FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd [2022] FCA 1105

File number(s):	VID 595 of 2020
Judgment of:	**MCEVOY J**
Date of judgment:	19 September 2022
Catchwords:	**CORPORATIONS –** where defendant holds an Australian financial services licence – defendant contravened s 961K of the *Corporations Act 2001* (Cth) by being the responsible licensee of representatives who provided personal advice to retail clients without considering the best interest obligations – personal advice provided to retain, acquire or roll over interests in certain financial products – contraventions agreed by the parties – defendant entered into voluntary administration after commencement of proceedings – where the Australian Securities and Investments Commission and the defendant company have reached an agreement on liability and penalties – where the parties filed agreed statement of facts, joint submissions and jointly proposed declarations and orders – consideration of whether the proposed declaration and quantum of penalty is appropriate in the circumstances – proposed declarations and quantum of penalty is found to be appropriate and orders made in the terms sought.
Legislation:	*Corporations Act 2001* (Cth) ss 440D(1)(a), 755B(1), 766B(3), 910A(a)(iii), 960, 961B(1), 961B(2)(e), 961G, 961J, 961K(1), 1101B(1)(a)(i), 1101B(4), 1317E(1), 1317E(2), 1317G(1), 1317G(4), 1317G(6), 1317G(1E), 1317G(1F)(b), 1317QF, 1657, Ch 7, Pt 7.7A Div 2 *Evidence Act 1995* (Cth) s 191 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth)
Cases cited:	*Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157; [2018] HCA 3 *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599; [2022] HCA 13 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 *Australian Competition and Consumer Commission v Get*

Qualified Australia Pty Ltd (in liquidation) (No 3) [2017] FCA 1018

Australian Competition and Consumer Commission v Google LLC (No 4) [2022] FCA 942

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (2016) 340 ALR 25; [2016] FCAFC 181

Australian Competition and Consumer Commission v Telstra Corporation Ltd (2010) 188 FCR 238; [2010] FCA 790

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640; [2013] HCA 54

Australian Competition and Consumer Commission v Yazaki Corporation (2018) 262 FCR 243; [2018] FCAFC 73

Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 4) (2020) 148 ACSR 511; [2020] FCA 1499

Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2) (2020) 377 ALR 55; [2020] FCA 69

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3) [2020] FCA 1421

Australian Securities and Investments Commission v Financial Circle (2018) 131 ACSR 484; [2018] FCA 1644

Australian Securities and Investments Commission v GE Capital Finance Australia [2014] FCA 701

Australian Securities and Investments Commission v NSG Services Pty Ltd (2017) 122 ACSR 47; [2017] FCA 345

Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 3) (2022) 158 ACSR 321; [2022] FCA 84

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147

Australian Securities and Investments Commission v Westpac Banking Corporation (No 3) (2018) 131 ACSR 585; [2018] FCA 1701

Australian Securities and Investments Commission v Westpac Securities Administration Limited (2021) 156 ACSR 614; [2021] FCA 1008

Australian Securities Commission v Donovan (1998) 28 ACSR 583

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482; [2015] HCA 46

	Kosen-Rufu Pty Ltd v Dixon Advisory and Superannuation Services Ltd [2022] FCA 573 *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41-993; [2004] FCAFC 72 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285; [1996] FCA 1134 *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412; [2014] FCA 27 *Royer v The State of Western Australia* (2009) 197 A Crim R 319; [2009] WASCA 139 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249; [2012] FCAFC 20 *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076; [1990] FCA 521 *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 270 CLR 118; [2021] HCA 3
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	72
Date of last submission/s:	2 August 2022
Date of hearing:	2 August 2022
Counsel for the plaintiff	Daniel Star QC, Zoe Maud and Shanta Martin
Solicitors for the plaintiff	Australian Securities and Investments Commission
Counsel for the defendant	The defendant did not appear at the hearing
Solicitors for the defendant	Clayton Utz

ORDERS

VID 595 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**DIXON ADVISORY & SUPERANNUATION SERVICES LTD (ACN 103 071 665)** Defendant

ORDER MADE BY: **MCEVOY J**

DATE OF ORDER: **19 SEPTMEBER 2022**

THE COURT NOTES THAT:

In these declarations and orders, the following terms have the following meanings:

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

(b) **Representatives** means persons who were employed by a related body corporate of the defendant to provide financial services to clients of the defendant, each of whom was a representative of the defendant pursuant to s 910A(a)(iii) and s 960 of the Corporations Act.

(c) **URF** means US Masters Residential Property Fund, a unit trust and registered managed investment scheme.

(d) **URF Units, URF Notes I, URF Notes II, URF Notes III** and **URF CPUs** (or convertible preference units) are all financial products which were the subject of the recommendations provided to clients by the Representatives.

THE COURT DECLARES THAT:

The defendant contravened s 961K(2) of the Corporations Act on 53 occasions during the period 6 October 2015 to 31 May 2019 by being the responsible licensee of Representatives who, in providing financial product advice on the dates and to the clients identified in the annexure to these orders that was personal advice within the meaning of s 766B(3) of the Corporations Act, contravened:

(a) s 961B(1) of the Corporations Act, by not acting in the best interests of the client in relation to the advice; and/or

(b) s 961G of the Corporations Act, by providing advice in circumstances where it was not reasonable to conclude that the advice was appropriate to the client, had the provider satisfied the duty under s 961B of the Corporations Act to act in the best interests of the client;

as identified in the annexure to these orders.

THE COURT ORDERS THAT:

1. The plaintiff must not seek to enforce any orders for pecuniary penalties, or any costs order, made against the defendant, without first obtaining leave of the Court to do so.

2. The defendant pay to the Commonwealth of Australia pecuniary penalties in the aggregate amount of $7.2 million in respect of the defendant's contraventions of s 961K(2) of the Corporations Act referred to in the declaration above.

3. Pursuant to s 1101B(1) of the Corporations Act, before the defendant resumes providing financial services (except as permitted by the terms of the suspension of its Australian financial services licence) it must first:

   (a) have in place systems, policies and procedures to ensure that its representatives comply with s 961B(1) and s 961G of the Corporations Act; and

   (b) provide the Australian Securities and Investments Commission (**ASIC**) with a written report of a suitably qualified independent expert confirming the defendant's compliance with order 3(a) above

4. The identity of the independent expert for the purposes of order 3 of these orders and the terms of his or her retainer are to be agreed between ASIC and the defendant or, failing agreement, be determined by the Court. The costs of the independent expert are to be met by the defendant.

5. The defendant pay the plaintiff's costs of, and incidental to, the proceeding in the amount of $800,000.

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

ANNEXURE

Date	Financial product advice	s 961B	s 961G
Client A			
31 January 2017	To apply for 25 URF Notes III, with a value of $2,500 (the **Second Client A Recommendation**).	x	x
1 November 2017	To retain Client A's existing holding of: (a) 98,640 URF Units with a value of $174,593; (b) 280 URF Notes I with a value of $28,280; and (c) 25 URF Notes III with a value of $2,538 (the **Third Client A Recommendation**).	x	x
5 December 2017	To roll over Client A's existing holding of 280 URF Notes I into 280 CPUs, for a total application of $28,000 (the **Fourth Client A Recommendation**).	x	x
21 September 2018	To retain Client A's existing holding of: (a) 98,640 URF Units with a value of $153,878; (b) 25 URF Notes III with a value of $2,520; and (c) 280 CPUs with a value of $27,160 (the **Fifth Client A Recommendation**).	x	x
Client B			
31 January 2017	To apply for 280 URF Notes III, with a value of $28,000 (the **Fourth Client B Recommendation**).	x	x
Client C			
6 October 2015	To apply for 165 URF Notes II, with a value of $16,500 (the **First Client C Recommendation**).	x	
31 January 2017	To apply for 290 URF Notes III, with a value of $29,000 (the **Third Client C Recommendation**).	x	
5 December 2017	To roll over Client C's existing holding of 700 URF Notes I into 700 CPUs, for a total application of $70,000 (the **Fifth Client C Recommendation**).	x	x
22 October 2018	To retain Client C's existing holding of: (a) URF Units with a value of $76,029; (b) URF Notes II with a value of $16,665; (c) URF Notes III with a value of $29,348; and (d) CPUs with a value of $67,550 (the **Sixth Client C Recommendation**).	x	x
12 April 2019	To retain Client C's existing holding of: (a) $57,915 worth of URF Units; (b) $16,451 worth of URF Notes II; (c) $28,710 worth of URF Notes III; and (d) $56,700 worth of CPUs, (the **Seventh Client C Recommendation**).	x	x

Client D			
31 January 2017	To apply for 340 URF Notes III, with a value of $34,000 (the **Fourth Client D Recommendation**).	x	x
29 August 2017	To retain Client D's existing holding of: (a) URF Units with a value of $158,426; (b) URF Notes I with a value of $60,846; and (c) URF Notes III with a value of $34,935 (the **Fifth Client D Recommendation**).	x	x
20 October 2017	To retain Client D's existing holding of: (a) URF Units with a value of $159,327; (b) URF Notes I with a value of $60,600; and (c) URF Notes III with a value of $34,510 (the **Sixth Client D Recommendation**).		x
5 December 2017	To roll over Client D's existing holding of 600 URF Notes I into 600 CPUs, for a total application of $60,000 (the **Seventh Client D Recommendation**).	x	x
29 May 2018	To retain Client D's existing holding of: (a) URF Units with a value of $144,924; (b) URF Notes III with a value of $34,408; and (c) CPUs with a value of $59,130 (the **Eighth Client D Recommendation**).	x	x
Client E			
31 January 2017	To apply for 180 URF Notes III, with a value of $18,000 (the **Fourth Client E Recommendation**).	x	x
5 December 2017	To roll over Client E's existing holding of 100 URF Notes I into 100 CPUs, for a total amount of $10,000 (the **Fifth Client E Recommendation**).	x	x
30 April 2018	To retain Client E's existing holding of: (a) URF Units with a value of $262,989; (b) URF Notes III with a value of $13,092; and (c) 100 CPUs with a value of $10,100, (the **Sixth Client E Recommendation**).	x	x
Client F			
31 January 2017	To apply for 700 URF Notes III, with a value of $70,000 (the **Second Client F Recommendation**).	x	
5 December 2017	To roll over Client F's existing holding of 800 URF Notes I into 800 CPUs, for a total application of $80,000 (the **Fourth Client F Recommendation**).	x	x
26 February 2018	To retain Client F's existing holding of: (a) URF Units with a value of $140,764; (b) URF Notes III with a value of $71,400; and (c) CPUs with a value of $80,000, (the **Fifth Client F Recommendation**).	x	x

26 April 2018	To retain Client F's existing holding of: (a) URF Units with a value of $139,079; (b) URF Notes III with a value of $70,700; and (c) CPUs with a value of $80,800, (the **Sixth Client F Recommendation**).	x	x
8 April 2019	To retain Client F's existing holding of: (a) URF Units with a value of $95,669; (b) URF Notes III with a value of $69,510; and (c) CPUs with a value of $64,800, (the **Seventh Client F Recommendation**).	x	x
Client G			
30 January 2017	To apply for 850 URF Notes III, with a value of $85,000 (the **Third Client G Recommendation**).	x	x
5 December 2017	To rollover Client G's existing holding of 360 URF Notes I into 360 CPUs, for a total application of $36,000, (the **Fourth Client G Recommendation**).	x	x
10 August 2018	To retain Client G's existing holding of: (a) URF Units with a value of $135,133; (b) URF Notes III with a value of $50,400; and (c) CPUs with a value of $34,733, (the **Fifth Client G Recommendation**).	x	x
17 December 2018	To retain Client G's existing holding of: (a) URF Units with a value of $124,101; (b) URF Notes III with a value of $50,300; and (c) CPUs with a value of $33,962, (the **Sixth Client G Recommendation**).	x	x
31 May 2019	To retain Client G's existing holding of: (a) URF Units with a value of $96,441; (b) URF Notes III with a value of $49,750; and (c) CPUs with a value of $29,700, (the **Seventh Client G Recommendation**).	x	x
Client H			
6 October 2015	To apply for 230 URF Notes II, with a value of $23,000 (the **First Client H Recommendation**).	x	

REASONS FOR JUDGMENT

MCEVOY J:

INTRODUCTION

1 The plaintiff in this proceeding, the Australian Securities and Investments Commission (**ASIC**), alleges contraventions by the defendant, Dixon Advisory Superannuation Services Limited (**DASS** or **the Company**), of s 961K(2) of the *Corporations Act 2001* (Cth) (**the Act**) on multiple occasions. By an originating application dated 3 September 2020, ASIC alleges that DASS was the responsible licensee of representatives who contravened ss 961B(1), 961G and 961J of the Act. DASS filed a defence to these allegations on 31 March 2021.

2 On 8 July 2021 the parties entered into a conditional heads of agreement to resolve the proceedings. DASS admitted to 53 of the alleged contraventions of s 961K(2) of the Act by being the responsible licensee of representatives who contravened s 961B(1) and s 961G on 29 occasions, however it denied any contraventions of s 961J of the Act. ASIC does not press any of the allegations of breach which DASS denies.

3 The parties prepared and filed a statement of agreed facts for the purposes of s 191 of the *Evidence Act 1995* (Cth), together with joint submissions, on 15 October 2021 for the assessment of the pecuniary penalty. These were filed in support of a signed proposed minute of orders, which was annexed to the joint submissions.

4 On 25 July 2022, ASIC provided a revised set of orders. These revised orders were provided in circumstances where DASS's Australian financial services licence (**AFSL**) had been suspended on 19 April 2022. The revised orders included a requirement that the plaintiff would not seek to enforce the pecuniary penalty orders or any costs order against the defendant without the leave of the Court. Further amended orders were provided by ASIC on 28 July 2022. These orders included the definitions of relevant terms used in the proposed declarations and orders.

5 The substance of the orders sought has not changed since the consent orders were initially proposed by the parties. Broadly, the orders sought by the parties comprise:

(a) a declaration of contravention of a civil penalty provision pursuant to s 1317E(1) of the Act in respect of DASS's 53 admitted contraventions;

(b) a penalty of $7.2 million in respect of the 53 admitted contraventions of s 961K(2) of the Act;

(c) orders pursuant to s 1101B(1) of the Act requiring DASS, if it resumes providing financial services, to have in place certain systems and procedures and to provide a report to ASIC verifying those matters (**compliance program orders**); and

(d) an order that DASS pay ASIC's costs of the proceeding in the amount of $800,000.

6 On 30 November 2021 orders were made by Anastassiou J granting Kosen-rufu Pty Ltd, as trustee for T Stott Superannuation Fund and Trudy Stott (**Interested Parties**), leave to intervene in the proceedings. The Interested Parties filed an interlocutory application seeking orders pursuant to s 1317QF of the Act. Orders were subsequently made by consent on 25 July 2022 to discontinue this application. A similar application was foreshadowed by the legal representatives for another interested party in July 2022, however the Court was later advised that this application would not be forthcoming.

7 On 19 January 2022 it was announced that DASS had entered into voluntary administration and that joint and several administrators had been appointed. By this time most of the steps to give effect to the heads of agreement entered into by the parties had been completed.

8 On 25 July 2022 the administrators provided ASIC with their signed written consent under s 440D(1)(a) of the Act for the proceeding to continue against the Company. The administrators advised in an email to the Court on 26 July 2022 that they do not oppose the orders sought by ASIC.

9 The administrators have since applied to have DASS's AFSL cancelled, which application is still pending.

10 On 2 August 2022 I heard oral submissions from ASIC, primarily in relation to the proposed pecuniary penalty. Having regard to the agreed position, the administrators were excused from attendance at the hearing.

11 The primary documents relied upon by ASIC at the hearing were as follows:

(a) statement of agreed facts dated 15 October 2021;

(b) joint submissions dated 15 October 2021;

(c) affidavit of Rayma Gupta, ASIC litigation counsel, sworn 25 July 2022; and

(d) proposed orders dated 28 July 2022.

12 Having regard to the parties' agreed position, it is necessary to determine:

(a) the form of the declaration of contravention;

(b) the amount of any pecuniary penalty; and

(c) whether and in what form any compliance program orders should be made.

13 For the reasons that follow, there will be a declaration and orders substantially in the terms sought by the parties. Given the agreement of the parties as to the relevant facts, the application of the law to those facts, and the appropriate penalties, in these reasons I have drawn from the statement of agreed facts and, where I agree with them, the written submissions. I will refer to the statutory provisions and the applicable principles, and then address each of the relevant issues in turn.

THE PRINCIPAL STATUTORY PROVISIONS

14 Part 9.4B of the Act is concerned with the civil consequences of contravening civil penalty provisions. Subsection 1317E(1) of the Act requires the Court to make a declaration of a contravention if the Court is satisfied that a person has contravened a civil penalty provision. Subsection 1317E(2) of the Act prescribes the matters which must be specified in the declaration.

15 Subsection 1317G(1) of the Act gives the Court power to impose a civil penalty in respect of the contravention of a civil penalty provision. Prior to 13 March 2019 and the enactment of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (**Treasury Laws Amendment Act**), the relevant provision was s 1317G(1E) of the Act.

16 The Treasury Laws Amendment Act also introduced s 1317QF into the Act. This section requires the Court, when making a pecuniary penalty order in relation to a contravention of a civil penalty provision, to give preference to making an appropriate amount available to compensate persons who suffer damage as a result of the contravention: see generally *Kosen-Rufu Pty Ltd v Dixon Advisory and Superannuation Services Ltd* [2022] FCA 573 at [37]-[39] (Thawley J).

17 Part 7.7A of the Act is concerned with the "best interests" obligations of providers of financial advice. It contains s 961K, which is a civil penalty provision for the purposes of s 1317E of the Act, and provides that:

(1) A financial services licensee contravenes this section if the licensee contravenes section 961B, 961G, 961H or 961J.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee contravenes section 961B, 961G, 961H or 961J; and

(b) the licensee is the, or a, responsible licensee in relation to that contravention.

Note: This subsection is a civil penalty provision (see section 1317E).

18 Subsection 961B(1) of the Act imposes a "best interests" obligation on the provider of the relevant financial advice, requiring that the provider must act in the best interests of the client in relation to the advice. Subsection 961B(2) of the Act provides a "safe harbour" by specifying a set of steps which, if proven to have been taken, will discharge this best interests obligation. The parties contend that s 961B(2)(e) is particularly relevant in this proceeding. It is in the following terms:

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

…

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

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

(ii) assessed the information gathered in the investigation;

19 Section 961G of the Act provides that:

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

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

THE CONTRAVENTIONS

Factual background

20 ASIC alleges that from 6 October 2016 to 31 May 2019 (**the Relevant Period**), DASS contravened s 961K(2) of the Act by being the responsible licensee of six representatives, as

defined under s 910A(a)(iii) and s 960 of the Act, who contravened s 961B(1) and s 961G of the Act.

21 DASS held an AFSL and carried on a financial services business. Through its AFSL, DASS was authorised to deal in financial products and to provide "personal advice" in relation to financial products. Subsection 766B(3) of the Act provides that "personal advice" is "financial product advice" that is given to a person in circumstances where either the provider of the advice has "considered" one or more of the person's objectives, financial situation and needs, or a reasonable person might expect the provider to have considered one or more of those matters. A provider will have "considered" one of the relevant matters if they "took account of" that matter: *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 270 CLR 118 at 132 [15] (Kiefel CJ, Bell, Gageler and Keane JJ). Further, "financial product advice" is defined in s 766B(1) of the Act as a recommendation or statement of opinion that is intended to influence a person/s in making a decision in relation to a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence.

22 During the Relevant Period, representatives of DASS provided 'personal advice' to eight 'retail clients', generally in their capacity as trustees and members of self-managed superannuation funds (**SMSF**). The provision of this advice engaged the 'best interest obligations' under Part 7.7A, Division 2 of the Act (as set out above).

23 Broadly, the representatives recommended that the clients invest in (acquire), retain an existing investment in, or roll over their interest in, certain financial products (namely units, notes or convertible preference units) issued by the responsible entity of the US Masters Residential Property Fund (**URF**). The financial products that were the subject of the client recommendations included URF Units, URF Notes I, URF Notes II, URF Notes III and URF convertible preference units (**URF CPUs**). The URF is a unit trust and a registered managed investment scheme. It sought to take advantage of the significant drop in house prices in the United States during the housing collapse that occurred in the period 2006 to 2011. The responsible entity of the URF owned all common shares in the US Masters Residential Property (USA) Fund, a Maryland real estate investment trust (**US REIT**). Throughout the Relevant Period, the US REIT carried on a property investment business which included the acquisition, renovation, leasing and management of residential properties in the US.

24 The risks associated with these URF financial products have been set out in detail by the parties in the statement of agreed facts. These risks included the fact that the URF notes were unsecured, the potential for the interest on the notes not to be paid or the face value not to be repaid, risks inherent in the nature of the business undertaken (acquiring properties, carrying out property renovations, leasing and selling properties) and the market for the URF Notes being highly illiquid. The URF CPUs carried similar risks. It is accepted that these risks made an investment in the financial products highly risky. The parties have also provided the breakdown of the various client's SMSF portfolios both before and after the recommendations. These show that in some instances the client's SMSF portfolio consisted of a quarter to a third of URF financial products.

25 In providing the advice the representatives were implementing an advice process established by DASS which recommended financial products for clients based on standard parameters and the clients' DASS risk profile. These financial products issued by the responsible entity of the URF were included in DASS' approved product list (**APL**), a register that contained financial products which DASS had already reviewed and approved.

26 Due to the process by which these recommendations were provided, and the risks associated with the financial products as outlined above, it is accepted that these recommendations were in breach of the best interest obligations under Part 7.7A, Division 2 of the Act. It is said that these recommendations resulted in the client's SMSF having a disproportionally high percentage of a high-risk product. Having regard to the client's personal and relevant circumstances, their SMSFs were insufficiently diversified, and exposed to an inappropriate risk of capital loss.

27 Within the 53 admitted contraventions by DASS, on 28 occasions advice was provided to DASS's clients in contravention of s 961B(1) of the Act by virtue of the *process* undertaken by the representatives. In particular, the failure to take specific steps when determining whether it was appropriate to provide the relevant advice to the clients in the context of their circumstances. Additionally, on 25 occasions advice was provided in contravention of s 961G of the Act by virtue of the *substance* of the advice. The advice provided could not be said to be reasonably capable of being regarded as appropriate to the client, had the best interests obligation in s 961B(1) been discharged: see *Australian Securities and Investments Commission v NSG Services Pty Ltd* (2017) 122 ACSR 47 at 53-53 [21] (Moshinsky J).

Contraventions of s 961B(1) of the Act

28 In relation to contraventions of s 961B(1) of the Act, it is submitted that recommendations to acquire or retain the financial products issued by the responsible entity of the URF were given to clients without first conducting a reasonable investigation into the recommended products and any alternatives to them, and were also given without proper consideration of the clients' personal and relevant circumstances. The relevant circumstances of the eight clients chosen by ASIC in its investigations have been set out in Part C of the joint submissions and it is unnecessary for them to be repeated in detail here. Briefly however, all of the clients were allocated with a risk profile of "3" to "5" by DASS, most of them were retired or close to retirement age and so did not have the capacity to save extra funds, all of the clients did not have any professional background experience in financial investments, and importantly they all sought a variety of different objectives from their investments.

29 ASIC concluded that reasonable investigations into the recommended financial products or any alternatives to them were not conducted, and that the clients' relevant personal circumstances were not considered, on the basis of the following findings:

(a) in relation to the advice that contained recommendations to acquire or roll over products:

(i) there were no records indicating that any reasonable investigations into the financial products or any alternatives to them were conducted or that the relevant personal circumstances of the clients were considered;

(ii) the DASS Investment Committee determined the recommendations according to standard parameters and a client's DASS risk profile;

(iii) the representatives were only given a limited time to review the recommendations determined by the DASS Investment Committee and decide whether they should be overridden;

(iv) DASS did not provide the representatives with the relevant documentation to assist with deciding whether or not the recommendation was appropriate to the client and whether or not to override it, or did so only shortly before this decision was due; and

(v) where there was also a s 961G contravention in respect of the advice, if the clients' circumstances had been considered, the representative would have concluded that the recommendation was not appropriate; and

(b) in relation to the advice that contained recommendations to retain products:

(i) there were no records indicating that any reasonable investigations into the financial products or any alternatives to them were conducted or that the relevant personal circumstances of the clients were considered; and

(ii) if the clients' circumstances had been considered, the representative would have concluded that the recommendation was not appropriate.

Contraventions of s 961G of the Act

30 In relation to contraventions of s 961G of the Act, it is submitted that each of the relevant recommendations resulted in the clients' SMSF being insufficiently diversified and exposed to an inappropriate risk of capital loss having regard to the clients' relevant circumstances. Thus it is said that the advice provided could not be said to have been reasonably capable of being regarded as appropriate to the client, had the best interests obligation in s 961B(1) been discharged.

RELEVANT PRINCIPLES

Pecuniary penalties

Deterrence

31 The statutory and legal principles that govern the assessment of the quantum of a pecuniary penalty that should be imposed for civil contraventions are well established. The primary purpose of civil penalties is deterrence, both specific and general: *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599 ("***Pattinson***") at 603 [10], 604-605 [15]-[19] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (the ***Agreed Penalties Case***) at 506 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), referring to *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 (***TPC v CSR***) at 52 [152] (French J). See also *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 (***Adler***) at 114-115 [125]–[126] (Santow J).

32 Obviously enough specific deterrence is for the purpose of deterring repetition of the contravening conduct by the contravener and general deterrence is for the purpose of deterring others who might be tempted to engage in similar contraventions: the *Agreed Penalties Case* at 506 [55] and 523-524 [110]; *Australian Competition and Consumer Commission v TPG*

Internet Pty Ltd (2013) 250 CLR 640 (***ACCC v TPG***) at 659 [65] (French CJ, Crennan, Bell and Keane JJ). Penalties will be imposed to promote the public interest in compliance: the *Agreed Penalties Case* at 506 [55], referring to *TPC v CSR* at 52 [152]. The penalty imposed should be no greater than necessary to achieve this objective: *Pattinson* at 603 [10], 610 [40]; *Australian Securities Commission v Donovan* (1998) 28 ACSR 583 at 608 (Cooper J).

33 While the civil penalty should not be so high that it is oppressive, it should not be so low as to be regarded by the contravener as "an acceptable cost of doing business": *Pattinson* at 605 [17], 610-611 [40]-[41]; *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 195 [116] (Keane, Nettle and Gordon JJ); *ACCC v TPG* at 659 [66]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 (***Singtel Optus***) at 265 [62]-[63] (Keane CJ, Finn and Gilmour JJ); *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 (***NW Frozen Foods***) at 294-295 (Burchett and Kiefel JJ); *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 (***ASIC v Westpac Banking)*** at [255] (Wigney J). Whatever penalty is to be imposed must be "proportionate" and "appropriate" in the sense that it strikes a reasonable balance between oppressive severity and deterrence in the circumstances of the case: see *Pattinson* at 610-611 [40]-[41], 612 [46].

Maximum penalty

34 The Court should have regard to the prescribed maximum penalty, however it should not start with the maximum penalty and then proceed by way of making proportional deductions from this amount: *Markarian v The Queen* (2005) 228 CLR 357 (***Markarian***) at 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ). Rather, consideration of the maximum penalty allows the Court to make comparison between the worst possible case and the case that it is being asked to address: *Australian Securities and Investments Commission v Westpac Securities Administration Limited* (2021) 156 ACSR 614 (***ASIC v Westpac Securities***) at 619 [24] (O'Bryan J), citing *Markarian* at 372 [31]. As the plurality emphasised in *Pattinson* at 603 [10], citing *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at 63 [156], the maximum penalty is not reserved only for the most serious examples of offending conduct. What is required is that there be "some reasonable relationship between the theoretical maximum and the final penalty imposed". The requisite relationship will be established where the maximum penalty does not exceed what is reasonably

necessary to deter future contraventions of a like kind by the contravener, and by others: *Pattinson* at 603 [10].

Factors to be considered

35 Self-evidently the Court exercises its discretion when determining the size of the penalty and should consider a number of factors: *Pattinson* at 605 [18]-[19], 612-613 [46]-[48]; *Adler* at 114 [126]. No one factor is decisive, and all of the circumstances should be weighed: *Australian Securities and Investments Commission v GE Capital Finance Australia* [2014] FCA 701 at [75] (Jacobson J). The Court is not generally assisted by a comparison of penalties imposed in other cases, due to the widely differing circumstances of each case: *Singtel Optus* at 264 [60], citing *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238 at 275 [215] (Middleton J). The Court must also have regard to the totality principle, which requires a level of satisfaction that the total aggregate penalty is not unjust or disproportionate to the conduct, having regard to the circumstances of the case: *Pattinson* at 610-611 [40]-[41], [46]; *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412 at 437 [198] (Jacobson J);

36 The factors that the Court should take into consideration, keeping in mind the objective of the pecuniary penalty provisions, have been essayed in numerous cases. In *Pattinson* at 605 [18] the plurality endorsed the factors identified by French J in *TPC v CSR*, that is:

> 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."

37 In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585 at 594 [49], Beach J formulated the factors to be taken into account in the following terms:

> (a) the extent to which the contravention was the result of deliberate or reckless conduct by the corporation, as opposed to negligence or carelessness;
>
> (b) the number of contraventions, the length of the period over which the contraventions occurred, and whether the contraventions comprised isolated conduct or were systematic;
>
> (c) the seniority of officers responsible for the contravention;
>
> (d) the capacity of the defendant to pay, but only in the sense that whilst the size of a corporation does not of itself justify a higher penalty than might otherwise be imposed, it may be relevant in determining the size of the pecuniary penalty that would operate as an effective specific deterrent;
>
> (e) the existence within the corporation of compliance systems, including provisions for and evidence of education and internal enforcement of such systems;
>
> (f) remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention;
>
> (g) whether the directors of the corporation were aware of the relevant facts and, if not, what processes were in place at the time or put in place after the contravention to ensure their awareness of such facts in the future;
>
> (h) any change in the composition of the board or senior managers since the contravention;
>
> (i) the degree of the corporation's cooperation with the regulator, including any admission of an actual or attempted contravention;
>
> (j) the impact or consequences of the contravention on the market or innocent third parties;
>
> (k) the extent of any profit or benefit derived as a result of the contravention; and
>
> (l) whether the corporation has been found to have engaged in similar conduct in the past.

See also *Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 3)* (2022) 158 ACSR 321 at 325 [20] (Moshinsky J), citing *Adler* at 114 [126]; *ASIC v Westpac Securities* at 617-619 [17]-[25]; *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 377 ALR 55 at 95-96 [156]-[160] (Lee J); *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 4)* (2020) 148 ACSR 511 at 521-524 [38]-[51] (Beach J); *ASIC v Westpac Banking* at [253]-[272]; *Australian Securities and Investments Commission v Financial Circle* (2018) 131 ACSR 484 (***Financial Circle***) at 517-518 [178]-[182] (O'Callaghan J).

38 Subsection 1317G(6) of the Act contains a non-exhaustive list of considerations that the Court must take into account in determining the pecuniary penalty. These considerations are consistent with the matters which the case law requires to be considered. While s 1317G(6) of the Act did not come into effect until 13 March 2019, and so was not in force for the entirety of the Relevant Period, it may be accepted that the relevant factors were already well established. The matters to be taken into account in determining a pecuniary penalty pursuant to s 1317G(6) of the Act are:

> (a) the nature and extent of the contravention;
>
> (b) the nature and extent of any loss or damage suffered because of the contravention;
>
> (c) the circumstances in which the contravention took place;
>
> (d) whether the person has previously been found by a court (including a court in a foreign county) to have engaged in similar conduct; and
>
> (f) in the case of a contravention by the trustee of a registrable superannuation entity – the impact that the penalty under consideration would have on the beneficiaries of the entity.

Course of conduct principle

39 The parties correctly submit that the "course of conduct principle", relating to multiple contraventions occurring as part of the one course of conduct, is applicable here: *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 (***Yazaki***) at 296 [234]-[236] (Allsop CJ, Middleton and Robertson JJ). Wigney J considered this principle in *ASIC v Westpac Banking* at [264]-[268], observing its derivation from criminal law sentencing principles. Citing *Royer v The State of Western Australia* (2009) 197 A Crim R 319 at 328 [22] (Owen JA), his Honour described the principle in the following terms at [264]:

> [W]here there is an interrelationship between the legal and factual elements of two or more offences with which an offender has been charged, care needs to be taken so that the offender is not punished twice (or more often) for what is essentially the same criminality.

40 In *Pattinson* at 612 [45] the plurality recognised that some concepts familiar from criminal sentencing, including the course of conduct principle, may usefully be deployed in the enforcement of the civil penalty regime. The course of conduct principle requires the Court to consider whether the multiple contravening acts arise out of the same course of conduct or the one transaction in determining whether it is appropriate that a "concurrent" or "single penalty" should be imposed for the contraventions: *ASIC v Westpac Securities* at 619 [25], citing *Yazaki* at 296 [234].

Orders by consent

41 Finally, the principles relevant to the making of orders by consent in civil penalty proceedings are of obvious application here. In *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, Gordon J observed as follows:

> [70] The applicable principles are well established. First, there is a well-recognised public interest in the settlement of cases under the Act: *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285 at 291. Second, the orders proposed by agreement of the parties must be not contrary to the public interest and at least consistent with it: *Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 at [18].
>
> [71] Third, when deciding whether to make orders that are consented to by the parties, the Court must be satisfied that it has the power to make the orders proposed and that the orders are appropriate: *Real Estate Institute* at [17] and [20] and *Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]. Parties cannot by consent confer power to make orders that the Court otherwise lacks the power to make: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163.
>
> [72] Fourth, once the Court is satisfied that orders are within power and appropriate, it should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where both parties are legally represented and able to understand and evaluate the desirability of the settlement: *Australian Competition & Consumer Commission v Woolworths (South Australia) Pty Ltd (Trading as Mac's Liquor)* [2003] FCA 530 at [21]; *Australian Competition & Consumer Commission v Target Australia Pty Ltd* [2001] FCA 1326 at [24]; *Real Estate Institute* at [20]-[21]; *Australian Competition & Consumer Commission v Econovite Pty Ltd* [2003] FCA 964 at [11] and [22] and *Australian Competition & Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2007] FCA 1370 at [4].
>
> [73] Finally, in deciding whether agreed orders conform with legal principle, the Court is entitled to treat the consent of Coles as an admission of all facts necessary or appropriate to the granting of the relief sought against it: *Thomson Australian Holdings* at 164.

42 In the *Agreed Penalties Case* the plurality noted the important public policy in promoting predictability of outcome in civil penalty proceedings. Their Honours observed at 503-504 [46] that:

> … predictability of outcome encourages corporations to acknowledge contraventions, which in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention.

43 The process of fixing the quantum of a civil penalty is not an exact science. There is a permissible range in which "courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another": the *Agreed Penalties Case* at 504

[47], citing *Minister for Industry, Tourism & Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41-993 at 48,626 [51] (Branson, Sackville an Gyles JJ) and referring to *NW Frozen Foods* at 290-291 (Burchett and Kiefel JJ). The question therefore is whether the agreed penalty falls within the range of appropriate penalties and is *an* appropriate penalty, rather than *the* appropriate penalty: *Australian Competition and Consumer Commission v Google LLC (No 4)* [2022] FCA 942 at [20] (Thawley J), referring to *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2020] FCA 1421 at [78] (Allsop CJ).

Compliance program orders

44 On an application by ASIC, the Court may make such orders it thinks fit if it appears that a person has contravened a provision of Chapter 7 of the Act, or a law relating to dealing in financial products or providing financial services: s 1101B(1)(a)(i) of the Act. Some examples of the sorts of orders the Court may make are set out at s 1101B(4) of the Act. It is, of course, not uncommon for the Court to make compliance program orders to facilitate future compliance with the civil penalty provisions of the Act by companies.

THE DECLARATION AND ORDERS SOUGHT BY THE PARTIES

Declaration of contravention

45 As has been mentioned, DASS has admitted to 53 contraventions of s 961K(2) of the Act.

46 The parties have thus proposed that a declaration be made by the Court in the following terms:

> The defendant contravened s 961K(2) of the Corporations Act on 53 occasions during the period 6 October 2015 to 31 May 2019 by being the responsible licensee of Representatives who, in providing financial product advice on the dates and to the clients identified in the annexure to these orders that was personal advice within the meaning of s 766B(3) of the Corporations Act, contravened:
>
> a. s 961B(1) of the Corproations Act, by not acting in the best interests of the client in relation to the advice; and/or
>
> b. s 961G of the Corporations Act, by providing advice in circumstances where it was not reasonable to conclude that the advice was appropriate to the client, had the provider satisfied the duty under s 961B of the Corporations Act to act in the best interests of the client
>
> as identified in the annexure to these orders.

Quantum of pecuniary penalty

47 Further, the parties jointly submit that an aggregate penalty of $7.2 million for the 53 contraventions is appropriate in the present circumstances. They have taken the following matters and circumstances into consideration in arriving at this figure.

Contraventions prior to 13 March 2019

48 The 47 contraventions occurring before 13 March 2019 fall to be considered under s 1317G(1E) of the Act, those contraventions occurring prior to the amendments made by the Treasury Laws Amendment Act. Under s 1317G(1F)(b) of the Act as it then existed, the maximum pecuniary penalty that could be imposed on a corporation for a contravention of s 961K at the time of DASS's contravening conduct was $1 million per contravention. The parties contend that the penalties imposed for the contraventions in this case should be significantly less than this maximum because the conduct did not involve dishonesty or wilful contravention of the law, and was not the most serious of contraventions if the contraventions were to be assessed on a spectrum. Further, they submit that each contravention should attract the same penalty as a starting point, because the underlying conduct is effectively the same for each contravention.

49 These 47 contraventions can be divided into the following two categories:

(a) 21 instances that gave rise to two contraventions of both s 961B(1) and s 961G of the Act: a penalty of $210,000 is suggested for the first contravention of s 961B(1) and a penalty of $135,000 is suggested for the second contravention of s 961G. This reduction in penalty for the second contravention is on the basis of the 'course of conduct' principle. The parties submit that each contravention in this circumstance should carry its own penalty, as the precise conduct that constituted the contraventions differed. However, because the second contravention arose from the same advice provided by the representative, there being some overlap in the representatives' conduct, the penalty for the second contravention of s 961G should be reduced by 35%; and

(b) five instances that gave rise only to one contravention of either s 961B(1) or s 961G of the Act: a penalty of $210,000 is suggested for each contravention of either s 961B(1) or s 961G.

Contraventions post 13 March 2019

50 The six contraventions occurring after 13 March 2019 must be assessed having regard to the relevant amendment to the Act in s 1317G(4) made by the Treasury Laws Amendment Act. The parties accept that the maximum penalty for these contraventions would be 50,000 penalty units, or $10.5 million, per contravention. However, as mentioned, they contend that a significantly lesser penalty should be imposed due to the relatively less serious nature of the contraventions. Again, the starting point should be the same for each contravention due to the same underlying conduct.

51 These six contraventions occurred over three instances, which each gave rise to two contraventions of both s 961B(1) and s 961G of the Act. A penalty of $420,000 is suggested for the first contravention of s 961B(1), and a penalty of $275,000 is suggested for the second contravention of s 961G. This increase in the penalty is due to the increased maximum penalty which is now operative. It is said to reflect Parliament's shift in attitude towards conduct of the kind in question. The reduction in the penalty for the second contravention is due to the same course of conduct principles mentioned above.

Total aggregate penalty

52 This results in a total aggregate penalty of $10,380,000.

Other considerations

53 The parties would then apply a further 30% reduction to the penalty by reason of the fact that DASS co-operated with ASIC in its investigations and acknowledged liability at an early stage, thus avoiding three weeks of a contested hearing. This would bring the penalty down to $7,266,000. The parties propose that this figure then be rounded down slightly to produce a final penalty of $7.2 million.

54 The parties considered the following factors as relevant in arriving at the initial figures of $210,000 and $410,000 per contravention, as well as the final penalty figure of $7.2 million:

(a) ASIC believes that a penalty of $7.2 million will have the requisite 'sting' and act as a deterrent to DASS for future conduct of a similar nature. ASIC noted in oral submissions that while DASS has applied to cancel its AFSL, this application is still being considered. Therefore, it may be that the Company will continue to hold an AFSL, and so specific deterrence is still a significant relevant factor in arriving at the

proposed penalty. ASIC noted however, that given the defendant is in voluntary administration, general deterrence may be a more important factor.

(b) The contraventions were not the result of isolated or unauthorised conduct of the representatives. Six representatives committed the contraventions over a period spanning some three and a half years. However, the conduct also did not involve dishonesty or wilful contravention of the law. Additionally, DASS has not previously been found to have contravened any similar provisions of the Act.

(c) While the contraventions had the potential to cause serious adverse financial impacts to the clients, all the entitlements have since been paid out in full, and there is no evidence of any detriment arising to any of the clients from the conduct. To the extent that s 1317QF is an applicable consideration, ASIC submitted at the hearing that the first proposed order negates any difficulty that may otherwise arise having regard to this section. The first proposed order requires ASIC to obtain the leave of the Court if it wishes to enforce any of the pecuniary penalty orders. Therefore, in deciding whether to grant leave or not, the Court will be able to consider whether such an order would impact the amount available to compensate other effected parties.

(d) It is relevant for the purposes of determining the appropriate pecuniary penalty in the context of specific deterrence that DASS is a part of a larger corporate group (**Evans Dixon Group**). While DASS and its head company, E & P Financial Group Limited (**Evans Dixon**), were both in a net loss after tax position for the 2021 financial year, DASS has accepted that it has the capacity to pay the proposed penalty.

(e) Since the conclusion of the Relevant Period, the Evans Dixon Group has made changes to a number of its senior personnel and implemented new compliance systems. In June and July 2019, the Chief Executive Officer, Chief Financial Officer and Strategy Officer left the Evans Dixon Group. Since then a new CEO and CFO have been appointed. Two independent non-executive directors were also appointed to the Evans Dixon board and a Chief Risk Officer has been appointed to oversee risk across the Evans Dixon Group. Significantly, in October 2019 the investment committees of both DASS and the related Evans & Partners were consolidated to form a single Evans Dixon Investment Committee, and in January 2020 a Product Review Group was established to assist the Investment Committee in assessing financial products. An independent chair was also appointed to the Investment Committee, who has the power to veto products that may be recommended to DASS clients. Finally, the Evans Dixon Group

appointed KPMG in June 2020 to conduct an independent review of their corporate governance framework.

Compliance program orders

55 The parties have also sought orders to facilitate future compliance by the representatives of DASS. In the event that DASS' ASFL is not cancelled, ASIC seeks orders that before DASS resumes providing financial services, it must first have in place systems, policies and procedures to ensure its representatives comply with s 961B(1) and s 961G of the Act. Further, an independent expert will need to provide ASIC with a written report to verify that this has occurred.

THE DECLARATION AND ORDERS TO BE MADE

Declaration of contravention

56 As has been mentioned, the parties have set out the contravening conduct in their jointly prepared statement of agreed facts. DASS has admitted to contravening s 961K(2) of the Act on 53 occasions by being the responsible licensee of its representatives who contravened s 961B(1) and/or s 961G of the Act.

57 I am satisfied that six representatives of DASS provided personal advice to eight retail clients, recommending that they either acquire an interest in, retain their interest in, or roll over their interest in, URF units, notes or convertible preference units. I am satisfied that in providing these recommendations the representatives were implementing an advice process established by DASS which recommended financial products for clients based on standard parameters and the clients' DASS risk profile. The representatives were given a limited time to review the recommendations and decide whether they should be overridden, and they were not provided with relevant documents to assist with this decision (or they were provided with such documents only shortly before the relevant decision was due to be made). There is no evidence that the representatives conducted the necessary reasonable investigations into the recommended financial products or any alternative financial products, nor is there evidence that they considered the personal circumstances of the clients.

58 Based on these circumstances and the inherent risks in the URF products, I am satisfied that these recommendations were in breach of DASS' best interest obligations under Part 7.7A, Division 2 of the Act. The representatives did not act in the best interests of the clients in relation to the advice on 28 occasions (contravening s 961B(1) of the Act), and had this duty

been satisfied, they would not have concluded that the advice was appropriate to the clients on 25 occasions (contravening s 961G of the Act).

59 The Court therefore must make a declaration of contravention: s 1317E(1) of the Act. The form of the declaration must be in accordance with s 1317E(2). I am satisfied that a declaration in the form proposed by the parties meets these requirements and is appropriate. There will be a declaration in the terms proposed.

Quantum of pecuniary penalty

60 I accept that DASS' contraventions of s 961K(2) of the Act with respect to the best interests obligations during the Relevant Period requires a significant penalty in light of the circumstances and in the interests of deterrence.

61 I am satisfied that the pecuniary penalty of $7.2 million proposed by the parties will act as a general deterrent. It will serve to deter others who may be tempted to engage in similar contraventions, and if DASS continues to hold an ASFL and resumes providing financial services, the penalty will achieve some level of specific deterrence also.

62 In accepting the parties' joint submissions as to the quantum of pecuniary penalty, I have considered the starting point for consideration of the appropriate penalties to be:

(a) in respect of the first sub-period, being 6 October to 13 March 2019, the 21 instances that gave rise to two contraventions of both s 961B(1) and s 961G of the Act: a penalty of $210,000 for the each contravention of s 961B(1) and a penalty of $135,000 for each contravention of s 961G, making a total of $7,245,000;

(b) in respect of the first sub-period, being 6 October to 13 March 2019, the five instances that gave rise to five contraventions of either s 961B(1) or s 961G of the Act: a penalty of $210,000 for the each contravention of either s 961B(1) or s 961G, making a total of $1,050,000; and

(c) in respect of the second sub-period, being 13 March 2019 to 31 May 2019, the three instances that gave rise to two contraventions of both s 961B(1) and s 961G of the Act: a penalty of $420,000 for the each contravention of s 961B(1) and a penalty of $275,000 for each contravention of s 961G, making a total of $2,085,000.

This produces a total aggregate penalty of $10,380,000.

63 In accepting the above penalties as proposed by the parties I have had regard to the maximum penalty prescribed by legislation in both the first and second sub-period. The significant increase in the maximum penalty in the second sub-period reflects Parliament's change in attitude towards such conduct. This has been accounted for, despite the fact that the underlying conduct of the contraventions was effectively the same for the entirety of the Relevant Period. Further, a significant reduction from the prescribed maximum is warranted due to the fact that the contravening conduct did not involve any dishonesty or wilful contravention of the law by either DASS or the representatives. If the conduct were to be considered on a spectrum, it would not be at the most serious end.

64 In determining the penalties set out above, I have had regard, in particular, to the course of conduct principle. I consider that it is appropriate in the circumstances of this case to treat each instance of advice as constituting separate contraventions of both s 961B(1) and s 961G of the Act (due to the provisions having different focus and content), and thus that they should attract separate and distinct penalties. However, I do consider that where recommendations were provided in contravention of both s 961B(1) and s 961G of the Act, the representatives provided the recommendations underlying the contraventions as part of a single course of conduct, and therefore a 35% reduction to the second contravention of s 961G is appropriate.

65 Further, I consider it appropriate that a reduction of 30% is applied to the total aggregate penalty for DASS's co-operation in the investigation and their early acknowledgement of liability, thus avoiding a three week contested hearing. This has saved both the parties and the Court a considerable amount of time and resources. This reduction brings the aggregate penalty down to $7,266,000.

66 I have had regard to the size of the Company and the corporate group to which it belongs, and the stated ability to meet the proposed penalty. I have considered the changes made to the senior personnel in the Evans Dixon Group, and the steps already taken to facilitate future compliance with the civil penalty provisions.

67 To the extent that the Court must give preference to any persons who suffers damage as a result of the contravention under s 1317QF of the Act, I accept that this is only applicable to the six contraventions occurring in the second sub-period by reason of s 1657 of the Act. The parties submit, and I accept, that the first proposed order requiring the plaintiff to obtain leave of the Court if it wishes to enforce the pecuniary penalty orders will allow the objectives of s 1317QF to be achieved without the need to reduce the pecuniary penalty ordered. Further, the parties

submit that there is no evidence of any detriment arising to any of the clients from the conduct. I accept this submission, particularly in light of the fact that the first s 1317QF interlocutory application initially made by the Interested Parties was subsequently withdrawn, and the second s 1317QF application foreshadowed by another interested party was never made. In these circumstances I accept that s 1317QF of the Act will have no effect on the appropriate quantum pecuniary penalty ordered.

68 Finally, I have taken the totality principle into account. I consider it appropriate, as the parties propose, to round down the penalty figure to arrive at the figure of $7.2 million. I do not consider that any further adjustment is required. I am satisfied that a pecuniary penalty of $7.2 million is just and appropriate in all the circumstances. This is particularly so having regard to the parties' agreement. I do not consider that the agreed penalty would be contrary to or inconsistent with the public interest. I am content that the proposed penalty order is *an* appropriate penalty and is within the appropriate range of penalties considering the circumstances. The penalty together with the other orders made will achieve the necessary general and specific deterrent objectives without being oppressive to the Company or any other third party who may be affected. I accept also the point made by senior counsel for the plaintiff at the hearing that the fact that the company is in liquidation does not provide a reason not to order a pecuniary penalty: see *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation) (No 3)* [2017] FCA 1018 at [78]-[80] (Beach J), and the cases there cited.

69 There will therefore be an order that DASS pay a pecuniary penalty of $7.2 million for the 53 contraventions of s 961K(2) of the Act. There will also be an order that if the plaintiffs wish to enforce this pecuniary penalty order, that they first obtain the leave of the Court to do so.

Compliance program orders

70 Given the compliance program orders sought by the plaintiff are only required if and when DASS resumes providing financial services (assuming its ASFL is not cancelled), I consider it appropriate that they be made. This will ensure that appropriate systems and policies are in place to facilitate future compliance with the civil penalty provisions by DASS and its representatives.

71 Accordingly, I will make the compliance program orders in the terms proposed.

COSTS

72 The parties have agreed that the defendant will pay the plaintiff's costs of and incidental to the proceeding in the amount of $800,000. I am satisfied that this is appropriate in all the circumstances and will make the order accordingly. Given the terms of the orders proposed by the parties, the obligation for the defendant to pay the plaintiff's costs can only arise if the Court grants leave for this to occur.

I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McEvoy.

Associate: 

Dated: 19 September 2022