendants on the meaning of written submissions filed by ASIC and the effect that the
orders and declarations sought might have on Monarch FX, Mr Hunter and Ms Hann.
The Court is grateful to the pro bono counsel for her assistance. After receiving pro-bono
assistance, Mr Hunter provided the Court with an additional written submission.

6 At the resumed hearing on 5 December 2014, Monarch FX and Mr Hunter advised the Court
that they neither consented to nor opposed the declarations and orders sought by ASIC.
The Court was also informed that the defendants did not seek to rely on any written
submission or affidavit filed on their behalf. ASIC therefore had to establish that the Court
should make the declarations and orders it sought.

7 These reasons for judgment will consider the applicable legislation, the facts and then turn to
consider the declarations and orders sought by ASIC.

2. LEGISLATION

8 ASIC relied primarily upon four provisions of the Corporations Act – ss 911A, 911B, 1101B
and 1324. Section 911A of the Corporations Act relevantly provides:

- (1) Subject to this section, a person who carries on a *financial services business*
in this jurisdiction must hold an Australian financial services licence
covering the provision of the financial services.

...

(Emphasis added.)

9 Section 911B then relevantly provides:

(1) A person (the **provider**) must only provide a financial service in this jurisdiction on behalf of another person (the **principal**) who carries on a *financial services business* if one or more of the following paragraphs apply:

...

(b) these conditions are satisfied:

(i) the principal holds an Australian financial services licence covering the provision of the service; and

(ii) the provider is an authorised representative of the principal; and

(iii) the authorisation covers the provision of the service by the provider; and

(iv) in the case of a provider who is an employee or director of any other person (the **second principal**) who carries on a financial services business, or of a related body corporate of such a second principal – if the provider provides any financial services in this jurisdiction on behalf of the second principal, the provider does so as an authorised representative of the second principal;

...

(d) the provider holds their own Australian financial services licence covering the provision of the service;

10 “Financial services business” is defined to mean “a business of providing financial services”: ss 9 and 761A of the Corporations Act. Section 766A provides that a person provides a financial service if they, amongst other things, provide financial product advice, or deal in a financial product (see also s 761C in relation to “carrying on a financial services business”).

11 Financial product advice has the meaning set out in s 766B of the Corporations Act, and includes a recommendation that is intended to influence a person making a decision in relation to a particular financial product or a 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.

12 A financial product includes a facility through which a person makes a financial investment: s 763A(1)(a) of the Corporations Act. A particular facility that is of a kind through which people commonly make financial investments, manage financial risks or make non-cash payments is a financial product even if that facility is acquired by a particular person for

some other purpose: s 763A(2). A facility includes an arrangement or a term of an arrangement: s 762C. “Arrangement” has a broad definition, and includes a contract, agreement, understanding, scheme or other arrangement whether formal or informal: see ss 761A and 761B of the Corporations Act.

13 A financial product also includes a superannuation interest (that is, a beneficial interest in a superannuation entity as defined in the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**)): s 764A(1)(g) of the Corporations Act and s 10 of the SIS Act.

14 Section 763B of the Corporations Act provides that a person (the investor) “makes a financial investment”, if:

- (a) the investor gives money or money’s worth (the **contribution**) to another person and any of the following apply:
 - (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
 - (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
 - (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
- (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

15 A person deals in a financial product if they apply for, acquire, issue, vary or dispose of a financial product, or arrange for another person to engage in that conduct, among other things: subs 766C(1) and (2).

16 Section 1324 of the Corporations Act deals with injunctions. ASIC sought an injunction under s 1324(1) restraining Monarch FX and Mr Hunter from carrying on a financial services business. Section 1324(1) provides:

- (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
 - (a) a contravention of this Act; or
 - (b) attempting to contravene this Act; or
 - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or

- (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
- (f) conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

17 As set out above, s 1324(1)(e) provides for an injunction to be made against a person who is a party to or knowingly concerned in a contravention by another person. A person will fall within the scope of that provision if they were an intentional participant with knowledge of the essential matters making up the contravention: *Yorke v Lucas* (1985) 158 CLR 661.

18 In addition, s 79 of the Corporations Act provides, in part, that a person is involved in a contravention where that person:

- (a) has aided, abetted, counselled or procured the contravention; or
- ...
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- ...

19 ASIC relied on s 1101B of the Corporations Act as providing a power for the Court to make orders restraining the defendants. Section 1101B 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; or
 - (ii) has contravened a condition of an Australian market licence, Australian CS facility licence, Australian derivative trade repository licence or Australian financial services licence; or

...

However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person.

...

- (4) Without limiting subsection (1), some examples of orders the Court may make under subsection (1) include:
- (a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene:
 - (i) a provision or provisions of this Chapter; or
 - (ii) a provision or provisions of any other law relating to dealing in financial products or providing financial services; or

...

20 Orders under ss 1324 and 1101B have been described as financial services disqualification orders: *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106 at [58].

3. FACTS

3.1 Introduction

21 In support of its application, ASIC filed a submission for final relief. That submission referred to facts and matters referred to in, or annexed to, affidavits filed by ASIC. ASIC also filed and served additional documents: a summary of ASIC's case by reference to the evidence, a summary of the contraventions, a supplementary submission on superannuation interests and a further submission on the use of transcripts of examinations conducted under s 19 of the ASIC Act.

22 As noted earlier, at the resumed hearing, the defendants advised the Court that they did not oppose or consent to the proposed declarations or orders. Further they did not seek to rely on any affidavit or written submission.

23 Before turning to the facts disclosed by the evidence, it is necessary to address the question of the admissibility of the transcripts of certain s 19 examinations.

3.2 Examinations and transcripts

24 Earlier in 2014, Mr Hunter, Mr Anthony Best (formerly a Business Development Partner of Vantage FX Pty Ltd) and Mr Dean Hyde (Senior Sales Trader of AxiCorp Financial Services

Pty Ltd) were examined pursuant to s 19 of the ASIC Act. In its submissions, ASIC sought to rely on these transcripts against Monarch FX and Mr Hunter. It is necessary to address the admissibility of each in turn.

3.2.1 *Mr Hunter*

- 25 On 17 April 2014, Mr Hunter was examined pursuant to s 19 of the ASIC Act. Mr Hunter was represented by a lawyer at that examination. Section 76(1) of the ASIC Act provides that a statement that a person makes at an examination of the person is admissible evidence against the person in a proceeding, except in certain circumstances, such as if the operation of s 68(3) renders the statement inadmissible.
- 26 Section 68(3) applies where, before making an oral statement giving information, a person other than a body corporate claims that the statement might tend to incriminate the person or make the person liable to a penalty, and the statement might in fact tend to incriminate the person or make the person so liable: s 68(2) of the ASIC Act. Where such a claim is made, the statement is not admissible *against the person* being examined in subsequent criminal proceedings or proceedings to impose a penalty, other than in proceedings in respect of the falsity of the statement: s 68(3) of the ASIC Act. In the current proceeding, declaratory and injunctive relief is sought. The financial services disqualification orders have a punitive function and are to be imposed having regard to the objects of personal and general deterrence: *Re Idylic Solutions* at [105]. This proceeding can be considered as one in which a penalty is sought to be imposed.
- 27 Is Mr Hunter's transcript admissible against Monarch FX? The answer to that question is yes. Mr Hunter was the director of Monarch FX from 1 June 2012 to 5 December 2013, and is now the General Manager. His mother is currently director and shareholder. At all times from at least May 2012, Mr Hunter had general and effective responsibility for all the operations of Monarch FX including its conduct which is the subject of this proceeding. As recorded above, Mr Hunter advised the Court that he has the majority of the running of Monarch FX, and Ms Hann has limited involvement. There was nothing to suggest that Mr Hunter was not authorised to give answers on behalf of Monarch FX. And, of course, any claim of privilege by Mr Hunter during the examination was not available to Monarch FX: ss 68(2) and 68(3) of the ASIC Act.
- 28 Is the transcript admissible against Mr Hunter? There are two answers. To the extent that Mr Hunter did not claim privilege, the transcript is admissible against Mr Hunter: s 76(1) of

the ASIC Act. Where he made a claim for privilege, the transcript is not admissible under s 68(3) of the ASIC Act. It is not admissible because this proceeding, seeking a restraining order under s 1101B and / or s 1324, is a proceeding for the imposition of a penalty. I reject ASIC's contrary submission. A financial services disqualification order under s 1101B and / or s 1324 may serve protective and remedial functions (*In the matter of Vault Market Pty Ltd* [2014] NSWSC 1641 at [93]) but it is in the nature of a penalty: *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [37]; *In the matter of Melinda Scott and Roach Graham Scott Pty Ltd* [2012] NSWSC 1643 at [18]-[21]. Adapting what the High Court said in *Rich*:

[The] consequences, whether taken separately or in combination, when inflicted on account of a defendant's wrongdoing, are penalties. That the penalty is not exacted in the form of a money payment does not deny that conclusion. ... [E]quity's concern with penalties was never confined to *pecuniary* penalties. If exposure to loss of office or exposure to dismissal from a police force is exposure to penalty, exposure to a disqualification order is exposure to a penalty.

(Original emphasis)

29 Section 1349(4) of the Corporations Act, introduced after the decision in *Rich*, does not disturb that conclusion. That section lists specific proceedings for the imposition of a penalty to which s 68(3) of the ASIC Act does not apply. The list does not include proceedings for financial services disqualification order under s 1101B and / or s 1324. The submission that a financial services disqualification order is analogous to an order banning a person from management of a corporation is insufficient to exclude the proceedings under ss 1101B and 1324 of the Corporations Act from the operation of s 68(3) of the ASIC Act.

3.2.2 *Other transcripts*

30 ASIC also relied upon the transcripts of the examinations of Mr Best and Mr Hyde. The transcripts were not signed, but were annexed to the affidavit of Mr Chris Kotsopoulos, one of the ASIC investigators, who was present at the examinations. Mr Kotsopoulos made his affidavit from information within his own knowledge and from an examination of the records of, or otherwise in the possession of ASIC, and swore in that affidavit that the transcripts were copies of the transcript of the examination.

31 These transcripts are admissible in the proceeding generally as against Monarch FX and Mr Hunter (being the persons other than the examinee), as no party required that the examinees be called as a witness in the proceeding: see *Re PFS Wholesale Mortgage*

Corporation Pty Ltd; Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd (2006) 57 ACSR 553 at [93], and s 77(b) of the ASIC Act; cf *Australian Securities and Investments Commission v Cyclone Magnetic Engines Inc* [2008] QSC 158 at [12].

32 The weight to be attached to statements contained in the transcripts, as against a person other than the examinee, is to be determined in accordance with s 78 of the ASIC Act. The examinations of Mr Best and Mr Hyde both took place on 8 September 2014, no more than two and a half years after the conduct the subject of this proceeding begun. On the material before the Court, there is no reason to consider that either Mr Best or Mr Hyde would have had any reason for concealing or misrepresenting a material matter. There is no other circumstance from which it is reasonable to draw an inference that the statements made by Mr Best or Mr Hyde were anything other than accurate. At this stage, it is worth repeating that Mr Hunter withdrew all written submissions that had been made on behalf of the defendants, so the only written material before the Court was filed by ASIC, and no witnesses were examined.

3.3 Evidence as to conversations

33 As noted earlier, Mr Kotsopoulos, one of the investigators from ASIC, swore an affidavit in this proceeding. In that affidavit, he deposed to matters of which he had been informed by a former employee of Monarch FX, Mr Tim Fraser, and by certain identified Monarch FX clients. ASIC sought to rely on the representations made by those people.

3.3.1 Conversation with Mr Fraser

34 The relevant paragraph of the affidavit in relation to Mr Fraser read as follows:

In March 2014, I spoke with Tim Fraser, who was employed by Monarch FX between July 2012 and August 2013. Mr Fraser informed me that:

- (a) he was initially employed by Monarch FX as a Consultant, but his job changed after a few months to Business Development Manager. Mr Hunter told him that his job was to get people to invest their money in membership agreements with Monarch FX which provided trade signals indicating when to buy and when to sell foreign exchange currency;
- (b) he and other sales staff were provided with approximately 50 client leads every Monday. They were told to contact these leads to try and sign them up for a membership with Monarch FX;
- (c) he was given a sales script and other documents by Quinten Hunter

to read when talking to clients. ...

- (d) if the clients did not have access to funds to pay for the membership agreement, he was told by Mr Hunter to recommend that they set up a self-managed superannuation fund (SMSF) and they were referred to a company called Breakaway Finance Group Pty Ltd to set up their SMSF;
- (e) he followed Mr Hunter's instructions and referred clients to Breakaway Finance Group Pty Ltd in order to set up their SMSF;
- (f) the majority of clients invested through a SMSF;
- (g) potential new clients were provided with login details to the Monarch FX website Forex trade results so that they could review certain published data;
- (h) if a client was interested in purchasing a membership agreement with Monarch FX, they would be required to pay a deposit of up to \$500;
- (i) once the deposit was paid, a welcome email and a membership agreement would be sent to that client by the office administrator of Monarch FX;
- (j) once the client returned the Membership Agreement and paid the balance of the membership fee, the client's details would be referred to either Vantage FX or Avatrade (who was the trader for a brief period before Vantage FX) and a trading account would be set up for that client; and
- (k) once the trading account was activated and funds were deposited, Monarch FX would link the trade signals to the client's trading account and trading would commence.

35 Mr Fraser was not called as a witness. Are the statements admissible against the defendants, and if so, on what basis? Section 64 of the *Evidence Act 1995* (Cth) (the **Evidence Act**) applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact. Section 64(2) provides that the hearsay rule (contained in s 59) does not apply to evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence. There is no suggestion that Mr Fraser would have been unavailable to give evidence in this proceeding. However, in the circumstances of this case, having regard to the manner in which parties reached agreement and the defendants neither consenting to nor opposing the application, it would cause undue expense and undue delay, and would not have been reasonably practicable to call him. Moreover, there is no

suggestion that as an employee of Monarch FX, Mr Fraser's knowledge of the facts was not personal knowledge, based on something that he saw, heard or otherwise perceived during the course of his employment with Monarch FX: s 62 of the Evidence Act.

36 Section 67 of the Evidence Act provides that s 64(2) does not apply to that evidence unless the party seeking to adduce it has given reasonable notice in writing to other parties of their intention to adduce the evidence. In the present case, a form of notice was given when the defendants were served with the ASIC's submissions for final relief, which were cross referenced to those representations in the affidavit. That form of notice did not however comply with subs 67(2) and (3) of the Evidence Act. That is not necessarily fatal. Even if notice is not given, the Court may on the application of a party direct that s 64(2) applies despite ASIC's failure to give that notice: s 67(4). Should the Court make such a direction? Section 192 of the Evidence Act provides that, in considering that question, the Court is to consider the amount of time that would be saved or wasted if the direction were not given, fairness to the parties and witness, the importance of the evidence, the nature of the proceeding and whether it is possible to grant an adjournment or make another order or give a direction in relation to the evidence.

37 In the present case, the evidence has significance. It comprises statements made by a former employee of Monarch FX to an ASIC investigator about the practices of Monarch FX, and instructions given to him by Mr Hunter. Monarch FX and Mr Hunter did not seek to oppose the application, or any evidence that was led by ASIC. Given the impact of making the direction on the length of the hearing, fairness to the parties and witness, the importance of the evidence, the nature of the proceeding, and the other courses that are open to me, I direct that s 64(2) applies to the representations set out at [34] above, and those representations are admissible against both Monarch FX and Mr Hunter.

3.3.2 *Conversations with Monarch FX clients*

38 Mr Kotsopoulos also provided sworn evidence that he spoke with three Monarch FX clients in relation to the execution of trades on their accounts. The relevant paragraphs of the affidavit read as follows:

In September 2014, I spoke with 3 Monarch FX Clients in relation to the execution of trades on their AxiCorp accounts. The Monarch FX Clients that I spoke with listed in rows 2 and 48, 54 and 82 of the AxiCorp Client Summary (Confidential Annexure "CJK36"). During these discussions:

- (a) all of the Monarch FX Clients told me that:

- i. Monarch FX executed trades on their accounts;
 - ii. Monarch FX never referred to them for instructions before executing the trades on their accounts;
 - iii. they never executed trades on their own trading accounts; and
 - iv. their membership agreements with Monarch FX have not yet expired.
- (b) the Monarch FX Clients listed in rows 2 and 48, and 82 told me that:
- i. the person that they spoke to at Monarch recommended that they:
 - 1. access their existing superannuation fund monies and set up an SMSF;
 - 2. use the money in the SMSF to:
 - a. pay for Monarch FX's membership fee; and
 - b. deposit funds into their trading accounts in order for Monarch to automatically trade on foreign exchange contracts on their behalf.
 - ii. they set up an SMSF in accordance with Monarch FX's recommendation.
- (c) the Monarch FX Client listed in row 82 of the AxiCorp Client Summary also told me that:
- i. he had been contacted by a person from Forex TG in the last month, and that person told him that Monarch FX was “pulling clients” from AxiCorp and those clients were opening trading accounts with Forex TG;
 - ii. he had recently opened a trading account with Forex TG but he had not deposited any funds into that account;
 - iii. he was still waiting on funds to be received from his trading account with AxiCorp;
 - iv. he understood from his discussions with Forex TG that, if he opened a trading account with Forex TG, Monarch FX would continue to provide trade signals on that account.

39 Similar considerations as those outlined in Section 3.3.1 above apply. The clients were not called to give evidence, and there is no suggestion that they would have been unavailable to do so. The representations were similarly made to the ASIC investigator. The evidence has

significance. It outlines what happened to the accounts of those clients, the clients' dealings with Monarch FX, what the clients did in response to those dealings, and, in one case, dealings with Forex TG. There is no suggestion that the clients' knowledge, as clients of Monarch FX, was not personal knowledge based on what they had seen, heard or otherwise perceived during their interactions with Monarch FX: s 62 of the Evidence Act. In the circumstances of this case, it was not reasonably practicable to call the witnesses. Again, informal notice was given of ASIC's intention to adduce the evidence. Monarch FX and Mr Hunter did not seek to oppose the application or the evidence that was led by ASIC. In the circumstances, and taking into consideration the matters outlined in Section 3.3.1 above, I direct that s 64(2) applies to the representations set out at [38] above.

3.4 Monarch FX and Mr Hunter

40 Unless otherwise specified, the following facts in this Section and Sections 3.5 to 3.7 below are admissible against each defendant.

41 Since at least around May 2012, Monarch FX has conducted a business of promoting and providing foreign exchange trading signals and executing those signals via an automated trading system. Monarch FX had about 150-200 clients. Monarch FX carried on its business from Victoria, and mainly from Melbourne. Since Monarch FX was formed, its registered address has been at one of two locations in Collins Street, Melbourne, Victoria. "Monarch FX Group Services Agreements" that were in evidence also recorded Collins Street, Melbourne as the company's address. An extract of ASIC's database in relation to Australian Financial Services Representatives records that Monarch FX had provided an address on One Tree Hill Road, Ferny Creek, Victoria as its principal business address. Further, a document located on Monarch FX's hard drive by ASIC included a sales script that script recorded "Monarch FX is a fully owned Australian Company, operated out of Melbourne".

42 Monarch FX entered into membership agreements with clients, for periods of several years, to provide foreign exchange signals and to automatically have those trade signals placed on client accounts. Examples of those membership agreements were in evidence. These agreements will be considered further in Section 3.6 below.

43 As noted above, Mr Hunter was the director of Monarch FX from 1 June 2012 to 5 December 2013, and is now the General Manager. His mother is currently director and shareholder. At all times from at least May 2012, Mr Hunter had general and effective responsibility for

all the operations of Monarch FX including its conduct which is the subject of this proceeding. As recorded above, Mr Hunter advised the Court that he has the majority of the running of Monarch FX, and Ms Hann has limited involvement.

44 It is admissible against Monarch FX only that Monarch FX had between 3-7 staff from June 2012 to November 2013, who reported to Mr Hunter, but now the only employees are Mr Hunter and his mother.

3.5 AFSL authorisations

45 Monarch FX and Mr Hunter have never held an AFSL. Monarch FX and Mr Hunter were registered as authorised representatives of the following AFSL holders in turn:

1. Audrn Financial Group Pty Ltd (**Audrn**) from 21 May 2012 (in the case of Monarch FX) and 16 August 2012 (in the case of Mr Hunter) to 28 February 2013 – the authorisation was limited to “Apply for, acquire, dispose of fin. products on another’s behalf; Issue or vary a financial product; Arrange for a person to deal in a financial product; Provide general financial product advice only”. Audrn’s AFSL states that it shall not provide managed discretionary account services except when operating a registered scheme. Managed discretionary account services (**MDA services**) are arrangements which involve an operator managing a portfolio of assets for a retail client on an individual basis. MDA services may involve dealing in financial products and / or a managed investment scheme: *ASIC Regulatory Guide 179*;
2. Avestra Capital Pty Ltd (**Avestra**) from 1 February 2013 (in the case of Monarch FX) and 1 March 2013 (in the case of Mr Hunter) to 15 April 2014 - the authorisation was limited to “Apply for, acquire, dispose of fin. products on another’s behalf; Arrange for a person to deal in a financial product; Provide general financial product advice only”; and
3. Forex TG Pty Ltd (**Forex TG**) from 16 April 2014 to on or around 10 October 2014, in the case of Monarch FX only, and the authorisation was limited to “Provide general financial product advice only”. Forex TG’s AFSL states that it shall not provide MDA services except when operating a registered scheme and Forex TG does not authorise Monarch FX to deal in foreign exchange contracts.

In relation to Avestra, Mr Hunter contended at the final hearing that Monarch FX's authorisation was from 1 March 2013, not 1 February 2013. Mr Hunter contended that the ASIC database was inaccurate. In the absence of other material, the date recorded in the ASIC database has been adopted.

46 At no times were Monarch FX or Mr Hunter authorised by those registrations or by holding their own AFSL to deal in MDA services or superannuation interests. ASIC did not contend that Mr Hunter contravened ss 911A and 911B of the Corporations Act. ASIC contended that Mr Hunter was "involved" in the contraventions by Monarch FX.

3.6 Provision of automated foreign exchange trading services

47 Monarch FX used a marketing and sales process which used sales scripts for conversations and email communications. The sales scripts were provided to staff by Mr Hunter. Those scripts included statements such as "the signals we provide to our clients have produced over 118% return since January 2010...". A website was also used to promote Monarch FX's service as an "automated solution that does all the work for you". The website promoted the service as a way to "make returns of up to 5% monthly, with minimal effort required".

48 When the marketing was successful, the clients entered into a "membership" agreement for a term of several years (and up to 10 years in some cases). The first clause of the agreement stated "[Monarch FX] provide trade signals for the Foreign Exchange market". The client paid a single upfront membership fee. The fee for a 10 year agreement was around \$15,000-\$18,000 including GST.

49 The client had a choice whether to receive the signals by email and then decide whether to instruct a broker to act on the signals or have the trades automatically placed. The standard agreement indicated that "Monarch FX Group will work for you at all times during the [X] year period, providing you with foreign exchange signals either emailed to you as information for you to act on, or to automatically have the trades placed on your account using a third party signal router service". The marketing scripts clearly promoted the automated service. Mr Kotsopoulos spoke with three Monarch FX clients in relation to the execution of trades on their accounts, all of whom told him that:

1. Monarch FX executed trades on their accounts;

2. Monarch FX never referred to them for instructions before executing the trades on their accounts;
3. They never executed trades on their own trading accounts.

50 This paragraph is admissible only against Monarch FX. No client of Monarch FX elected to receive signals by email for their own use. All clients agreed to receive automated trading.

51 For the purpose of providing the trading signals for clients, Monarch FX used the services of a broker to hold clients' funds and carry out foreign exchange trades. From at least 19 November 2012 to around April 2014, the broker was Vantage FX Pty Ltd (**Vantage**). From 29 May 2013 to 2 September 2014, AxiCorp Financial Services Pty Ltd (**AxiCorp**) was also a broker.

52 With Monarch FX's assistance, clients set up a brokered account for trading foreign exchange and deposited money into the account. Client deposits ranged from about \$5,000 to \$40,000 and were typically around \$10,000.

53 Clients gave a limited power of attorney which authorised the broker to act on Monarch FX's instructions. By the power of attorney in relation to Vantage, the client authorised Monarch FX as agent to purchase and sell (including short sales) foreign currencies and contract for differences on margin (derivatives) or otherwise for the client's account and risk. The power of attorney in relation to AxiCorp gave Monarch FX the ability to "enter into transactions using any electronic or online trading system provided by [AxiCorp]", among other things.

54 Monarch FX then had one or more master accounts with the broker, which virtually pooled the accounts of individual clients. The signals obtained by Monarch FX, supplied to it by traders, were sent to the broker as instructions in respect of Monarch FX's relevant master account. The broker automatically routed the signals onto each client's brokered account in proportion to the balance of their account within Monarch FX's master account. This arrangement was carried out by Monarch FX from at least 19 November 2012 up to 2 September 2014.

55 At the s 19 examinations, Mr Hyde said that losses of around 50% were sustained on accounts of Monarch FX clients. Mr Best said that it was typical for Monarch FX clients to sustain losses of around 40%. ASIC received complaints from clients about money that was

lost and received complaints from clients that they were misled about the trading to be undertaken and the setting up of the SMSF.

56 Mr Hunter was in charge of Monarch FX's operations, and had the majority of the running of the company: see [2]-[3] and [43] above. His role as General Manager included dealing with AFSL holders in relation to setting up accounts, and Monarch FX's compliance with authorisations (for example, in relation to what content could appear on Monarch FX's website). Mr Hunter liaised with brokers, including in relation to opening Monarch FX's accounts. Mr Hyde, the Senior Sales Trader at AxiCorp, gave evidence at the s 19 examination that he was the account manager for Monarch FX, and the relationship between AxiCorp and Monarch FX was conducted through Mr Hunter as director (or where Mr Hyde understood Mr Hunter to be the director). Mr Hunter co-signed a power of attorney granted by a client as "trading agent" on behalf of Monarch FX. As noted in Section 3.5 above, for a time Mr Hunter also held authorisations in his own name.

57 From 2 September 2014, AxiCorp, the broker used by Monarch FX, suspended and then terminated its relationship with Monarch FX, so that Monarch FX was no longer able to trade with that broker. At the time that Monarch FX's account was suspended, 24 Monarch FX clients had open positions on their accounts. The conduct founding contraventions alleged in the proceeding is limited to conduct up to 2 September 2014.

58 Nonetheless, it is relevant to observe (including in relation to the injunctions sought by ASIC) that Monarch FX took steps to use Forex TG (Monarch FX's current AFSL holder) as its broker, and entered into an Introducer Broker agreement with Forex TG. By no later than June 2014, Monarch FX had provided a list of clients to Forex TG, who then contacted clients directly. The evidence before the Court indicates that Monarch FX clients were encouraged to close their trading accounts with AxiCorp and open trading accounts with Forex TG, and that Monarch FX would continue to provide trade signals on that account. Around 30 clients of Monarch FX opened a trading account with Forex TG between June and October 2014. Forex TG revoked Monarch FX's authorisation (which was for general advice only) on 10 October 2014.

3.7 Recommendation of SMSF

59 When a prospective client did not have access to funds for investment, the practice of Monarch FX was to recommend that the client access his or her superannuation funds, by setting up a self-managed superannuation fund (SMSF). Mr Hunter directed employees to

follow this course, and they did. The majority of Monarch FX clients invested through a SMSF.

60 For the purpose of setting up the SMSF, Monarch FX referred clients to a company called Breakaway Finance Group Pty Ltd (**Breakaway**): see [34] above. Monarch FX carried the cost of establishing the SMSF. Application materials provided by Monarch FX to prospective clients included Monarch FX's own advice in relation to taking that course, for example:

1. an introductory email, entitled "suggested self managed super fund" or "suggested self managed super fund option to consider [sic]", which referred to "exploring the opportunity where you may utilise a self managed super fund (**SMSF**) as an option of diversifying your investment and getting you started with an appropriate signal membership with the Monarch FX Group";
2. on Monarch FX letterhead, a resolution to establish an SMSF which stated:
 - 2.1 "The persons present have agreed to establish an indefinitely continuing complying self managed superannuation fund"; and
 - 2.2 "In the event I / we do not proceed with Monarch FX Group upon establishment of the SMSF, I / we agree to pay the costs of establishment \$1,990 directly to Monarch FX Group";
3. on Monarch FX letterhead, a "resolution to authorise a once off debit from our self managed superannuation fund upon establishment and rollover of funds" to pay to Monarch FX "for the purpose of Foreign Exchange signals"; and
4. authorities to Breakaway to collect information, including a request that "all relevant information of my investments, insurances, superannuation, bank accounts or other financial information be released".

61 Mr Kotsopoulos was also told by clients that the person they spoke to at Monarch FX recommended that they access their existing superannuation fund monies and set up an SMSF, use that money to pay for Monarch FX's membership fee and deposit funds into their trading accounts in order for Monarch FX to automatically trade on foreign exchange contracts on their behalf. Those clients said that they set up a SMSF in accordance with that recommendation: see Section 3.3.2 above.

4. DECLARATIONS

4.1 Applicable principles

62 The Court has a wide discretionary power, pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth), to grant declarations that particular persons have engaged in conduct that contravenes the Corporations Act: *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 97-98; *Australian Securities and Investments Commission v Axis International Management Pty Ltd* (2009) 178 FCR 485 at [9]-[12]; and *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [8]-[9].

63 Considerations relevant to the exercise of the discretion to make declarations in the present case include whether the declaration will have any utility, whether the proceeding involves a matter of public interest and whether the circumstances call for the marking of the Court's disapproval of the contravening conduct: *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 at [65], citing *Tobacco Institute* at 99-100; *Australian Competition and Consumer Commission v Powerballwin.com.au Pty Ltd* [2010] FCA 378 at [41] and *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-8.

64 Declarations are not made as a matter of course. The Court will not make declarations of contravention unless it is satisfied that there is sufficient evidence to support those declarations, to the standard set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2: *Re Scott* at [17]; *Australian Securities and Investments Commission v Lindberg* [2012] VSC 332 at [6]. Where it is appropriate for a declaration to be made, attention must be given to the form of the declaration, so that it is at least informative as to the basis on which the Court declares that a contravention has occurred. The declarations should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act: *Renegade Gas* at [66] and the cases cited.

65 For the reasons set out below, there is utility in making the declarations. They will define the contravening aspects of the relevant conduct and also thereby enable others in the foreign exchange industry to recognise the unlawfulness of the conduct, and serve as a warning. In addition, the declaration will mark the Court's disapproval of the contravening conduct, and may inform affected persons that the conduct occurred and was unlawful.

4.2 Provision of MDA services

66 In relation to the provision of MDA services, ASIC alleges that Monarch FX contravened ss 911A and 911B of the Corporations Act. Under s 911A, three elements must be established – Monarch FX must carry on a “financial services business”, “in this jurisdiction” and without holding an AFSL that covers the provision of the financial services.

67 Under s 911B, the elements to be established are that Monarch FX must provide a financial service in this jurisdiction on behalf of another person (the **principal**) who carries on a financial services business and the principal does not hold an AFSL covering the provision of the service or the principal holds an AFSL covering the provision of the service but Monarch FX is not an authorised representative of the principal for the provision of that service.

68 The first allegations of Monarch FX’s contravention of ss 911A and 911B concern the provision of automated trading services.

4.2.1 *Contravention of s 911A?*

69 First, did Monarch FX carry on a financial services business? Monarch FX’s master account with the broker and its membership agreement with each client constituted a facility within the meaning of s 762C of the Corporations Act: see [12] above.

70 The client made a financial investment (within the meaning of s 763B of the Corporations Act, see [14] above) through the facility by depositing funds into his or her brokered account (see [52] above), by Monarch FX using that money to attempt to generate a financial return for the client (even if no financial return was achieved) by providing automated signals (see [47] and [49] above), where the client and Monarch FX both intended that a financial return would be generated (see [47] and [49] above) and where Monarch FX, and not the client, had day to day control over the use of the client’s funds to generate the return or benefit (see [49] and [53]-[54] above). The facility was thereby a financial product within the meaning of s 763A: see [12] above.

71 Monarch FX dealt in the financial product (within the meaning of s 766C, see [15] above) by promoting it through member agreements and providing services pursuant to those agreements, and thereby provided a financial service within the meaning of s 766A (see [10] above). Monarch FX thereby carried on a “financial services business” and provided a financial service (see also ss 761A and 761C) for the purposes of ss 911A.

72 Second, did Monarch FX carry on that financial services business in this jurisdiction? It did: see [41] above.

73 Third, did it have an AFSL that covered the provision of the financial services? Monarch FX never held a licence for the purpose of s 911A of the Corporations Act. It was an authorised representative for the purpose of s 911B but in limited respects that did not extend to the provision of MDA services. At all relevant times, Monarch FX was not licensed or authorised to deal in a facility for making financial investment by providing MDA services: see Section 3.5 above.

74 Monarch FX was authorised (up to 15 April 2014) to provide financial product advice by suggesting trading instructions to its clients, and to carry out a client's instructions for trades by conveying those instructions to a broker. However, by the arrangements it established, Monarch FX had discretion and power for the period of the client's membership agreement (up to 15 years in some cases) to determine the trades to be undertaken with the client's funds without instructions from the client for each and every trade. It was not authorised to provide services of that kind.

75 The evidence establishes that for the period 19 November 2012 to 2 September 2014, the three elements for a contravention of s 911A are established – Monarch FX carried on a “financial services business”, “in this jurisdiction”, and without an AFSL.

4.2.2 *Contravention of s 911B?*

76 ASIC has established above that, in relation to the provision of MDA services, Monarch FX provided a financial service in this jurisdiction: see [71] and [72] above. Did it provide that financial service on behalf of a principal who carries on a financial services business? Monarch FX carried on its business on behalf of each of the AFSL holders for which it was an authorised representative: see Section 3.5 above. However, as explained at [73] to [74] above, Monarch FX was not an authorised representative for the provision of the MDA services that it in fact provided. In the case of Audrn and Forex TG, the principal itself was not authorised to provide the MDA services that were provided by Monarch FX, and in any case, Monarch FX's authorisation did not include the provision of MDA services. In the case of Avestra, although the principal was authorised to provide the MDA services, Monarch FX's authorisation did not extend to cover those services.

77 In relation to the provision of MDA services, the evidence establishes that Monarch FX contravened s 911B of the Corporations Act.

4.2.3 *Should a declaration be made in relation to Monarch FX?*

78 The next question is whether there is utility in making declarations in relation to those contraventions by Monarch FX. The contravening conduct of Monarch FX is a matter of public interest. The circumstances are such that it is appropriate for the Court to mark its disapproval of the contravening conduct. Having regard to the considerations outlined in Section 4.1 above, it is appropriate to make a declaration.

4.2.4 *Should a declaration be made in relation to Mr Hunter?*

79 ASIC contended that Mr Hunter was involved in the contraventions of ss 911A and 911B of the Corporations Act and sought a declaration that Mr Hunter was directly or indirectly, knowingly concerned in, or party to, or otherwise involved in, each contravention for the purposes of s 79 of the Corporations Act. The evidence establishes that Mr Hunter was in charge of Monarch FX's operations as General Manager, was a sole director of the company for some of the relevant period, and had the majority of the running of the company: see [2]-[3], [43] and [56] above. As counsel for ASIC submitted, although Mr Hunter may not have been aware that the conduct was unlawful, he knew of the actual events, the essential ones, which constituted the contraventions of ss 911A and 911B of the Corporations Act by Monarch FX: *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267 at [112]. As noted above, ASIC did not seek to proceed against Mr Hunter other than in relation to his involvement in the alleged contraventions by Monarch FX.

80 There can be no dispute that Mr Hunter was knowingly concerned or otherwise involved in each contravention outlined in [75] and [77] above. However, there is some doubt whether s 79 of the Corporations Act is available as a stand-alone provision that operates in respect of each contravention of the Corporations Act or only those provisions which impose liability on a person involved in a contravention (eg ss 181(2), 182(2), 183(2), 209(2) and (3), 254L(2) and (3), 256D(3) and (4), 412(9) and 1041I): cf *Re Vault Market* at [59]-[74]; *Australian Investors Forum* at [92] and [110]-[111] and *Re Scott* at [26].

81 It is unnecessary to resolve that dispute. It is unnecessary because the declaration sought by ASIC in relation to Mr Hunter is neither necessary nor appropriate. The declaration is neither

necessary nor appropriate because ASIC seeks a financial services disqualification order against Mr Hunter. That disqualification order identifies the penalty imposed on Mr Hunter – disqualification from the industry for four years: *Re Idylic Solutions* at [58]. That order is addressed in Section 5 below. In the circumstances of this case, that injunction is the appropriate mechanism by which the Court marks its disapproval of Mr Hunter’s conduct.

4.3 Advice as to superannuation interests

82 In relation to advice as to superannuation interests, ASIC alleges that Monarch FX contravened ss 911A and 911B of the Corporations Act. The elements to be established are outlined at [66]-[67] above.

4.3.1 Contravention of s 911A?

83 By its marketing communications with prospective clients (see Section 3.7 above), Monarch FX provided advice in relation to establishing a SMSF and rolling in funds held elsewhere. The clients’ superannuation interests were financial products within the operation of s 764A(1)(g) of the Corporations Act: see [13] above. Monarch FX therefore provided financial product advice for the purpose of s 766B of the Corporations Act, as it made recommendations that could reasonably be regarded as being intended to influence clients making a decision about their superannuation interests: see [11] above.

84 Further, by co-ordinating the client’s procurement of a SMSF from Breakaway, including provision of standard form resolutions and authorities and paying for Breakaway’s services (see [60] above), Monarch FX arranged for clients to acquire, vary and / or dispose of superannuation interests. It thereby dealt in financial products for the purpose of s 766C and provided financial services within the meaning of s 766A(1): see [10] and [15] above.

85 Monarch FX was carrying on a financial services business and providing a financial service for the purposes of ss 911A and 911B of the Corporations Act. It provided those financial services in this jurisdiction: see [41] above. At no time did Monarch FX have an AFSL that covered the provision of those financial services (that is, advice in relation to superannuation interests): see Section 3.5 above.

86 The evidence establishes that, between 21 May 2012 and 15 April 2014, the three elements of a contravention of s 911A are established – Monarch FX carried on a “financial services business”, “in this jurisdiction”, without an AFSL.

87 Mr Hunter was in charge of Monarch FX's operations as General Manager, was a sole director of the company for some of the relevant period, and had the majority of the running of the company: see [2]-[3], [43] and [56] above. He instructed employees to recommend that clients set up a SMSF: see [59] above. The evidence justifies a conclusion that he was knowingly concerned in or otherwise involved in that contravention.

4.3.2 *Contravention of s 911B?*

88 ASIC has established that, in relation to the provision of advice about superannuation interests, Monarch FX provided a financial service in this jurisdiction: [84]-[85] above. As was the case with the provision of MDA services, Monarch carried on its business on behalf of each of the AFSL holders for which it was an authorised representative. In relation to each principal, Monarch FX was not authorised to provide financial services: see Section 3.5 above. In relation to the provision of advice regarding superannuation interests, the evidence establishes that Monarch FX contravened s 911B.

89 As noted above, Mr Hunter was in charge of Monarch FX's operations as General Manager, was a sole director of the company for some of the relevant period, and had the majority of the running of the company: see [2]-[3], [43] and [56] above. He instructed employees to recommend that clients set up a SMSF: see [59] above. The evidence justifies a conclusion that he was knowingly concerned in or otherwise involved in this contravention.

4.3.3 *Should a declaration be made in relation to Monarch FX?*

90 There is utility in making declarations in relation to those contraventions. The proceeding involves a matter of public interest. The circumstances are such that it is appropriate for the Court to mark its disapproval of the contravening conduct.

4.3.4 *Should a declaration be made in relation to Mr Hunter?*

91 ASIC again sought a declaration that Mr Hunter was directly or indirectly, knowingly concerned in, or party to, or otherwise involved in, each contravention. For the reasons outlined in Section 4.2.4 above, those declarations will not be made.

4.4 *Dealing in foreign exchange products from 16 April 2014*

92 ASIC alleged that after 16 April 2014, a further aspect of the conduct described in Sections 3.6 and 4.2 above contravened the Corporations Act. From that time, Monarch FX and Mr Hunter were authorised only to provide general financial product advice, and were no

longer authorised to deal in financial products. Indeed, Mr Hunter did not hold any authorisation, and Monarch FX held authorisation for general advice only from an AFSL holder which was itself not licensed to deal in foreign exchange products: see Section 3.5 above. That conduct, from that time, constituted a more significant contravention of ss 911A and 911B of the Corporations Act.

93 However, Monarch FX continued its business with no relevant change until 2 September 2014 when Monarch FX's account was suspended by its provider: see [57] above. Accordingly, by sending instructions to the automated trading platform, it was arranging for clients to apply for, acquire, vary or dispose of foreign exchange contracts or derivatives. It was thereby dealing in financial products when it was not authorised to do so.

94 As before, Mr Hunter was in charge of Monarch FX's operations as General Manager, was a sole director of the company for some of the relevant period, and had the majority of the running of the company: see [2]-[3], [43] and [56] above. The evidence justifies a conclusion that he was knowingly concerned in or otherwise involved in that contravention.

95 Although separate declarations were sought in relation to this conduct, in the circumstances of this case, due to the overlapping conduct in relation to the provision of MDA services, and having regard to the principles set out in Section 4.1 above, the declaration foreshadowed in Section 4.2.3 is sufficient to mark the Court's disapproval of this conduct. For the reasons given in Section 4.2.4, no declaration will be made about the conduct of Mr Hunter.

5. INJUNCTIONS

5.1 Applicable principles

96 ASIC seeks injunctive relief by way of financial services disqualification orders under ss 1101B and 1324(1) of the Corporations Act restraining Monarch FX and Mr Hunter from carrying on a financial services business.

97 Where a person has contravened Ch 7 of the Corporations Act, the Court has power to restrain a person from carrying on a business: subs 1101B(1)(a) and (4)(a). However, under s 1101B, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person. Under s 1324 of the Corporations Act, the Court has power to restrain the contravener *and* a person involved in the contravention: *Re Idyllic Solutions* at [72]-[91].

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

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

5.2 Financial services disqualification orders

100 ASIC submitted that the financial services disqualification orders should be made for four years. The following circumstances were said to support the disqualification for that period:

1. The object of Ch 7 in s 760A includes promotion of confident and informed decision making by consumers of financial products and services, and the Corporations Act generally is concerned primarily with protection of the public interest in the prevention of particular conduct: *Re Idylic Solutions* at [69];
2. A financial services disqualification order would protect the public from harmful activity of an unauthorised financial services provider and promote prudential regulation in connection with obtaining authorisation;
3. A financial services disqualification order would protect individuals dealing with Monarch FX and Mr Hunter;
4. The objects of personal deterrence and general deterrence would be served;
5. The undertaking by Monarch FX of a range of activities (and Mr Hunter's involvement in them) in disregard of the authorisation required as to each of them is serious, incompetent and reckless, and displays a propensity for conduct in disregard of the requirements as to licensing and authorisation, most particularly exposed by the continuance of activities after the significantly reduced authorisations from 15 April 2014 and the migration of clients in September 2014 after a broker ceased providing services;
6. There is no evidence of dishonest conduct or a deliberate course of action by Monarch FX and Mr Hunter to enrich themselves at others' expense;

7. There are multiple contraventions over a period of 2 years, namely unlicensed dealings in foreign exchange contracts, MDA services and superannuation interests;
8. Although Monarch FX would not be able to continue its current business operations, there is no contention as to particular personal hardship for the defendants: cf s 1101B(1);
9. Consumers lost funds in consequence of automated trading;
10. There were complaints to ASIC about being misled in relation to trading and setting up a SMSF; and
11. The defendants have co-operated with ASIC's investigation and have not contested the proceeding.

I agree.

101 Monarch FX committed contraventions of ss 911A and 911B of the Corporations Act. It is appropriate, pursuant to s 1101B of the Corporations Act, to restrain Monarch FX from carrying on a financial services business. Having regard to the each of the matters identified in [100] above, the duration of the order agreed between the parties, four years, in my view is appropriate in all the circumstances: cf *Adler* at [56] and *Re Idyllic Solutions*. It was not suggested that the financial services disqualification order would unfairly prejudice any person: s 1101B(1).

102 As noted earlier, ASIC also sought a financial services disqualification order against Mr Hunter. ASIC did not contend that Mr Hunter contravened ss 911A and 911B of the Corporations Act. As a result, it is arguable that s 1101B(1) is not engaged: see [97] above and *Re Vault Market* at [80].

103 That leaves s 1324(1) of the Corporations Act. It relevantly provides in subsection (e) that where a person (here, Mr Hunter) has engaged in conduct that constitutes "being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act", the Court may on the application of ASIC grant an injunction on such terms as it thinks appropriate restraining the person from engaging in the conduct. Here, Mr Hunter was knowingly concerned or otherwise involved in each of the contraventions by Monarch FX: see [80], [87], [89] and [94] above.

104 In *Re Idyllic Solutions* at [82]ff, Ward JA addressed the issue of whether s 1101B operates as a code so as to preclude ASIC claiming relief under s 1324 by way of injunctions having the

effect of financial services disqualification orders without a contravention of the kind on which s 1101B is predicated having been established. Ward JA rejected that contention and concluded at [90]-[91] that there was power for the Court under s 1324, on the application of ASIC, to grant a financial services disqualification order. Her honour concluded that s 1101B did not operate as an exclusive code for the circumstances in which such an order may be made. I agree.

105 Having regard to the nature and extent of the conduct of Mr Hunter, and the principles outlined in Section 5.1 above, it is appropriate pursuant to s 1324(1)(e) of the Corporations Act that there be an order disqualifying him from carrying on, either directly or indirectly, a financial services business within the meaning of s 761A of the Corporations Act, both for the protection of the public and to safeguard public interest as well as the objects of personal and general deterrence.

6. COSTS

106 The parties agree that there should be no order as to costs. There will be an order to that effect.

I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gordon.

Associate: *ED Bishop*

Dated: 17 December 2014