

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited [2022] FCA 1115

File number: VID 420 of 2021

Judgment of: **MOSHINSKY J**

Date of judgment: 20 September 2022

Catchwords: **CORPORATIONS** – financial services – fees for no services – where the defendants deducted a plan service fee (PSF) to which they were not entitled from the accounts of members of a superannuation plan for a period of over three years – where the applicable rules of the plan provided that the defendants were not entitled to the PSF after a member ceased employment with the employer-sponsor – where the defendants continued to deduct the PSF after members ceased employment with the employer-sponsor – where the defendants received many complaints from members and authorised representatives about the deduction of the PSF, but this did not (for a long time) trigger an investigation into whether there was a systemic issue – where the defendants admitted contravening the relevant legislative provisions and the parties jointly proposed declarations of contravention – where the plaintiff sought the imposition of pecuniary penalties totalling \$17.5 million and the defendants proposed penalties totalling \$4.6 million – held: declarations made and penalties totalling \$14.5 million imposed

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth), ss 12DB, 12DI, 12GBA, 12GLB  
*Corporations Act 2001* (Cth), ss 761A, 912A  
*Federal Court of Australia Act 1976* (Cth), s 21  
*Trade Practices Act 1974* (Cth)

Cases cited: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68  
*Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599  
*Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* (2015) 146 ALD 385; [2015] FCA 399

*Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36  
*Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312  
*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540  
*Australian Competition and Consumer Commission v Energy Australia Pty Ltd* (2014) 234 FCR 343  
*Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698  
*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25  
*Australian Competition and Consumer Commission v Trivago N.V. (No 2)* (2022) 159 ACSR 353  
*Australian Competition and Consumer Commission v Woolworths Limited* [2016] ATPR ¶42-251; [2016] FCA 44  
*Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd* (2020) 377 ALR 55  
*Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790  
*Australian Securities and Investments Commission v Westpac Banking Corporation* (2022) 159 ACSR 381  
*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482  
*Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421  
*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285  
*Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076; [1990] FCA 762

Division: General Division  
Registry: Victoria  
National Practice Area: Commercial and Corporations  
Sub-area: Regulator and Consumer Protection  
Number of paragraphs: 156  
Date of hearing: 29 August 2022  
Counsel for the Plaintiff: Mr CH Truong QC with Mr LR Howard  
Solicitor for the Plaintiff: Australian Securities and Investments Commission

Counsel for the Defendants: Ms T Spencer Bruce with Mr A Terzic

Solicitor for the Defendants: AMP Services Limited

# ORDERS

VID 420 of 2021

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

**AND:**                 **AMP FINANCIAL PLANNING PROPRIETARY LIMITED  
(ACN 051 208 327)**  
First Defendant

**HILLROSS FINANCIAL SERVICES LIMITED  
(ACN 003 323 055)**  
Second Defendant

**CHARTER FINANCIAL PLANNING LIMITED  
(ACN 002 976 294)** (and others named in the Schedule)  
Third Defendant

**ORDER MADE BY:**   **MOSHINSKY J**

**DATE OF ORDER:**   **20 SEPTEMBER 2022**

## THE COURT NOTES THAT:

In the declarations and orders set out below, terms have the following meanings:

*Affected Members* means the AMPFP Affected Members, the Charter Affected Members and the Hillross Affected Members.

*AFSL* means Australian Financial Services Licence.

*AMPFP Affected Members* means 1,111 members of Flexible Super – Employer group plan that were previously entitled to receive general advice services by Authorised Representatives of AMP Financial Planning Proprietary Limited and from whom \$282,453.01 in PSF was wrongfully deducted after the member’s employment had ceased with the relevant employer sponsor.

*Authorised Representative* has the meaning provided by s 761A of the *Corporations Act 2001* (Cth).

*Charter Affected Members* means 89 members of Flexible Super – Employer group plan that were previously entitled to receive general advice services by Authorised Representatives of Charter Financial Planning Limited and from whom \$29,250.13 in PSF was wrongfully deducted after the member’s employment had ceased with the relevant employer sponsor.

**Hillross Affected Members** means 252 members of Flexible Super – Employer group plan that were previously entitled to receive general advice services by Authorised Representatives of Hillross Financial Services Limited and from whom \$44,485.06 in PSF was wrongfully deducted after the member’s employment had ceased with the relevant employer sponsor.

**PSF** means plan service fees which were deducted from the accounts of members of Flexible Super – Employer group plan in consideration for general advice services to be provided by Authorised Representatives of either AMP Financial Planning Proprietary Limited, Charter Financial Planning Limited or Hillross Financial Services Limited.

**Relevant Period** means the period between 31 July 2015 and 30 September 2018.

## **THE COURT DECLARES THAT:**

### **AMP Financial Planning**

1. During the Relevant Period, the first defendant, AMP Financial Planning Proprietary Limited (ACN 051 208 327), in trade or commerce accepted payments from AMPFP Affected Members for the provision of general advice services, which are financial services within the meaning of s 12DI(3)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), in circumstances where there were reasonable grounds for believing that AMP Financial Planning Proprietary Limited would not be able to supply the financial services to the Affected Members within the Relevant Period, and thereby contravened s 12DI(3) of the ASIC Act in respect of each payment accepted in this period.
2. AMP Financial Planning Proprietary Limited, by its conduct in:
  - (a) failing to procure and administer a system that ensured that the deduction of PSFs from AMPFP Affected Members’ accounts ceased upon notification of cessation of employment and the remission of any fees deducted between the date of cessation of the AMPFP Affected Members’ employment and the date of notification; and
  - (b) not having effective compliance arrangements in place to monitor and supervise the deduction and remission of PSFs from AMPFP Affected Members’ accounts to Authorised Representatives,breached its obligation to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act 2001* (Cth).

3. AMP Financial Planning Proprietary Limited, by its conduct in contravening s 12DI(3) of the ASIC Act, breached its general obligation as a financial service licensee to comply with financial services laws and thereby contravened s 912A(1)(c) of the *Corporations Act*.

#### **Hillross Financial Services Limited**

4. During the Relevant Period, the second defendant, Hillross Financial Services Limited (ACN 003 323 055), in trade or commerce accepted payments from Hillross Affected Members for the provision of general advice services, which are financial services within the meaning of s 12DI(3)(a) of the ASIC Act, in circumstances where there were reasonable grounds for believing that Hillross Financial Services Limited would not be able to supply the financial services to the Hillross Affected Members within the Relevant Period, and thereby contravened s 12DI(3) of the ASIC Act in respect of each payment accepted in this period.
5. Hillross Financial Services Limited, by its conduct in:
  - (a) failing to procure and administer a system that ensured that the deduction of PSFs from Hillross Affected Members' accounts ceased upon notification of cessation of employment and the remission of any fees deducted between the date of cessation of the Hillross Affected Members' employment and the date of notification; and
  - (b) not having effective compliance arrangements in place to monitor and supervise the deduction and remission of PSFs from Hillross Affected Members' accounts to Authorised Representatives,

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

6. Hillross Financial Services Limited, by its conduct in contravening s 12DI(3) of the ASIC Act, breached its general obligation as a financial service licensee to comply with financial services laws and thereby contravened s 912A(1)(c) of the *Corporations Act*.

#### **Charter Financial Planning Limited**

7. During the Relevant Period, the third defendant, Charter Financial Planning Limited (ACN 002 976 294), in trade or commerce accepted payment from Charter Affected

Members for the provision of general advice services, which are financial services within the meaning of s 12DI(3)(a) of the ASIC Act, in circumstances where there were reasonable grounds for believing that Charter Financial Planning Limited would not be able to supply the financial services to the Charter Affected Members within the Relevant Period, and thereby contravened s 12DI(3) of the ASIC Act in respect of each payment accepted in this period.

8. Charter Financial Planning Limited, by its conduct in:
  - (a) failing to procure and administer a system that ensured that the deduction of PSFs from Charter Affected Members' accounts ceased upon notification of cessation of employment and the remission of any fees deducted between the date of cessation of the Charter Affected Members' employment and the date of notification; and
  - (b) not having effective compliance arrangements in place to monitor and supervise the deduction and remission of PSFs from Charter Affected Members' accounts to Authorised Representatives,

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

9. Charter Financial Planning Limited, by its conduct in contravening s 12DI(3) of the ASIC Act, breached its general obligation as a financial service licensee to comply with financial services laws and thereby contravened s 912A(1)(c) of the *Corporations Act*.

### **AMP Superannuation Limited**

10. AMP Superannuation Limited (ACN 008 414 104), by:
  - (a) its conduct in:
    - (i) failing to exercise its powers under the outsourcing agreement with AMP Life Limited to effectively monitor and supervise the deduction of PSFs from Affected Members' accounts; and
    - (ii) the deduction of PSFs from Affected Members' accounts by the U2 System used to administer AMP Superannuation Limited's products (which system was operated for AMP Superannuation Limited by AMP Life Limited, pursuant to the outsourcing agreement between those parties); and

- (b) having knowledge of the continued deduction of PSFs from the Affected Members' accounts after notification of their cessation of employment, and therefore knowledge of the contravening conduct in the Relevant Period,

was knowingly concerned in each of the contraventions of Hillross Financial Services Limited, Charter Financial Planning Limited and AMP Financial Planning Proprietary Limited of s 12DI(3) of the ASIC Act within the meaning of s 12GBA(1)(e) of the ASIC Act (as in force during the Relevant Period).

11. AMP Superannuation Limited, by its conduct in:

- (a) failing to adequately procure, administer and oversee a system that ensured the deduction of PSFs from a member's account ceased upon notification of cessation of employment and the remission of any fees deducted between the date of cessation of member's employment and the date of notification;
- (b) not having effective compliance arrangements in place to monitor and supervise the deduction and remission of PSFs from Affected Members' accounts to Authorised Representatives,

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

12. AMP Superannuation Limited, by its conduct in being knowingly concerned in the contraventions of Hillross Financial Services Limited, Charter Financial Planning Limited and AMP Financial Planning Proprietary Limited of s 12DI(3) of the ASIC Act within the meaning of s 12GBA(1)(e) of the ASIC Act (as in force during the Relevant Period), breached its general obligation as a financial service licensee to comply with financial services laws and thereby contravened s 912A(1)(c) of the *Corporations Act*.

### **AMP Life Limited**

13. AMP Life Limited (ACN 079 300 379), by:

- (a) its conduct in:
  - (i) facilitating the deduction of the PSFs from each Affected Member's account as administrator and operator of the U2 System (which system was operated for AMP Superannuation Limited by AMP Life Limited, pursuant to the outsourcing agreement between those parties);

- (ii) deducting PSFs from Affected Members' accounts through the U2 System; and
  - (b) having knowledge:
    - (i) that there were reasonable grounds for believing that Hillross Financial Services Limited, Charter Financial Planning Limited and AMP Financial Planning Proprietary Limited would not be able to provide the financial services to Affected Members within a specified period, or at all, after notification that the Affected Members had ceased employment with their employer-sponsor; and
    - (ii) of the continued deduction of PSFs from the Affected Members' accounts after notification of their cessation of employment, and therefore knowledge of the contravening conduct in the Relevant Period,
- was knowingly concerned in each of the contraventions of Hillross Financial Services Limited, Charter Financial Planning Limited and AMP Financial Planning Proprietary Limited of s 12DI(3) of the ASIC Act within the meaning of s 12GBA(1)(e) of the ASIC Act (as in force during the Relevant Period).

**THE COURT ORDERS THAT:**

14. The first defendant (AMP Financial Planning Proprietary Limited) pay to the Commonwealth of Australia a pecuniary penalty of \$4,800,000 in respect of the contraventions of s 12DI(3) of the ASIC Act referred to in paragraph 1 of the declarations set out above.
15. The second defendant (Hillross Financial Services Limited) pay to the Commonwealth of Australia a pecuniary penalty of \$720,000 in respect of the contraventions of s 12DI(3) of the ASIC Act referred to in paragraph 4 of the declarations set out above.
16. The third defendant (Charter Financial Planning Limited) pay to the Commonwealth of Australia a pecuniary penalty of \$480,000 in respect of the contraventions of s 12DI(3) of the ASIC Act referred to in paragraph 7 of the declarations set out above.
17. The fourth defendant (AMP Superannuation Limited) pay to the Commonwealth of Australia a pecuniary penalty of \$2,500,000 in respect of its being knowingly concerned in contraventions of s 12DI(3) of the ASIC Act as referred to in paragraph 10 of the declarations set out above.

18. The fifth defendant (AMP Life Limited) pay to the Commonwealth of Australia a pecuniary penalty of \$6,000,000 in respect of its being knowingly concerned in contraventions of s 12DI(3) of the ASIC Act as referred to in paragraph 13 of the declarations set out above.
19. The pecuniary penalties referred to in paragraphs 14 to 18 are to be paid within 30 days of the date of this order.
20. Pursuant to s 12GLB(1)(a) of the ASIC Act, within 30 days of this order, the first to fifth defendants publish, at their own expense, a written adverse publicity notice (**Written Notice**) in the terms set out in Annexure A to this order, by:
  - (a) for a period of no less than 90 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the following web addresses:
    - (i) <https://www.amp.com.au/>;
    - (ii) <http://www.hillross.com.au>;**(the webpages)**
  - (b) for a period of no less than 365 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the webpages to appear after a person uses credentials to log into the secure online service via the ‘member’ or ‘employer’ sections of the webpage (to the extent applicable); and
  - (c) sending a copy of the Written Notice to any person who was a member of the Flexible Super – Employer group plan during the Relevant Period to the last known email or postal address of the member.
21. The first to fifth defendants pay the plaintiff’s costs of the proceeding, as agreed or assessed.
22. The originating application as against the sixth defendant be dismissed with no order as to costs.

## ANNEXURE A: MISCONDUCT NOTICE

*The Federal Court of Australia has ordered AMP Financial Planning Proprietary Limited, Hillross Financial Services Limited, Charter Financial Planning Limited, AMP Superannuation Limited and AMP Life Limited (AMP Entities) to publish this misconduct notice:*

On 20 September 2022, Justice Moshinsky of the Federal Court ordered the AMP Entities to pay a total pecuniary penalty of \$14.5 million for charging 1,452 members of the AMP Flexible Super – Employer group plan (**Flexible Super Plan**) fees for no services.

The affected members of the Flexible Super Plan had been nominated by their employers to receive general advice services from financial planners with the AMP Entities in return for paying a fee called a Plan Service Fee (**PSF**) that was automatically deducted from their superannuation accounts on a regular basis. When members ceased employment with their employer-sponsors, they no longer had access to those general advice services and were therefore no longer liable to pay PSFs.

Between 31 July 2015 and 30 September 2018, the AMP Entities deducted \$356,188.20 in PSFs from the superannuation accounts of members in circumstances where each of the AMP Entities were aware that the relevant member had ceased employment with their employer-sponsor, and therefore no general advice services could be provided to them.

The AMP Entities agree that they failed to have proper systems and compliance arrangements to ensure that the deduction of PSFs from affected members' accounts ceased upon notification of cessation of employment and that they failed to refund the fees to members in a timely manner.

After reporting this conduct to the Australian Securities and Investments Commission (**ASIC**), the AMP Group remediated \$691,032.68 in fees and lost earnings to the Affected Members.

The AMP Entities acknowledge that their complaints monitoring systems and processes failed to identify the issue in a timely manner, which meant it took longer than it should have to rectify the issue.

### ***Further information***

The above conduct contravened the following financial services laws:

- section 12DI(3) of the *Australian Securities and Investments Commission Act 2001* (Cth); and
- section 912A(1)(a) and (c) of the *Corporations Act 2001* (Cth).

For further information about the conduct, see the following links:

- Statement of facts agreed between the parties to the proceeding [hyperlink];
- Justice Moshinsky's judgment on penalty [hyperlink]; and
- ASIC media release [hyperlink].

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

## REASONS FOR JUDGMENT

### MOSHINSKY J:

#### Introduction

1 This proceeding concerns the charging of fees for no services during the period 31 July 2015 to 30 September 2018 (the **Relevant Period**). During that period, fees known as plan service fees (**PSFs**) were deducted from the superannuation accounts of certain members in circumstances where there was no entitlement to charge or deduct the fees.

2 The relevant superannuation plan was known as “Flexible Super”, which was an employer-sponsored superannuation product. Pursuant to the Flexible Super product rules, on a member ceasing employment with their employer-sponsor:

- (a) the fifth defendant (**AMP Life**) received notification that the member had ceased employment;
- (b) the member’s account was transferred out of the employer-sponsored group plan and into the retail category of Flexible Super;
- (c) there was no entitlement to charge or deduct the PSF from the member’s account; and
- (d) the PSF should have ceased being deducted from the member’s account.

3 However, during the Relevant Period, a total of \$356,188.20 in PSFs was deducted from the superannuation accounts of 1,452 members (**Affected Members**) after AMP Life was notified of the cessation of the member’s employment.

4 The proceeding was commenced by the plaintiff (**ASIC**) by originating process and concise statement. The first to fifth defendants, which were all members of the AMP Limited (**AMP**) group of companies (the **AMP Group**) during the Relevant Period, are:

- (a) AMP Financial Planning Proprietary Limited (**AMP Financial Planning**);
- (b) Hillross Financial Services Limited (**Hillross**);
- (c) Charter Financial Planning Limited (**Charter**);
- (d) AMP Superannuation Limited (**AMP Superannuation**); and
- (e) AMP Life.

5 The sixth defendant to the proceeding is AMP Services Limited. It is proposed by the parties that the proceeding against that defendant be dismissed. That defendant can therefore be put to one side for present purposes. I will refer to the first to fifth defendants as the **defendants**.

6 The defendants have admitted that they contravened the relevant provisions of the legislation. Specifically, it is agreed between the parties that:

- (a) each of AMP Financial Planning, Hillross and Charter (together, the **Advice Licensees**) contravened s 12DI(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and s 912A(1)(a) and (c) of the *Corporations Act 2001* (Cth);
- (b) each of AMP Superannuation and AMP Life was knowingly concerned in the Advice Licensees' contraventions of s 12DI(3) of the ASIC Act, within the meaning of s 12GBA(1)(e) of the ASIC Act (as in force during the Relevant Period); and
- (c) AMP Superannuation contravened s 912A(1)(a) and (c) of the *Corporations Act*.

7 Section 12DI(3) of the ASIC Act, which is a civil penalty provision, provides that a person contravenes the section 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.

8 Section 912A of the *Corporations Act* was not a civil penalty provision during the Relevant Period. Section 912A(1)(a) provides that a financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly, and fairly.

9 Section 912A(1)(c) provides that a financial services licensee must comply with the "financial services laws". The expression "financial services laws" picks up s 12DI of the ASIC Act.

10 The parties have prepared a statement of agreed facts and admissions dated 27 April 2022 (the **SOAF**).

11 The parties are agreed on the form of declarations that should be made in respect of the contraventions. However, there is an issue between the parties as to the pecuniary penalties

that should be imposed. ASIC contends that penalties totalling \$17.5 million should be imposed. The defendants propose penalties totalling \$4.6 million.

12 Apart from the issue of penalties, the parties are largely agreed on the form of other orders. There is a minor disagreement as to the form of an adverse publicity notice to be published by the defendants.

13 For the reasons that follow, I have concluded that penalties totalling \$14.5 million should be imposed on the defendants. In relation to the form of the adverse publicity notice, I consider the additional words proposed by the defendants should be included.

### **The hearing and the evidence**

14 The proceeding was listed for a hearing on liability and penalty. There was no issue between the parties concerning liability, and the hearing focussed on the issue of penalty.

15 The material before the Court comprises the SOAF (including a bundle of documents) and a number of affidavits.

16 ASIC relies on two affidavits of Andrew Fleming, a senior lawyer in ASIC's Financial Services Enforcement team, affirmed on 14 June 2022 and 8 July 2022. Parts of the affidavit of 14 June 2022 were not read.

17 The defendants rely on the following affidavits:

- (a) an affidavit of Rachelle Taylor, Head of Customer Resolutions at AMP, sworn on 15 July 2022;
- (b) an affidavit of Claudia Firmansjah, Head of Regulatory Response – Operations at AMP, affirmed on 15 July 2022;
- (c) an affidavit of Allen Pavlek, a Senior Business Analyst at AMP, sworn on 10 August 2022;
- (d) an affidavit of David John Clark, Director – Master Trust Product at AMP, affirmed on 15 July 2022; and
- (e) an affidavit of Shamus Paul Toomey, General Counsel, Dispute Resolution and Regulatory Response at AMP, sworn on 26 July 2022.

18 There was no cross-examination of any of the deponents.

## **Factual findings**

19 The following findings are based on the SOAF and the affidavit evidence.

### ***The defendants***

20 At all material times:

- (a) AMP Financial Planning held an Australian Financial Service Licence (**AFSL**), which authorised it to carry on a financial services business pursuant to which it engaged authorised representatives as defined in s 761A of the *Corporations Act* (**Authorised Representatives**) to provide financial product advice for classes of financial products that included superannuation;
- (b) Hillross held an AFSL, which authorised it to carry on a financial services business pursuant to which it engaged Authorised Representatives to provide financial product advice for classes of financial products that included superannuation;
- (c) Charter held an AFSL, which authorised it to carry on a financial services business pursuant to which it engaged Authorised Representatives to provide financial product advice for classes of financial products that included superannuation;
- (d) AMP Superannuation held an AFSL, which authorised it to carry on a financial services business of dealing in financial products, including by issuing superannuation products; and
- (e) AMP Life held an AFSL, which authorised it to carry on a financial services business of dealing in financial products, including by issuing life insurance products, and applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of classes of products, including superannuation.

### ***The Trusts and Flexible Super***

21 During the Relevant Period, AMP Superannuation was the trustee of:

- (a) the AMP Superannuation Savings Trust; and
- (b) the AMP Retirement Trust,

(the **Trusts**).

22 Within the Trusts, AMP Superannuation offered retail and employer-sponsored superannuation products. One such employer-sponsored product was Flexible Super. The members who

joined the group plan for that product were sponsored by their employers, who entered into the group plan on the members' behalf.

23 Where employers opted in for members of their group plan in Flexible Super to receive general advice services, Authorised Representatives of each Advice Licensee provided those general advice services to members. The general advice services provided by Authorised Representatives included services such as employee seminars, email updates, policy committee attendance, ongoing phone support, and assistance with form completion.

24 Under the superannuation policies in respect of the Flexible Super group plan, AMP Life was entitled to deduct a PSF from members' accounts, where their employer had opted them in to receive general advice services. The PSF was an ongoing monthly fee that was negotiated between the employer-sponsor and the Authorised Representative. It applied to members who joined a group plan before 30 June 2014.

25 AMP Financial Planning and Hillross were each a party to a Facilitation Agreement with AMP Life. During the Relevant Period, the arrangement between AMP Life and Charter operated in substantially the same way as the arrangements between AMP Life, AMP Financial Planning and Hillross. Pursuant to the terms of the Facilitation Agreements, AMP Life remitted a percentage of the PSFs deducted from members' accounts to the Advice Licensees and the balance was remitted to the Authorised Representatives who provided the general advice services.

26 When a member ceased employment with his or her employer-sponsor, AMP Life received a notification to that effect. Upon receipt of the notification, the member was transferred to a retail plan by the operation of a rule in the product administration system.

27 Once AMP Life was notified that a member had ceased employment with their employer-sponsor, the member no longer had access to the general advice services being offered by the Authorised Representatives and was therefore no longer liable to pay the PSF.

28 As at 30 September 2018, there were 105,750 members in the Flexible Super product, of which 4,057 members had an employer who opted in to receive general advice services.

29 As noted in the Introduction to these reasons, pursuant to the Flexible Super product rules, on a member ceasing employment with their employer-sponsor:

(a) AMP Life received notification that the member had ceased employment;

- (b) that member's account was transferred out of the employer-sponsored group plan and into the retail category of Flexible Super;
- (c) there was no entitlement to charge or deduct the PSF from that member's account; and
- (d) the PSF should have ceased being deducted from that member's account.

30 The relevant product rule is clause 6.4 (Member Advice Fees and Plan Service Fees), which states in part:

The Plan Service Fee will not be charged in respect of a Member if AMP accepts a notice from a Participating Employer stating that a Member has ceased employment. A Participating Employer may change any Plan Service Fee by written agreement with the financial planner and by notice to the Trustee.

### ***The wrongful deduction of PSFs***

#### *Overview*

31 During the Relevant Period, a total of \$356,188.20 in PSFs was deducted from the superannuation accounts of 1,452 members (referred to in these reasons as the "Affected Members"), after AMP Life was notified of the cessation of the member's employment. No general advice services were provided to the Affected Members after the cessation of their employment, which were referable to, or which could justify the continued charging of, the PSF. There was therefore no entitlement to charge the PSF to the Affected Members.

32 Of the 1,452 Affected Members, 1,111 were members previously serviced by AMP Financial Planning Authorised Representatives, 252 were members previously serviced by Hillross Authorised Representatives and 89 were members previously serviced by Charter Authorised Representatives.

33 The total amount of \$356,188.20 in PSFs wrongly deducted consisted of:

- (a) \$282,453.01 (approximately 79% of the total of \$356,188.20) in respect of AMP Financial Planning members;
- (b) \$44,485.06 (approximately 12%) in respect of Hillross members; and
- (c) \$29,250.13 (approximately 8%) in respect of Charter members.

34 Of the \$356,188.20 in PSFs wrongly deducted, \$24,672.00 was retained by the Advice Licensees (\$19,614.49 by AMP Financial Planning, \$3,497.26 by Hillross and \$1,560.25 by Charter), with the balance of \$331,516.20 remitted to Authorised Representatives of the Advice Licensees.

*AMP Life's role in relation to the wrongful deductions*

35 AMP Life was the administrator of AMP Superannuation's superannuation products, performing administrative services in connection with the funds pursuant to contractual arrangements with AMP Superannuation.

36 It also had contractual arrangements in place with each Advice Licensee which facilitated the distribution of PSFs from members' superannuation accounts to each Advice Licensee and their Authorised Representatives (being the Facilitation Agreements described above).

37 In performance of its administration of the Trusts and its contractual obligations with each Advice Licensee, AMP Life was the entity that deducted the PSF from members' accounts and remitted it to the Advice Licensees. It was also primarily the entity that received complaints and queries from members and/or their advisers concerning the charging of the PSF, as detailed below.

38 AMP Life was typically notified of the Affected Member's cessation of employment with their employer-sponsor by the employer-sponsor of the member. In some cases, the member notified their Authorised Representative, who then notified the employer-sponsor or AMP Life. In some other cases, the member notified AMP Life directly.

39 AMP Life typically sent a notification of the Affected Member's cessation of employment to the applicable Authorised Representative of the Advice Licensee who was providing the general advice services, through a planner portal (a system used for communication, among other things).

40 The deduction of PSFs from Affected Members' accounts was facilitated through the Ultimaas II (U2) Product Administration System (the **U2 System**), which was used to administer AMP Superannuation's products and was operated for AMP Superannuation by AMP Life under an outsourcing agreement. The U2 System facilitated the continued deduction and charging of PSFs from an Affected Member's account by AMP Life as the administrator of the funds.

*AMP Superannuation's role in relation to the wrongful deductions*

41 Under an outsourcing agreement between AMP Superannuation and AMP Life, AMP Superannuation had powers to supervise and monitor AMP Life's performance of its obligations:

- (a) AMP Superannuation had power to obtain information from AMP Life about the provision of services to AMP Superannuation, the AMP Superannuation funds and the superannuation policies;
- (b) AMP Superannuation had power to conduct on-site visits to AMP Life and obtain copies of any documents or information relating to the provision of services to AMP Superannuation; and
- (c) AMP Superannuation had power to engage independent auditors to investigate AMP Life's business activities relevant to the performance of its obligations under the agreement.

42 AMP Superannuation was the trustee of the funds and therefore had records in its possession that showed that:

- (a) the Affected Members had ceased employment with their employer-sponsor, because the Affected Member had been transferred to the retail category of the relevant product; and
- (b) PSFs continued to be deducted from the Affected Members' accounts after they had been transferred to the retail category of the relevant product.

*Advice Licensees' role in relation to the wrongful deductions*

43 Authorised Representatives were typically notified of the cessation of Affected Member's employment by AMP Life as described above.

44 The PSF deducted after an Affected Member's cessation of employment was recorded as revenue of the Advice Licensees.

45 Each Advice Licensee retained the portion of the PSFs which represented its licensee fees. The balance of the PSFs was distributed to the Authorised Representatives who were responsible for the provision of the general advice services.

46 The Advice Licensees, through their Authorised Representatives, did not (and could not) provide any general advice services to the Affected Members referable to the PSFs charged after notification that the Affected Members had ceased employment with their employer-sponsor.

*The cause of the wrongful deductions*

47 The evidence of Mr Clark establishes that the wrongful deductions stem from a computer coding error that occurred at about the time the Flexible Super – Employer group plan was introduced (in May 2010).

48 The exhibit to Mr Clark’s affidavit includes a document titled “Ultimaas II Application Documentation” (the **U2 Application Document**), which was prepared in 2010 to provide an overview to the Technology team of the business rules required to be coded into U2 for the Flexible Super product. The Flexible Super product was programmed into U2 after its introduction in or around May 2010.

49 Mr Clark gives evidence that U2 operates with “if this, then that” coding. That means that coding a rule into it causes the system to operate such that, when a particular event is recorded into the relevant field in U2, certain actions will automatically occur (or cease occurring) as a result. Rules that operate this way are identified in the U2 Application Document by the letter “R” followed by a four-digit number. The U2 Application Document states that:

If the member terminates employment, the PAF [sic: PSF] will no longer be charged to member’s account. R1744

50 Mr Clark gives evidence that, had Rule 1744 been coded into U2, a member who ceased employment with their employer-sponsor would no longer be charged a PSF.

51 Mr Clark gives evidence that, following an investigation into the issue in 2018, it was determined that the cause of the continued deduction of the PSF following “detachment” (that is, the member ceasing employment with the employer-sponsor) was a failure to code Rule 1744 in U2.

52 While the Court has evidence (summarised above) that the wrongful deductions arose because of a coding error, the evidence filed by the defendants does not provide any details about the how that error occurred and who was responsible for it.

53 Mr Clark gives evidence in paragraphs 48-50 of his affidavit about auditing and monitoring of U2 in relation to the Flexible Super – Employer product. He states that U2 was the subject of periodic and ad hoc audits and testing, including standard user acceptance testing (UAT) before the Flexible Super – Employer product was implemented. He states that the document at tab 25 of the exhibit to his affidavit sets out the test strategy in relation to the Flexible Super – Employer product. In particular, page 578 of the exhibit sets out the dates (in 2010) on which

UAT was undertaken, as well as the dates on which various other tests were undertaken. Mr Clark states that the UAT involved a standard U2 user, from each of the relevant teams, undertaking testing of scenarios they were likely to encounter on a day-to-day basis. Mr Clark states that, in his experience, the specific UAT scenarios for each business unit are generally determined by the relevant business unit personnel, such as Business Analysts, Product, Master Trust Operations/Client Services and Finance.

54 I observe that this evidence is presented at a very general level, with no detail as to subsequent auditing and monitoring of the U2 system (and, in particular, the Flexible Super product) and no explanation as to why the auditing and monitoring did not pick up the coding error.

### ***Complaints from members and advisers***

#### *Overview*

55 AMP Life and AMP Financial Planning received many complaints from members and/or their advisers in relation to the continued deduction of PSFs after a member's cessation of employment, as detailed below.

56 Each of the complaints was resolved at the time it was raised, through a refund of the PSFs wrongfully deducted from the relevant member's account or (where applicable) manually removing the PSF from the member's account.

57 The following table sets out details of complaints that were received from members and advisers in relation to PSFs charged through the Flexible Super group plan and how the complaints were resolved.

<b>No.</b>	<b>Date</b>	<b>Complainant</b>	<b>Recipient</b>	<b>Nature of complain and outcome</b>
1.	9 February 2015	Member	AMP Life	Member (OS) complained that they had requested that PSFs be cancelled from July 2014, but PSFs continued to be charged. The complaint was resolved by providing OS with a refund of \$18.71 and manually switching off the fee.
2.	23 December 2015	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to client (TT) after date of notification of employment termination on 20 September 2012. On 12 January 2016, the complaint was resolved by providing TT with a refund of \$152.40 and manually switching off the fee.

3.	24 August 2016	Member	AMP Life	Member (ECS) complained that PSF charged after date of notification of employment termination on 29 May 2014. On 12 September 2016, the complaint was resolved by providing ECS with a refund of \$286.04 and manually switching off the fee.
4.	7 September 2016	Member	AMP Life	Member (BP) complained that PSF charged after date of notification of employment termination on 20 March 2012. On 9 September 2016, the complaint was resolved by providing BP with a refund of \$34.09 and manually switching off the fee.
5.	24 November 2016	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to member (BT) after date of notification of employment termination on 17 December 2012. On 25 November 2016, the complaint was resolved by providing BT with a refund of \$194.75. The fee had already been switched off from 31 July 2016. BT was also the subject of the complaint made on 21 December 2017.
6.	25 November 2016	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to member (AJ) after date of notification of employment termination on 20 December 2013. On 29 November 2016, the complaint was resolved by providing AJ with a refund of \$403.91 and manually switching off the fee.
				Adviser complained that PSF charged to member (AH) after date of notification of employment termination on 20 December 2013. On 29 November 2016, the complaint was resolved by providing AH with a refund of \$175.45 and manually switching off the fee.
7.	6 December 2016	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to member (MB) after date of notification of employment termination on 29 July 2016. On 12 December 2016, the complaint was resolved by providing MB with a refund of \$43.97 and manually switching off the fee.
8.	28 April 2017	Employee	AMP Life	Employee complained that PSF charged to member (DY) after date of notification of employment termination on 23 April 2015. On 22 May 2017, the complaint was resolved by providing DY with a refund of \$146.25 and manually switching off the fee.
9.	17 August 2017	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to member (DAB) after date of notification of employment termination on 4 May 2017. On 21 August 2017, the complaint was resolved by providing DAB with a refund of \$21.15 and manually switching off the fee.
10.	20 November 2017	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to member (JG) after date of notification of employment termination on 9 March 2017. On 22 November 2017, the complaint was resolved by providing JG with a refund of \$147.77 and manually switching off the fee.

				Adviser complained that PSF charged to member (CJK) after date of notification of employment termination on 9 March 2017. On 22 November 2017, the complaint was resolved by providing CJK with a refund of \$13.79 and manually switching off the fee.
11.	21 December 2017	Adviser	AMPFP	Adviser complained on behalf of 34 clients, 23 of whom were members of a Flexible Super group plan and who had PSFs charged after date of notification of employment termination of those members. 22 of these members were remediated in full at the time of the complaint. One member was remediated through the remediation program.
12.	15 March 2018	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to member (LS) after date of notification of employment termination on 4 September 2014. On 19 March 2018, the complaint was resolved by providing LS with a refund of \$634.09 and manually switching off the fee.
13.	23 April 2018	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to member (JM) after date of notification of employment termination on 13 March 2014. The complaint was resolved by providing JM with a refund on 3 May 2018 and a further refund on 11 December 2018, totalling \$73.02, and manually switching off the fee.
				Adviser complained that PSF charged to member (SW) after date of notification of employment termination on 13 and 19 March 2014. On 3 May 2018, the complaint was resolved by providing SW with a refund of \$2.19 and manually switching of the fee.
14.	24 April 2018	Adviser	AMP Life / AMPFP	Adviser raised concern that PSF charged to two members (JM and SW) who were part of an employer plan but had left their employer-sponsor and joined a personal plan with AMP. This complaint triggered the investigation which led to the 26 June 2018 breach report in this matter. These members were remediated as part of AMP's remediation program.
15.	7 June 2018	Member	AMP Life	Member (CKF) complained that PSF charged after date of notification of employment termination on 31 March 2018. On 12 June 2018, the complaint was resolved by providing CKF with a refund of \$105.64 and manually switching off the fee.
16.	1 August 2018	Adviser	AMP Life / AMPFP	Adviser complained that PSF charged to member (EC) after date of notification of employment termination on 24 April 2014. On 27 August 2018, the complaint was resolved by providing EC with a refund of \$198.39 and manually switching off the fee.

17.	27 August 2018	Member	AMP Life	Member (DMB) complained that PSF charged after date of notification of employment termination on 20 April 2015. On 7 June 2019, the complaint was resolved by providing DMB with a refund of \$2,308.54 and manually switching off the fee.
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58 In relation to complaints 1 to 13, despite the fact that each complaint related to the erroneous deduction of the PSF after a member ceased employment with the employer-sponsor, the systemic nature of the issue was not identified. It was not until after complaint 14, received on 24 April 2018, that steps were taken to investigate whether there was a systemic issue.

*The 9 February 2015 complaint*

59 Mr Pavlek provides evidence in his affidavit in relation to complaint 1 in the above table, which was made on 9 February 2015. In 2015, Mr Pavlek was a Business Support Analyst in the Business Support Team (**BST**) at AMP.

60 Mr Pavlek describes, at paragraph 8 of his affidavit, his typical workflow when working on coding issues in respect of product administration systems. This included: an employee lodging a “ticket” on the Management Incident Tracking Tool system (**Mitts**), which included information about the issue or problem being encountered; once a ticket was lodged on Mitts, it was allocated by a team manager to a member of the BST. The Mitts ticket for the 9 February 2015 complaint was allocated to Mr Pavlek.

61 Annexed to Mr Pavlek’s affidavit is a copy of a business process management system record relating to the Mitts ticket for the 9 February 2015 complaint. Mr Pavlek sets out, in paragraph 14 of his affidavit, the record for the 9 February 2015 complaint and his interpretation of the data. The following facts and matters emerge from that evidence:

- (a) On 9 February 2015, an AMP employee (who I will refer to as ES), working in Operations/Platform & Corporate Support/Customer Service, created the Mitts ticket for the complaint. ES advised that she could not process a fee reversal/removal for a member, and requested that the fee be removed manually. The record contains the following data:

Call No 1916564 Log Date 9/02/2015 11:17AM Customer [ES] Organization Operations/Platform & Corporate Sup/Customer Servi Telephone 02 9768 7042 Service Type Ultimaas 2 Status Closed Configuration Item Priority 5 First/Response Esc Time Next Esc Time Problem Desc AP - FL 947418455 – **Error “Ongoing Planner Service Fee is not allowed for Fee Sub Type**

**POD” Objects Mitts 1374595 - Ongoing Planner Service Fee is not allowed for Fee Sub Type POD.msg42Kb Knowledge Articles (None)**

(Emphasis added.)

Mr Pavlek’s evidence regarding the above data includes that he believes that “Sub Type POD” was the type of fee.

- (b) On 12 February 2015, Mr Pavlek opened the ticket for initial investigation. On the same day, Mr Pavlek emailed ES with a potential solution. He states in his affidavit that he believes he proposed a “workaround”, being to remove the employer as “sponsoring employer”.
- (c) On 16 February 2015, ES added a note that advised that the employer sponsorship could not be removed as the member had already been detached from the employer.
- (d) On the same day, Mr Pavlek referred the ticket to AMP’s second line support (IT Production Support). Mr Pavlek referred IT Production Support to three previous tickets that likely related to the same or a similar issue (and providing the Mitts numbers for those tickets).
- (e) On 25 March 2015, Andrew Reid (from IT Production Support) placed a note on the ticket, advising that the fee would be manually removed from the back end of the system. The record contains the following data:

25/03/2015 7:46 AM - Andrew Reid [Call Updated] Problem: FL 947418455 – **Error “Ongoing Planner Service Fee is not allowed for Fee Sub Type POD” RCA: Known issue. An enhancement is required.** Solution: Manually add ad new UFEEOH record for the Employment termination date and then add a UFEEOD record with code “Z”.

(Emphasis added.)

Mr Pavlek states in his affidavit that “RCA” means “Root Cause Analysis”. He states that he believes that where Mr Reid has written “enhancement required”, he has done so because, without an enhancement, if this issue (that is, the need to manually remove fee type POD for a particular member) arose again, the business user would be required to contact BST to implement the fix (as the business users did not have access to the back end of U2).

- (f) On 25 March 2015, Mr Pavlek closed the ticket and sent an email to ES. Mr Pavlek states in his affidavit that, while he cannot recall specifically, based on his typical workflow, he expects that he would have advised ES that the ticket had been actioned,

a manual workaround had been processed, and an enhancement was required to enable the business user to manually remove that fee type in the future.

62 Mr Pavlek states at paragraph 15 of his affidavit that he does not know whether the enhancement referred to above was implemented. He states that enhancements were dealt with by the Maintenance and Enhancements team (**M&E team**). He states at paragraph 16 that, without an enhancement being implemented, if this issue arose again for another individual member, the business user would be required to contact the BST to implement the fix (as the business users did not have access to the back end of U2). Mr Pavlek also gives the following evidence at paragraph 17 of his affidavit:

I have been told that these proceedings are about a U2 problem where there was a failure to code a rule that turned off plan service fees upon delink. During my time working in the BST, I operated on the assumption that the rules in U2 were correct. When resolving the Mitts ticket referred to above, my concern was the reason why the fee could not be turned off by the business user, not whether it was appropriate for the fee to be charged in the first place or following the member delinking.

63 I accept the evidence of Mr Pavlek, which was not challenged. However, it only goes so far. I make the following observations. First, the defendants have not called Mr Reid to give evidence (or indicated whether or not he is available to give evidence). It is unclear whether, in stating that this was a “[k]nown issue” and that an “enhancement” was required, Mr Reid was referring to an issue that business users could not manually remove the fee themselves (and an enhancement to address that issue), or to an issue that the PSF was being automatically deducted where it should not have been (and an enhancement to address that issue). Secondly, no one from the M&E team has been called to give evidence as to whether that team was requested to make an enhancement to address one or other or both of these issues. Thirdly, it seems that no one at AMP thought to ask *why* the PSF that was the subject of this ticket (or the three previous similar tickets) had been deducted in error – had this question be asked, the systemic issue may well have been identified much earlier than it was.

*The 21 December 2017 complaint*

64 Complaint 11 in the above table, which was made on 21 December 2017, was a complaint by an adviser on behalf of 34 clients, 23 of whom were members of a Flexible Super group plan and who had PSFs charged after the date of notification of employment termination of those members. Despite this complaint coming from an adviser and involving so many members, it still did not trigger an investigation as to whether there was a systemic issue.

*AMP's complaints handling system*

65 Ms Taylor gives evidence in her affidavit about AMP's complaints handling system during the Relevant Period. She states that complaints were handled within the business unit to which the complaints related – for example, a complaint relating to advice was generally handled by the complaints handling team within the advice business unit. That business unit was responsible for the receipt, recording, investigation, resolution and closure of complaints from both members/customers and advisers and self-reports from advisers.

66 In her affidavit, Ms Taylor states that, as acknowledged in the SOAF, between 2015 and 2018, AMP's complaints monitoring system and processes did not identify in a timely manner that there was a systemic issue that resulted in the deduction of PSFs from the accounts of members in the Flexible Super – Employer group plan who had ceased employment with their employer-sponsors.

67 Ms Taylor expresses the opinion, which I accept, that the primary reasons why the complaints monitoring system did not detect this systemic issue until in or about April 2018 were as follows:

- (a) The AMP Group did not have holistic oversight of complaints. There was no enterprise-wide sharing of complaints data, at a management level or frontline level, that would have enabled the analysis of that data to identify possible systemic issues. The complaints monitoring system across AMP was decentralised, in that different business units within AMP used different systems and processes to record and manage complaints, and these systems and processes were distinct from one another.
- (b) There was no quality assurance of closed complaints to ensure that complaints were managed and resolved effectively and that any systemic issues were flagged.

***Knowledge of the contravening conduct***

68 As trustee of the Trusts with access to records indicating that Affected Members had ceased employment with their employer-sponsor, AMP Superannuation had knowledge of the continued deduction of PSFs from the Affected Members' accounts and therefore knowledge of the contravening conduct in the Relevant Period.

69 Further, by reason of the complaints referred to above, and the records of these complaints, AMP Life and AMP Financial Planning knew that in the Relevant Period:

- (a) the contravening conduct had occurred; and
- (b) certain members and/or their advisers had complained about the contravening conduct and had received a refund in respect of such conduct.

***Contraventions of the relevant provisions***

70 The conduct the subject of this proceeding was in trade or commerce, and in connection with a financial product and a financial service, within the meaning of the *Corporations Act* and the ASIC Act. The general advice services provided by the Advice Licensees through their Authorised Representatives to the Affected Members was a service otherwise supplied in relation to a financial product.

71 The SOAF, at paragraphs 66-83, contains agreed facts establishing each element of the contraventions (or knowing involvement in the contraventions).

72 There were many thousands of contraventions of s 12DI(3) of the ASIC Act. A contravention by an Advice Licensee of s 12DI(3) occurred on each occasion a PSF was deducted from an Affected Member’s account. AMP Superannuation and AMP Life were involved in each and every contravention. This brings about the following calculations of the number of contraventions by each Advice Licensee and the number of contraventions in respect of which AMP Superannuation and AMP Life were knowingly concerned (as set out in ASIC’s submissions at paragraph 30, which I understand to be accepted by the defendants):

<b>Defendant</b>	<b>Contraventions between 31 July 2015 and 30 June 2017</b>	<b>Contraventions between 1 July 2017 and 30 September 2018</b>
AMP Financial Planning	34,681	8,957
Hillross	5,685	1,038
Charter	1,224	250
AMP Superannuation	41,590	10,245
AMP Life	41,590	10,245

73 Thus, the total number of contraventions by the Advice Licensees during the Relevant Period was 51,835. That figure was accepted by counsel for the defendants during the hearing (T77). AMP Superannuation and AMP Life were each involved in that number of contraventions.

***Identification of the contravening conduct and rectification***

74 On 24 April 2018, an Authorised Representative made a complaint to AMP. That complaint led AMP Life to make preliminary inquiries and to investigate members’ account records to determine whether the wrongful deduction of PSFs was a systemic issue.

75 On 18 May 2018, an incident was recorded on AMP’s incident management system, the Incident Management Database. Mr Clark states in his affidavit that he was the “Incident Owner” for the incident, meaning that he was the accountable business lead for the incident. Members of his team were the Incident Responsible Managers. Their role, and the investigation of the incident, are described at paragraphs 22-26 of Mr Clark’s affidavit.

76 As noted above, following its investigation, AMP Life determined that the cause of the continued deduction of the PSF following a member ceasing employment with the employer-sponsor was a failure to code Rule 1744 in the U2 System.

77 In May and June 2018, the issue was discussed internally at the Insurance, WSC & Group Functions Incident Working Group and then referred to the Insurance & Wealth Solutions Breach Review Committee, where AMP Superannuation became aware of the issue.

78 On 19 June 2018, the Advice Licensees were notified of the wrongful deduction of the PSFs and informed that steps were being taken to prevent such deductions.

79 In June 2018, AMP commenced a process to find a technological solution to ensure that PSFs were automatically removed from the accounts of members who had ceased employment with their employer-sponsor. As an interim step, it identified the accounts of members who had recently been transferred to a retail plan and manually removed the PSF from those members’ accounts before any further PSFs were deducted. In addition, AMP Superannuation began preparing a remediation plan that would address the compensation payable to impacted members, notification to those members, and the calculation of any loss of earnings. Breach reports were provided to ASIC.

80 In October 2018, AMP delivered a technology solution by which new code was written in the U2 System to prevent it from charging PSFs to members at the time that AMP Life was notified of cessation of employment. The effect of that fix was that the system automatically removed PSFs from the accounts of members who had ceased employment with their employer-sponsor.

81 In February 2019, following another review of the U2 System, AMP Superannuation and AMP Life determined that the deduction of PSFs should cease from the date of employment cessation, rather than from the date of notification of employment cessation (which may occur some time after the date of cessation). At this time, AMP began to develop a further technology release to give effect to that determination.

82 In May 2019, AMP implemented the further technology release to ensure that the deduction of PSFs ceased from the date of employment cessation (rather than from the date of notification). Under that release, a new code was written in the U2 System so that it automatically set the PSF to a zero value at the time of cessation of employment. That value was set retrospectively once AMP Life received notification of cessation of employment. The relevant member was then refunded where necessary.

83 In June 2019, AMP carried out testing to determine whether the system correctly identified all members whose employment had ceased and that the PSFs that they had been charged were recalculated and refunded where necessary. The results of the testing showed that PSFs had ceased being deducted from the accounts of members whose employment had ceased.

### ***Remediation***

84 During the period December 2018 to July 2019, the AMP Group conducted a remediation program under which it refunded PSFs charged to those affected (including sums reflecting the associated loss of performance).

85 Members other than the Affected Members were the subject of the remediation program as deduction of PSFs extended back to 1 September 2010. However, by reason of limitation periods, this proceeding is only concerned with the deduction of PSFs that occurred within the Relevant Period.

86 Pursuant to this remediation program:

- (a) 2,555 superannuation accounts of members were refunded PSFs; and
- (b) the AMP Group refunded a total amount of \$928,494.20 to these members.

87 In relation to the Affected Members the subject of this proceeding:

- (a) 1,452 members were refunded \$554,950.58 in PSFs; and
- (b) a total amount of \$691,032.68 was paid to Affected Members (representing the \$554,950.58 in PSFs plus loss of performance on those funds).

88 Each of the 1,452 Affected Members was fully remediated through AMP Group's remediation program.

89 Further detail as to the remediation is provided in paragraphs 43-47 of Mr Clark's affidavit.

### ***Breach reports and updates to ASIC***

90 The SOAF, at paragraphs 56-63, details various breach reports, and updates, provided by the defendants to ASIC in relation to the issues that are the subject of this proceeding. The SOAF, at paragraph 64, refers to notices issued by ASIC to the defendants for the production of documents and the responses to those notices.

### ***Co-operation***

91 The defendants co-operated with ASIC throughout the investigation leading to this proceeding, and also co-operated with ASIC in the preparation of the SOAF. They have admitted the contraventions of the relevant legislative provisions.

### ***Improvements in systems***

92 Ms Taylor gives evidence, in paragraphs 18-26 of her affidavit, that there have been significant developments and improvements in AMP's complaints monitoring systems and processes since September 2018. I accept that evidence. I note also that AMP no longer charges PSFs on its superannuation products.

### ***Size and circumstances of the defendants***

93 The AMP Group is a wealth management company that, during the Relevant Period, offered a variety of financial solutions across financial advice, investment management, banking, life insurance, superannuation, retirement income and investing, to approximately 3.5 million customers in Australia and New Zealand.

94 In the 2018 financial year, being the last financial year that falls within the Relevant Period:

- (a) AMP Superannuation was the trustee of 2,240,195 superannuation member accounts across the AMP Group;
- (b) AMP Life administered the superannuation accounts of 922,446 members across the AMP Group;
- (c) there were 1,345,462 superannuation member accounts linked to an Authorised Representative of AMP Financial Planning;
- (d) there were 55,268 superannuation member accounts linked to an Authorised Representative of Hillross; and
- (e) there were 54,259 superannuation member accounts linked to an Authorised Representative of Charter.

95 The table below outlines each entity’s revenue and net profit after tax (NPAT) throughout the years that fall within the Relevant Period:

Year	AMP Limited	AMP Life	AMP Superannuation	AMP Financial Planning	Hillross	Charter
2015 Revenue	\$1,115M	\$7,697M	\$7,637,829	\$474,352,000	\$150,023,000	\$298,167,000
2015 Loss/Expenses	\$61M	\$7,122M	\$5,993,410	\$487,732,000	\$138,734,000	\$322,557,000
2015 NPAT	\$972M	\$575M	\$1,152,051	-\$9,338,000	\$6,209,000	-\$17,008,000
2016 Revenue	\$527M	\$8,437M	\$9,591,469	\$472,622,000	\$156,730,000	\$305,238,000
2016 Loss/Expenses	\$104M	\$8,129M	\$7,265,857	\$502,352,000	\$126,658,000	\$343,710,000
2016 NPAT	-\$344M	\$308M	\$1,792,542	-\$20,811,000	\$22,390,000	-\$26,921,000
2017 Revenue	\$1,072M	\$13,849M	\$932,574,000	\$480,685,000	\$147,408,000	\$293,781,000
2017 Loss/Expenses	\$74M	\$13,284M	\$930,105,000	\$497,816,000	\$131,779,000	\$324,078,000
2017 NPAT	\$848M	\$565M	\$1,642,000	-\$11,992,000	\$11,098,000	-\$21,208,000
2018 Revenue	728M	\$4,539M	\$891,116,000	\$469,775,000	\$142,772,000	\$271,480,000
2018 Loss/Expenses	\$76M	\$4,678M	\$889,138,000	\$533,923,000	\$135,531,000	\$298,812,000
2018 NPAT	\$28M	-\$139M	\$1,389,000	-\$44,904,000	\$5,073,000	-\$18,769,000

### Applicable principles

#### *Section 12DI(3) of the ASIC Act*

96 The terms of s 12DI(3) of the ASIC Act have been set out in the Introduction to these reasons. The elements of the provision were described by Beach J in *Australian Securities and Investments Commission v Westpac Banking Corporation* (2022) 159 ACSR 381 (*ASIC v Westpac*) at [45]-[46]. His Honour also discussed, at [49]-[50], what must be shown to establish that a person has been “knowingly concerned” in a contravention of s 12DI(3).

#### *Section 912A(1)(a) and (c) of the Corporations Act*

97 The terms of s 912A(1)(a) and (c) of the *Corporations Act* are set out in the Introduction, above. The principles relating to s 912A(1)(a) were discussed by Beach J in *ASIC v Westpac* at [60]-[66].

#### *Declaratory relief*

98 This Court has the power to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth).

99 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 (*ABCC v CFMEU*), the Full Court stated (at [90]):

The fact that the parties have agreed that a declaration of contravention should be made does not relieve the Court of the obligation to satisfy itself that the making of the declaration is appropriate. ... It is not the role of the Court to merely rubber stamp orders that are agreed as between a regulator and a person who has admitted contravening a public statute.

(Citations omitted.)

The Full Court continued (at [93]):

Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions ...

(Citations omitted.)

100 In *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J stated (at 437-438) that before making declarations three requirements should be satisfied:

- (a) the question must be a real and not a hypothetical or theoretical one;
- (b) the applicant must have a real interest in raising it; and
- (c) there must be a proper contradictor.

### ***Civil penalties***

101 During the Relevant Period, s 12GBA of the ASIC Act provided in part:

#### **12GBA Pecuniary penalties**

- (1) If the Court is satisfied that a person:
  - (a) has contravened a provision of Subdivision C, D [which includes s 12DI] 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; or
  - ...

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.
- (2) In determining the appropriate pecuniary penalty, the Court must 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; and
- (b) the circumstances in which the act or omission took place; and
- (c) whether the person has previously been found by the Court in proceedings under this Subdivision [Subdivision G] to have engaged in any similar conduct.

...

- (4) If conduct constitutes a contravention of 2 or more provisions referred to in paragraph (1)(a):
  - (a) a proceeding may be instituted under this Act against a person in relation to the contravention of any one or more of the provisions; but
  - (b) a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

102 The maximum pecuniary penalty in respect of a contravention of s 12DI(3) (or being knowingly concerned in a contravention of that provision) changed during the Relevant Period. For the period 31 July 2015 to 30 June 2017, the maximum was \$1.8 million. For the period 1 July 2017 to 30 September 2018, the maximum was \$2.1 million.

103 The principles applicable to the discretion to impose pecuniary penalties have been discussed in many cases. I refer to and adopt the summary of the principles in my judgment in *Australian Competition and Consumer Commission v Trivago N.V. (No 2)* (2022) 159 ACSR 353 at [61]-[72]. For ease of reference, I set out the substance of part of that passage in the paragraphs below.

104 In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (the *Agreed Penalties Case*), the High Court emphasised that the primary purpose of civil penalties is to secure deterrence. In contrast to criminal sentences, they are not concerned with retribution and rehabilitation but are “primarily if not wholly protective in promoting the public interest in compliance”: *Agreed Penalties Case* at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; see also at [110] per Keane J. This point was also emphasised by the High Court in *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599 (*Pattinson*) at [15]-[16], [43], [45], [55] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.

105 The plurality in *Pattinson* affirmed (at [18]) the well-known statements of French J, as his Honour then was, in *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076; [1990] FCA 762 (*CSR*). In that case, his Honour listed several factors that informed the assessment

of a penalty of appropriate deterrent value under the *Trade Practices Act 1974* (Cth). His Honour stated:

The assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases. These include the following:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.
3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the contravention and the period over which it extended.
7. Whether the contravention arose out of the conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

106 After setting out the above passage, the plurality in *Pattinson* stated at [19]:

It may readily be seen that this list of factors includes matters pertaining both to the character of the contravening conduct (such as factors 1 to 3) and to the character of the contravenor (such as factors 4, 5, 8 and 9). It is important, however, not to regard the list of possible relevant considerations as a “rigid catalogue of matters for attention” as if it were a legal checklist. The court’s task remains to determine what is an “appropriate” penalty in the circumstances of the particular case.

(Footnotes omitted.)

107 The plurality in *Pattinson* considered the role of the prescribed maximum penalty as a yardstick in a civil penalty context, affirming (at [53]) the explanation provided by the Full Court of this Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 (*Reckitt Benckiser*) at [155]-[156]. See also *Pattinson* at [54]-[55].

108 In cases involving a very large number of contraventions, it may be unhelpful to seek to make a finding as to the precise number of contraventions, or to calculate a maximum aggregate penalty by reference to such a number: see *Australian Competition and Consumer Commission*

*v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540 at [18] and [82] per Allsop CJ; *ABCC v CFMEU* at [143] per Dowsett, Greenwood and Wigney JJ.

109 It is relevant to refer to the course of conduct principle, which was considered by the Full Court of this Court in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312 at [421]-[428]. The Full Court (Middleton, Beach and Moshinsky JJ) stated at [424] that the course of conduct principle is a useful “tool” in the determination of appropriate civil penalties. The Full Court continued:

As we have already indicated, the principal object of the penalties imposed by s 76 of the [*Trade Practices Act 1974* (Cth)] is that of specific and general deterrence. With this in mind, in a civil penalty context, the course of conduct principle can be conceived of as a recognition by the courts that the deterrent effect in respect of a civil penalty (at both a specific and general level) is measured by reference to the nature of the conduct for which it is imposed. It is therefore of paramount importance to identify whether multiple contraventions constitute a single course of conduct or separate instances of conduct, so as to ensure that an appropriate deterrent effect is achieved by the imposition of the penalty or penalties in respect of that particular conduct.

110 In relation to the course of conduct principle, in *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 (*Hillside*), Beach J stated at [25]:

... 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.

111 The above passage was cited with approval by the Full Court in *Reckitt Benckiser* at [141].

112 Where multiple separate penalties are to be imposed upon a particular wrongdoer, the ‘totality principle’ requires the Court to make a ‘final check’ of the penalties to be imposed on a wrongdoer, considered as a whole. It will not necessarily result in a reduction. However, in cases where the Court believes that the cumulative total of the penalties to be imposed would be too high, the Court should alter the final penalties to ensure that they are ‘just and appropriate’: see *Australian Competition and Consumer Commission v Australian Safeway*

*Stores Pty Ltd* (1997) 145 ALR 36 at 53 per Goldberg J; *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* (2014) 234 FCR 343 at [101]-[102] per Middleton J.

113 In determining the appropriate penalty, it is relevant to consider steps taken to ameliorate loss or damage (such as payment of compensation) as potentially mitigatory considerations: *Australian Competition and Consumer Commission v Woolworths Limited* [2016] ATPR ¶42-251; [2016] FCA 44 at [166]-[167] per Edelman J; *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* (2015) 146 ALD 385; [2015] FCA 399 at [38] per White J.

114 Co-operation with authorities in the course of investigations and subsequent proceedings can properly reduce the penalty that would otherwise be imposed. The reduction reflects the fact that such co-operation: increases the likelihood of co-operation in future cases in a way that furthers the object of the legislation; frees up the regulator's resources, thereby increasing the likelihood that other contravenors will be detected and brought to justice; and facilitates the course of justice: see, eg, *Agreed Penalties Case* at [46]; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 293-294.

### **Application of principles to this case**

#### ***Declarations***

115 The parties propose that declarations be made (in summary) that:

- (a) each of Advice Licensees contravened s 12DI(3) of the ASIC Act and s 912A(1)(a) and (c) of the *Corporations Act*;
- (b) each of AMP Superannuation and AMP Life was knowingly concerned in the Advice Licensees' contraventions of s 12DI(3) of the ASIC Act, within the meaning of s 12GBA(1)(e) of the ASIC Act (as in force during the Relevant Period); and
- (c) AMP Superannuation contravened s 912A(1)(a) and (c) of the *Corporations Act*.

116 The proposed declarations are:

#### **AMP Financial Planning**

1. During the Relevant Period, the first defendant, AMP Financial Planning Proprietary Limited (ACN 051 208 327), in trade or commerce accepted payments from AMPFP Affected Members for the provision of general advice services, which are financial services within the meaning of s 12DI(3)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), in circumstances where there were reasonable grounds for believing that AMP Financial Planning Proprietary Limited would not be able to supply the

financial services to the Affected Members within the Relevant Period, and thereby contravened s 12DI(3) of the ASIC Act in respect of each payment accepted in this period.

2. AMP Financial Planning Proprietary Limited, by its conduct in:
  - (a) failing to procure and administer a system that ensured that the deduction of PSFs from AMPFP Affected Members' accounts ceased upon notification of cessation of employment and the remission of any fees deducted between the date of cessation of the AMPFP Affected Members' employment and the date of notification; and
  - (b) not having effective compliance arrangements in place to monitor and supervise the deduction and remission of PSFs from AMPFP Affected Members' accounts to Authorised Representatives,

breached its obligation to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act 2001* (Cth).

3. AMP Financial Planning Proprietary Limited, by its conduct in contravening s 12DI(3) of the ASIC Act, breached its general obligation as a financial service licensee to comply with financial services laws and thereby contravened s 912A(1)(c) of the *Corporations Act*.

#### **Hillross Financial Services Limited**

4. During the Relevant Period, the second defendant, Hillross Financial Services Limited (ACN 003 323 055), in trade or commerce accepted payments from Hillross Affected Members for the provision of general advice services, which are financial services within the meaning of s 12DI(3)(a) of the ASIC Act, in circumstances where there were reasonable grounds for believing that Hillross Financial Services Limited would not be able to supply the financial services to the Hillross Affected Members within the Relevant Period, and thereby contravened s 12DI(3) of the ASIC Act in respect of each payment accepted in this period.

5. Hillross Financial Services Limited, by its conduct in:
  - (a) failing to procure and administer a system that ensured that the deduction of PSFs from Hillross Affected Members' accounts ceased upon notification of cessation of employment and the remission of any fees deducted between the date of cessation of the Hillross Affected Members' employment and the date of notification; and
  - (b) not having effective compliance arrangements in place to monitor and supervise the deduction and remission of PSFs from Hillross Affected Members' accounts to Authorised Representatives,

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

6. Hillross Financial Services Limited, by its conduct in contravening s 12DI(3) of the ASIC Act, breached its general obligation as a financial service licensee to comply with financial services laws and thereby contravened s 912A(1)(c) of the *Corporations Act*.

### **Charter Financial Planning Limited**

7. During the Relevant Period, the third defendant, Charter Financial Planning Limited (ACN 002 976 294), in trade or commerce accepted payment from Charter Affected Members for the provision of general advice services, which are financial services within the meaning of s 12DI(3)(a) of the ASIC Act, in circumstances where there were reasonable grounds for believing that Charter Financial Planning Limited would not be able to supply the financial services to the Charter Affected Members within the Relevant Period, and thereby contravened s 12DI(3) of the ASIC Act in respect of each payment accepted in this period.
8. Charter Financial Planning Limited, by its conduct in:
  - (a) failing to procure and administer a system that ensured that the deduction of PSFs from Charter Affected Members' accounts ceased upon notification of cessation of employment and the remission of any fees deducted between the date of cessation of the Charter Affected Members' employment and the date of notification; and
  - (b) not having effective compliance arrangements in place to monitor and supervise the deduction and remission of PSFs from Charter Affected Members' accounts to Authorised Representatives,

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

9. Charter Financial Planning Limited, by its conduct in contravening s 12DI(3) of the ASIC Act, breached its general obligation as a financial service licensee to comply with financial services laws and thereby contravened s 912A(1)(c) of the *Corporations Act*.

### **AMP Superannuation Limited**

10. AMP Superannuation Limited (ACN 008 414 104), by:
  - (a) its conduct in:
    - (i) failing to exercise its powers under the outsourcing agreement with AMP Life Limited to effectively monitor and supervise the deduction of PSFs from Affected Members' accounts; and
    - (ii) the deduction of PSFs from Affected Members' accounts by the U2 System used to administer AMP Superannuation Limited's products (which system was operated for AMP Superannuation Limited by AMP Life Limited, pursuant to the outsourcing agreement between those parties); and
  - (b) having knowledge of the continued deduction of PSFs from the Affected Members' accounts after notification of their cessation of employment, and therefore knowledge of the contravening conduct in the Relevant Period,

was knowingly concerned in each of the contraventions of Hillross Financial Services Limited, Charter Financial Planning Limited and AMP Financial Planning Proprietary Limited of s 12DI(3) of the ASIC Act within the meaning of s 12GBA(1)(e) of the ASIC Act (as in force during the Relevant Period).

11. AMP Superannuation Limited, by its conduct in:
- (a) failing to adequately procure, administer and oversee a system that ensured the deduction of PSFs from a member's account ceased upon notification of cessation of employment and the remission of any fees deducted between the date of cessation of member's employment and the date of notification;
  - (b) not having effective compliance arrangements in place to monitor and supervise the deduction and remission of PSFs from Affected Members' accounts to Authorised Representatives,

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

12. AMP Superannuation Limited, by its conduct in being knowingly concerned in the contraventions of Hillross Financial Services Limited, Charter Financial Planning Limited and AMP Financial Planning Proprietary Limited of s 12DI(3) of the ASIC Act within the meaning of s 12GBA(1)(e) of the ASIC Act (as in force during the Relevant Period), breached its general obligation as a financial service licensee to comply with financial services laws and thereby contravened s 912A(1)(c) of the *Corporations Act*.

#### **AMP Life Limited**

13. AMP Life Limited (ACN 079 300 379), by:
- (a) its conduct in:
    - (i) facilitating the deduction of the PSFs from each Affected Member's account as administrator and operator of the U2 System (which system was operated for AMP Superannuation Limited by AMP Life Limited, pursuant to the outsourcing agreement between those parties);
    - (ii) deducting PSFs from Affected Members' accounts through the U2 System; and
  - (b) having knowledge:
    - (i) that there were reasonable grounds for believing that Hillross Financial Services Limited, Charter Financial Planning Limited and AMP Financial Planning Proprietary Limited would not be able to provide the financial services to Affected Members within a specified period, or at all, after notification that the Affected Members had ceased employment with their employer-sponsor; and
    - (ii) of the continued deduction of PSFs from the Affected Members' accounts after notification of their cessation of employment, and therefore knowledge of the contravening conduct in the Relevant Period,

was knowingly concerned in each of the contraventions of Hillross Financial Services Limited, Charter Financial Planning Limited and AMP Financial Planning Proprietary Limited of s 12DI(3) of the ASIC Act within the meaning of s 12GBA(1)(e) of the ASIC Act (as in force during the Relevant Period).

117 I am satisfied that the contraventions that are the subject of the proposed declarations are established by the facts and admissions set out in the SOAF.

118 I consider it appropriate to make declarations substantially in the terms proposed by the parties. The preconditions for the making of declarations, set out above, are satisfied. In particular, I am satisfied that: there is a real and not a hypothetical question; the plaintiff has a real interest in raising the question; and there is a proper contradictor.

### ***Civil penalties***

#### *General matters*

119 The penalties proposed by each of the parties for the contraventions of s 12DI(3) of the ASIC Act, or being knowingly concerned in the contraventions of s 12DI(3), are as follows:

<b>Defendant</b>	<b>ASIC's proposed penalties</b>	<b>Defendants' proposed penalties</b>
AMP Financial Planning	\$5 million	\$1.8 million
Hillross	\$2 million	\$450,000
Charter	\$1 million	\$150,000
AMP Superannuation	\$2.5 million	\$700,000
AMP Life	\$7 million	\$1.5 million
Total:	\$17.5 million	\$4.6 million

120 As set out above, the maximum pecuniary penalty in respect of a contravention of s 12DI(3) (or being knowingly concerned in a contravention of that provision) was: \$1.8 million (for the period 31 July 2015 to 30 June 2017); and \$2.1 million (for the period 1 July 2017 to 30 September 2018).

121 The number of contraventions by each Advice Licensee, and the number of contraventions in respect of which AMP Superannuation and AMP Life were knowingly concerned, during each of those periods are set out at [72] above. The maximum penalties produced by multiplying those figures by the maximum penalty per contravention are extremely large.

122 While the contraventions of s 12DI(3) stemmed from a single coding error, and involved the same type of conduct (the wrongful deduction of the PSF from the superannuation accounts of members of Flexible Super who had ceased employment with their employer-sponsor), I do not consider the "course of conduct" principle to be of much assistance in the circumstances of the present case. As stated by Beach J said in *Hillside* at [25] (set out above), the "course of conduct" 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 for contraventions of civil penalty provisions of (in this case) the ASIC Act. The present case is one where, even

if the conduct can be described as a single “course of conduct”, the contravening conduct affected a large number of members and involved the wrongful deduction of (in total) a substantial sum of money. In my view, in the circumstances of this case, the preferable approach is to have regard to the nature and extent, and the circumstances, of the contravening conduct, including its common features, rather than determining whether the conduct constitutes a single “course of conduct”.

*The nature and extent of the contravening conduct*

123 The nature and extent of the contravening conduct emerges from the factual findings set out earlier in these reasons.

124 The Advice Licensees deducted PSFs from the accounts of superannuation members in circumstances where there was no entitlement to charge those fees. AMP Superannuation and AMP Life were knowingly concerned in those contraventions. The number of members affected by the conduct was large: 1,452 members. The total amount of PSFs deducted was significant: approximately \$356,000. And the wrongful conduct continued for a long period of time: more than three years. The deduction of fees that the Advice Licensees were not entitled to charge is self-evidently very serious, wrongful behaviour.

*The circumstances of the contravening conduct*

125 The circumstances of the contravening conduct are set out in the factual findings section of these reasons. I note, in particular, the following matters.

126 While it is admitted that three of the defendants (AMP Financial Planning, AMP Superannuation and AMP Life) had knowledge of the contravening conduct, it is not suggested that the conduct of the defendants was deliberate.

127 The defendants were members of the AMP Group, a large and trusted superannuation group. The Affected Members were entitled to rely (and, I infer, did rely) on the Advice Licensees to only deduct fees that they were entitled to deduct.

128 The contravening conduct occurred in circumstances where, as detailed earlier in these reasons, many complaints were received from Authorised Representatives or members about the incorrect deduction of the PSF from the superannuation accounts of members who had ceased employment with the employer-sponsor. However, it was not until after 24 April 2018 (near the end of the Relevant Period) that the defendants investigated whether there was a systemic

issue. This, in my view, adds to the seriousness of the contravening conduct, because the problem could, and should, have been picked up much earlier.

129 In my view, the facts and matters set out above establish that there were serious deficiencies in AMP's complaints handling system during the Relevant Period. Given the number of complaints that were received, and the nature of some of those complaints, I consider that the problem should have been investigated much earlier than it was.

130 To the extent that the defendants submitted that, given that the issue stemmed from a coding error, it was "unsurprising" that it was not picked up, I reject that submission. In my view, it is surprising – and concerning – that the problem was not investigated much earlier, particularly given the number of complaints.

#### *Loss or damage*

131 Initially, the Affected Members suffered loss and damage by way of fees being wrongfully deducted from their superannuation accounts and loss of earnings in respect of those amounts. However, the defendants have now fully remediated the Affected Members.

#### *The defendants' size and financial position*

132 Details of the size and financial position of the defendants have been set out above. The defendants were large companies, and part of a very large group of companies (the AMP Group). The turnover of each of the defendants (with the exception of AMP Superannuation during the first two years of the Relevant Period) was large, in the hundreds of millions of dollars.

#### *Benefits from the contraventions*

133 The benefits obtained by the defendants from the contravening conduct were relatively small, and the bulk of the amount wrongfully deducted was paid to the Authorised Representatives: see [34] above.

#### *Co-operation, contrition and corporate culture*

134 It is relevant to take into account, in favour of the defendants, that they co-operated with ASIC's investigation of the issues, and have displayed co-operation in the course of this proceeding. Specifically, they have admitted the contraventions and joined with ASIC in preparing a statement of agreed facts. This has avoided the need for a trial on liability.

135 The defendants' witnesses do not in their affidavits make any apology on behalf of the defendants for the contravening conduct. The material does include examples of letters from the defendants to Affected Members that include an apology. However, the defendants' affidavits do not otherwise express contrition for the contravening conduct. In the course of the hearing, seemingly in response to ASIC's submissions, counsel for the defendants said that she had instructions to make an apology on behalf of the defendants. The timing of this statement (that is, coming so late) tended to diminish its power and effect. In any event, I am more interested in whether or not the defendants have taken practical actions to acknowledge and address their contravening conduct. By co-operating in the ways indicated above, and in making remediation, the defendants have taken practical steps to acknowledge and address the contravening conduct. The defendants have also taken steps to improve their complaints handling systems and processes.

136 In relation to "corporate culture", I consider that the failure to investigate whether or not there was a systemic issue, despite many complaints, over a lengthy period of time, reflects very poorly on the defendants (in particular, AMP Life). It is surprising and concerning that repeated complaints that the PSF had been wrongly debited from the superannuation accounts of members who had ceased employment with their employer-sponsor did not lead anyone within the defendants (in particular, within AMP Life) to question whether there was a systemic issue. While it is not suggested that senior management were involved in the contraventions, in my opinion it reflects very poorly on the organisational culture that this type of questioning did not occur.

137 I accept that the defendants' reports and updates to ASIC, remediation of members and co-operation in the proceeding indicate an improvement in the defendants' corporate culture. However, as discussed earlier in these reasons, there are significant gaps in the evidence as to how the coding error came about, why it was not picked up soon after the error occurred, and why it was not picked up subsequently. The absence of such material makes it difficult to be satisfied that the defendants have fully understood what went wrong here, so as to ensure that this type of conduct does not occur again. While there is evidence (which I accept) of improvements in the defendants' *complaints handling systems and processes*, this material is not directed to whether there have been improvements in processes relating to the coding of product rules and improvements in systems for detecting whether a coding error has occurred. Further, the fact that the PSF is no longer being charged by the defendants does not mean that

there is no risk of further contraventions. There is the potential for contravention of s 12DI(3) in relation to other fees and in respect of other products.

*Prior similar conduct*

138 The defendants have not previously been found to have engaged in any similar conduct in proceedings commenced under Subdivision G of the ASIC Act.

139 In the case of AMP Financial Planning, this is the second occasion in recent history that it has been found to have failed to comply with financial services laws, and failed do all things necessary to ensure that its financial services are provided efficiently, honestly and fairly: *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd* (2020) 377 ALR 55 at [153].

*Conclusion as to pecuniary penalties*

140 In my view, the contraventions of s 12DI(3) in the present case were extremely serious. They involved a large number of contraventions, affected a significant number of members, involved the wrongful deduction of a substantial sum of money, and continued for a long period of time.

141 The defendants were part of a large group (the AMP Group) and members were entitled to rely on the Advice Licensees to only deduct fees that they were entitled to charge. Despite many complaints, the defendants failed (for a long period of time) to investigate whether there was a systemic issue. Put simply, the Advice Licensees took money to which they were not entitled from the superannuation accounts of the Affected Members, and continued to do so for a long period of time after many complaints had been made. AMP Superannuation and AMP Life were knowingly concerned in those contraventions. While the conduct was not deliberate, it was extremely serious.

142 I consider the penalties proposed by the defendants to be inadequate for the purposes of specific and general deterrence. In my view, much larger penalties are required for the purposes of both specific and general deterrence in the circumstances of this case.

143 Both parties approached the question of penalties on the basis that a *single penalty* should be imposed on each defendant. I will adopt this approach.

144 In the circumstances, I consider it appropriate to impose the following pecuniary penalties on the defendants. I propose to order that:

- (a) AMP Financial Planning pay a pecuniary penalty of \$4,800,000 in respect of the contraventions of s 12DI(3) of the ASIC Act referred to in paragraph 1 of the declarations;
- (b) Hillross pay a pecuniary penalty of \$720,000 in respect of the contraventions of s 12DI(3) of the ASIC Act referred to in paragraph 4 of the declarations;
- (c) Charter pay a pecuniary penalty of \$480,000 in respect of the contraventions of s 12DI(3) of the ASIC Act referred to in paragraph 7 of the declarations;
- (d) AMP Superannuation pay a pecuniary penalty of \$2,500,000 in respect of its being knowingly concerned in contraventions of s 12DI(3) of the ASIC Act as referred to in paragraph 10 of the declarations; and
- (e) AMP Life pay a pecuniary penalty of \$6,000,000 in respect of its being knowingly concerned in contraventions of s 12DI(3) of the ASIC Act as referred to in paragraph 13 of the declarations.

145 The penalties that I propose to impose on the Advice Licensees total \$6 million. The penalty to be imposed on each Advice Licensee broadly reflects its proportion of the total amount wrongfully deducted. As set out at [33] above, approximately 79% of the wrongful deductions were in respect of AMP Financial Planning, 12% were in respect of Hillross and 8% were in respect of Charter. The penalties broadly reflect these percentages.

146 The penalty I propose for AMP Superannuation reflects the significance of its role as the trustee of the superannuation plan.

147 The penalty that I propose for AMP Life reflects its central role in the administration of the Flexible Super product and thus in the contravening conduct.

148 In determining the appropriate penalties, I have taken into account the fact that the defendants are members of one group, and the interrelationship of the conduct across the defendants.

149 I have considered whether any adjustment is required on account of the totality principle and do not consider that any adjustment is required. It was submitted by the defendants that the totality principle should be applied to the total penalty imposed on all the defendants, in circumstances where they are members of the same group, and the problem arose from a single coding error. The totality principle is usually expressed in terms of a *particular wrongdoer*: see, eg, *ASIC v Westpac* at [139]. The defendants have not cited any authority for the proposition that it applies in the context of multiple defendants. In any event, as indicated

above, I have taken into account the fact that the defendants are members of one group, and the interrelationship of the conduct across the defendants.

150 Insofar as the defendants relied on the penalties imposed in certain other cases, I do not consider those cases to provide much assistance. The penalty in each case is necessarily dependent on the facts and circumstances of the particular case. The defendants placed particular reliance on *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790, in which a penalty of \$5 million was imposed for contraventions of both s 12DB(1) and s 12DI(3) of the ASIC Act. There are a number of distinctions between that case and the present. The number of contraventions of s 12DI(3) was less than in the present case, and the contravening period for the purposes of the s 12DI(3) contraventions was shorter than in the present case (albeit the number of customers and the total amount wrongfully deducted were greater than in the present case). The factual circumstances giving rise to the contraventions in that case (see, eg, at [123]) were quite different from those of the present case. It was in that context that ASIC proposed penalties of \$2.5 million for the s 12DB(1) contraventions and \$3.5 million for the s 12DI(3) contraventions. Applying the totality principle, ASIC proposed a total penalty of \$5 million (see [141]). It seems that the defendant in that case did not strongly argue for a lower penalty (see [142]). Further, in that case, Beach J acknowledged (at [11]) that a penalty of \$5 million may be seen to be on the “light side” but explained why that penalty was nevertheless appropriate. The reasons included that, in the circumstances of that case, there was little need for a substantial penalty to serve the objective of specific deterrence (see [11]). However, in the present case, I consider that substantial penalties are required for the purposes of specific as well as general deterrence.

151 For these reasons, I am satisfied that it is appropriate to impose the pecuniary penalties set out in [144] above.

### ***Other orders***

152 The parties are agreed that there should be orders to the effect that:

- (a) Pursuant to s 12GLB(1)(a) of the ASIC Act, within 30 days of this order, the first to fifth defendants publish, at their own expense, a written adverse publicity notice (**Written Notice**) in the terms set out in Annexure A to the order, by:

(i) for a period of no less than 90 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the following web addresses:

(A) <https://www.amp.com.au/>;

(B) <http://www.hillross.com.au/>;

(the **webpages**)

(ii) for a period of no less than 365 days, maintaining a copy of the Written Notice, in font no less than 10 point, in an immediately visible area of the webpages to appear after a person uses credentials to log into the secure online service via the ‘member’ or ‘employer’ sections of the webpage (to the extent applicable); and

(iii) sending a copy of the Written Notice to any person who was a member of the Flexible Super - Employer group plan during the Relevant Period to the last known email or postal address of the member.

(b) The first to fifth defendants pay the plaintiff’s costs of the proceeding, as agreed or assessed.

(c) The originating application as against the sixth defendant be dismissed with no order as to costs.

153 There is a minor disagreement as to the form of Annexure A to the orders, which is the adverse publicity notice to be published by the defendants. ASIC’s proposed wording is annexed to its submissions. The seventh paragraph reads:

The AMP Entities acknowledge that it took longer than it should have to rectify the issue.

154 The defendants propose the addition of the underlined words to that paragraph:

The AMP Entities acknowledge that their complaints monitoring systems and processes failed to identify the issue in a timely manner, which meant it took longer than it should have to rectify the issue.

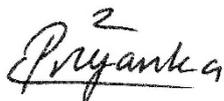
155 Given that this paragraph contains an acknowledgement by *the defendants*, I consider it appropriate that it be expressed in terms to which the defendants agree. I will therefore include the additional words proposed by the defendants in the form of adverse publicity notice to be set out in Annexure A to the orders.

## Conclusion

156 I will therefore make: declarations in the form proposed by the parties; orders for the payment of pecuniary penalties by the defendants in the amounts set out above; and the orders set out in [152] above (with the wording of Annexure A to include the additional words proposed by the defendants).

I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

A handwritten signature in black ink, appearing to read 'Pryanka', with a small '2' written above the first few letters.

Dated: 20 September 2022

## SCHEDULE OF PARTIES

VID 420 of 2021

### Defendants

Fourth Defendant: AMP SUPERANNUATION LIMITED  
(ACN 008 414 104)

Fifth Defendant: AMP LIFE LIMITED (ACN 079 300 379)

Sixth Defendant: AMP SERVICES LIMITED (ACN 081 143 786)