

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v AMP Superannuation Limited [2023] FCA 488

File number(s): VID 280 of 2021

Judgment of: **HESPE J**

Date of judgment: 19 May 2023

Catchwords: **CORPORATIONS** – financial services – where the defendants deducted and retained life insurance premiums and advice fees from the superannuation accounts of deceased customers – where the defendants admitted contravening the relevant legislative provisions – declarations of contravention – imposition of pecuniary penalties – consideration of appropriate penalty to be imposed for contraventions of ss 12CB(1) and 12DI(3) of the *Australian Securities and Investments Commission Act 2001* (Cth)

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12DI, 12GGB, 12GLB
Corporations Act 2001 (Cth) ss 761A, 912A, 912D
Federal Court of Australia Act 1976 (Cth) s 21

Cases cited: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68
Australian Building and Construction Commissioner v Pattinson [2022] HCA 13
Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2017] FCAFC 159; (2017) 258 FCR 312
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2015] FCA 330; (2015) 327 ALR 540
Australian Competition and Consumer Commission v Energy Australia Pty Ltd [2014] FCA 336; (2014) 234 FCR 343
Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (No 2) [2016] FCA 698
Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181;

(2016) 340 ALR 25

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd [1997] FCA 450; (1997) 145 ALR 36

Australian Competition and Consumer Commission v Trivago N.V. (No 2) [2022] FCA 417

Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd [2020] FCA 69

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

Australian Securities and Investments Commission v Kobelt [2019] HCA 18; (2019) 267 CLR 1

Trade Practices Commission v CSR Ltd [1990] FCA 762; [1991] ATPR ¶41-076

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 170

Date of last submission/s: 19 December 2022

Date of hearing: 12–13 December 2022

Counsel for the Plaintiff: Mr C H Truong KC with Mr L R Howard

Solicitor for the Plaintiff: Australian Securities and Investments Commission

Counsel for the Defendants: Mr M Darke SC with Ms J Bunclre

Solicitor for the Defendants: Herbert Smith Freehills

ORDERS

VID 280 of 2021

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

AND: **AMP SUPERANNUATION LIMITED (ACN 008 414 104)**
First Defendant

**NM SUPERANNUATION PROPRIETARY LIMITED
(ACN 008 428 322)**
Second Defendant

**AMP FINANCIAL PLANNING PTY LIMITED
(ACN 051 208 327) (and others named in the Schedule)**
Third Defendant

ORDER MADE BY: HESPE J

DATE OF ORDER: 19 MAY 2023

THE COURT NOTES THAT:

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

AFSL means Australian Financial Services Licence.

AMP Financial Planning means the Third Defendant, AMP Financial Planning Pty Limited (ACN 051 208 327).

AMP Life means the Fourth Defendant, AMP Life Limited (ACN 079 300 379).

AMP Superannuation means the First Defendant, AMP Superannuation Limited (ACN 008 414 104).

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth) as in force during the Relevant Period.

Authorised Representative has the meaning provided by s 761A of the *Corporations Act*.

Corporations Act means the *Corporations Act 2001* (Cth) as in force in the Relevant Period.

NM Superannuation means the Second Defendant, NM Superannuation Pty Ltd (ACN 008 428 322).

Relevant Period means 26 May 2015 to 31 August 2019.

THE COURT DECLARES THAT:

AMP Superannuation

1. During the Relevant Period, while AMP Superannuation was trustee of the AMP Superannuation Savings Trust and the AMP Retirement Trust, AMP Superannuation failed to do all things necessary to ensure the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act*, in that:

(a) during that period, AMP Life, engaged by AMP Superannuation to provide administrative services in respect of the AMP Superannuation Savings Trust and the AMP Retirement Trust:

(i) deducted premiums from the superannuation accounts of 1,109 members after the date of notification of the member's death and failed to restore those premiums (along with premiums deducted in the period between the member's death and the date of notification of the member's death), and failed to restore the premiums deducted from the superannuation accounts of an additional 889 members where deductions ceased on or by the date of notification of their death; and

(ii) deducted ongoing advice fees from the superannuation accounts of 27 members after the date of notification of the member's death and failed to restore those advice fees (along with advice fees deducted in the period between the member's death and the date of notification of the member's death),

prior to or on the payment of those members' death benefits to their beneficiaries; and

(b) AMP Superannuation's frameworks, pursuant to which it sought to monitor and supervise the performance by AMP Life of its obligations, did not operate to detect or prevent the conduct in (a).

NM Superannuation

2. During the Relevant Period, while NM Superannuation was trustee of the Super Directions Fund, NM Superannuation failed to do all things necessary to ensure the

financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act*, in that:

- (a) during that period, AMP Life (and, prior to 1 January 2017, National Mutual Life Association of Australasia Limited), engaged by NM Superannuation to provide administrative services in respect of the Super Directions Fund, deducted premiums from the superannuation accounts of 30 members after the date of notification of the member's death and failed to restore those premiums (along with premiums deducted in the period between the member's death and the date of notification of the member's death), and failed to restore the premiums deducted from the superannuation accounts of an additional 101 members where deductions ceased on or by the date of notification of their death, prior to or on the payment of those members' death benefits to their beneficiaries; and
- (b) NM Superannuation's frameworks pursuant to which it sought to monitor and supervise the performance by AMP Life of its obligations did not operate to detect or prevent the conduct in (a).

AMP Life

3. During the Relevant Period, AMP Life engaged in conduct that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *ASIC Act*, by:
 - (a) deducting premiums from the superannuation accounts of 1,139 members, and advice fees from the superannuation accounts of 27 members, after the notification of those members' deaths, for life insurance and advice services that were not provided to those members; and
 - (b) failing to restore the premiums deducted from the superannuation accounts of 2,129 members, and advice fees deducted from the superannuation accounts of 27 members, after the date of the member's death, prior to or on the payment of those members' death benefits to their beneficiaries.
4. During the Relevant Period, AMP Life contravened s 12DI(3) of the *ASIC Act* by accepting payment of premiums deducted from the superannuation accounts of 1,139 members after the notification of those members' deaths, in circumstances where, at the time of acceptance, there were reasonable grounds for believing that AMP Life would not be able to supply the financial services within a reasonable time or at all.

5. During the Relevant Period, while AMP Life carried on a financial services business which included issuing the life insurance component of products issued by AMP Superannuation and NM Superannuation and performing administrative services for AMP Superannuation and NM Superannuation in respect of the AMP Superannuation Trust, AMP Retirement Trust and Super Directions Fund, AMP Life failed to do all things necessary to ensure the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act* in that:
- (a) during that period, AMP Life:
 - (i) deducted premiums from the superannuation accounts of 1,139 members after the date of notification of the member's death and failed to restore those premiums (along with premiums deducted in the period between the member's death and the date of notification of the member's death), and failed to restore the premiums deducted from the superannuation accounts of an additional 990 members where deductions ceased on or by the date of notification of their death; and
 - (ii) deducted ongoing advice fees from the superannuation accounts of 27 members after the date of notification of the member's death and failed to restore those advice fees (along with advice fees deducted in the period between the member's death and the date of notification of the member's death),
prior to or on the payment of those members' death benefits to their beneficiaries; and
 - (b) while AMP Life had in place systems, policies and processes for the administration of the products the subject of the proceeding, prior to 1 May 2019, those systems did not operate to prevent, or detect, the conduct in (a).
6. In respect of each contravention of s 12DI(3) and s 12CB(1) of the *ASIC Act*, AMP Life breached its general obligation to comply with financial services laws in contravention of s 912A(1)(c) of the *Corporations Act*.

AMP Financial Planning

7. During the Relevant Period, AMP Financial Planning engaged in conduct that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *ASIC Act*, by:
 - (a) accepting payment of the portion of the advice fees deducted from the superannuation accounts of 27 members that represented its licensee fee after notification of those members' deaths, for financial advice that was not provided to those members; and
 - (b) failing to return such amounts deducted by AMP Life and received by it and/or its Authorised Representatives after a member's death, to be refunded to members for the benefit of their beneficiaries.
8. During the Relevant Period, AMP Financial Planning contravened s 12DI(3) of the *ASIC Act* by accepting payment of the portion of the advice fees deducted from the superannuation accounts of 27 members that represented its licensee fee after the notification of those members' deaths, in circumstances where, at the time of acceptance, there were reasonable grounds for believing that AMP Financial Planning Authorised Representatives would not be able to supply the financial services within a reasonable time or at all.
9. During the Relevant Period, while AMP Financial Planning carried on a financial services business pursuant to which it engaged Authorised Representatives to provide (among other things) financial product advice for classes of financial products that included life products and superannuation, AMP Financial Planning failed to do all things necessary to ensure the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act* in that:
 - (a) during that period, AMP Financial Planning failed to return advice fees deducted by AMP Life from the superannuation accounts of 27 members after the date of the member's death and received by it and/or Authorised Representatives, to be refunded to members for the benefit of their beneficiaries; and
 - (b) AMP Financial Planning did not have systems, policies and processes in place which operated in the Relevant Period to prevent, or detect, the conduct in (a).

10. In respect of each contravention of s 12DI(3) and s 12CB(1) of the *ASIC Act*, AMP Financial Planning breached its general obligation to comply with financial services laws in contravention of s 912A(1)(c) of the *Corporations Act*.

THE COURT ORDERS THAT:

11. AMP Life pay to the Commonwealth of Australia a pecuniary penalty in the amount of \$18,000,000 in respect of its contraventions of ss 12CB(1) and 12DI(3) of the *ASIC Act* referred to in paragraphs 3 and 4 of the declarations set out above.
12. AMP Financial Planning pay to the Commonwealth of Australia a pecuniary penalty in the amount of \$6,000,000 in respect of its contraventions of ss 12CB(1) and 12DI(3) of the *ASIC Act* referred to in paragraphs 7 and 8 of the declarations set out above.
13. The pecuniary penalties referred to in paragraphs 11 and 12 above be paid within 30 days of the date of this order.
14. Pursuant to s 12GLB(1)(a) of the *ASIC Act*, within 30 days of this order, the 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 address: <https://www.amp.com.au/> (**Webpage**); and
 - (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 Webpage 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).
15. The First to Fourth Defendants pay the Plaintiff’s costs of the proceeding, as agreed or assessed.
16. The originating application as against the Fifth Defendant be dismissed with no order as to costs.

ANNEXURE A
Adverse Publicity Order

*The Federal Court of Australia has ordered AMP Superannuation Limited, NM Superannuation Proprietary Limited, AMP Financial Planning Proprietary Limited and AMP Life Limited (the **AMP Entities**) to publish this written adverse publicity notice.*

On 19 May 2023, Justice Hespe of the Federal Court ordered AMP Life Limited (**AMP Life**) and AMP Financial Planning Proprietary Limited (**AMP Financial Planning**) to pay a total pecuniary penalty of \$24 million in connection with the deduction and retention of life insurance premiums and advice fees from the superannuation accounts of deceased customers throughout the period spanning 26 May 2015 to 31 August 2019 (the **Relevant Period**).

Justice Hespe imposed the \$24 million pecuniary penalty after declaring that the conduct engaged in by AMP Life and AMP Financial Planning:

- (a) was, in all of the circumstances, unconscionable; and
- (b) involved the acceptance of insurance premiums and advice fees when, at the time of accepting those fees, there were reasonable grounds to believe that they could not supply financial services to the deceased customers.

Justice Hespe also declared that, by the conduct:

- (a) the AMP Entities failed to do all things necessary to provide financial services fairly, honestly and efficiently; and
- (b) AMP Life and AMP Financial Planning failed to comply with financial services laws.

A total of \$601,767.87 in advice fees and premiums were incorrectly deducted and/or not refunded to 2,156 customers during the Relevant Period.

The AMP Entities made admissions of contravention in the proceeding. Prior to the proceeding, the AMP Entities conducted a remediation program in which \$5,255,105.10 in fees and lost earnings were provided to the representatives of deceased customers. This remediation program was for a broader customer base than the 2,156 customers that were subject of the proceeding (and included remediation for deceased customers impacted prior to the Relevant Period).

The conduct the subject of the proceeding affected 2,156 customers of the following products during the Relevant Period:

- (a) Flexible Lifetime Super;
- (b) Custom Super;
- (c) Signature Super;
- (d) Super Leader (pursuant to the AMP Superannuation Savings Trust);
- (e) AMP Flexible Super (pursuant to the AMP Retirement Trust);
- (f) Tailored Super;
- (g) Simple Super;
- (h) Super Directions for Business; and
- (i) Super Directions Rollover Section (also known as NMRP Super Directions).

Further information

The above conduct contravened the following financial services laws:

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

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

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

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

REASONS FOR JUDGMENT

HESPE J:

INTRODUCTION

1 This proceeding commenced by the Plaintiff (**ASIC**) concerns the deduction and retention of life insurance premiums and advice fees from the superannuation accounts of deceased customers during the period 26 May 2015 to 31 August 2019 (the **Relevant Period**) in circumstances where it has since been acknowledged that there was no entitlement to charge or deduct the premiums or fees.

2 The Defendants were all members of the AMP Limited (**AMP**) group of companies (the **AMP Group**) during the Relevant Period.

3 The parties prepared a statement of agreed facts and admissions dated 12 August 2022 (the **SOAF**).

4 For the purposes of these proceedings:

(1) each of the First Defendant (**AMP Superannuation**), the Second Defendant (**NM Superannuation**), the Third Defendant (**AMP Financial Planning**) and the Fourth Defendant (**AMP Life**) admits that it contravened s 912A(1)(a) of the *Corporations Act 2001* (Cth);

(2) each of AMP Life and AMP Financial Planning admits that it contravened s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);

(3) each of AMP Life and AMP Financial Planning admits that it contravened s 12DI(3) of the *ASIC Act*; and

(4) each of AMP Life and AMP Financial Planning admits that it contravened s 912A(1)(c) of the *Corporations Act*.

5 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 does not seek pecuniary penalties against the First to Fourth Defendants for their admitted contraventions of s 912A of the *Corporations Act*, but contends that penalties totalling \$30 million should be imposed on AMP Financial Planning and AMP Life for their admitted contraventions of the *ASIC Act*. AMP Financial Planning and AMP Life propose penalties totalling \$18 million. The parties are agreed that the proceeding

is to be dismissed as against the Fifth Defendant (AMP Services Limited) with no order as to costs.

6 For the reasons that follow, I have concluded that penalties totalling \$24 million should be imposed on AMP Financial Planning and AMP Life.

Statutory provisions

7 Section 12CB(1) of the *ASIC Act* is a civil penalty provision (as defined in s 12GBA(6)). It provides:

- (1) A person must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of financial services to a person; or
 - (b) the acquisition or possible acquisition of financial services from a person;engage in conduct that is, in all the circumstances, unconscionable.

8 Section 12DI(3) of the *ASIC Act* is also a civil penalty provision. It provides:

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

9 Prior to 13 March 2019, s 12GBA of the *ASIC Act* provided:

- (1) If the Court is satisfied that a person:
 - (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA); or
 - (b) has attempted to contravene such a provision; or
 - (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
 - (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; 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
 - (f) has conspired with others to contravene such a provision;

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by 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 to have engaged in any similar conduct.
- (3) The pecuniary penalty payable under subsection (1) is not to exceed the number of penalty units worked out using the following table:

| Number of penalty units | | |
|--------------------------------|---|--|
| Item | For each act or omission to which this section applies that relates to ... | the number of penalty units is not to exceed ... |
| 2 | a provision of Subdivision C or D (other than section 12DA) | (a) if the person is a body corporate—10,000; or (b) if the person is not a body corporate—2,000. |
| 3 | section 12GYB | (a) if the person is a body corporate—150; or (b) if the person is not a body corporate—30. |
| 4 | section 12GYC | (a) if the person is a body corporate—250; or (b) if the person is not a body corporate—50. |

- (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.

10 From 13 March 2019, s 12GBB applied to the same effect.

11 Section 912A(1)(a) of the *Corporations Act* provides:

- (1) A financial services licensee must:
- (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; ...

12 Section 912A(1)(a) became a civil penalty provision with effect from 13 March 2019.

The hearing and the evidence

13 The material before the Court comprises the SOAF (including a bundle of attached documents),
an addendum to the SOAF filed on 19 December 2022 after the conclusion of the hearing and
a number of affidavits.

14 ASIC relies on an affidavit of Mr Philip Peck, a Senior Lawyer in ASIC's Financial Services
Enforcement team, affirmed on 30 September 2022. Parts of the affidavit were not read.

15 Mr Peck was not cross-examined.

16 AMP Life and AMP Financial Planning rely on the following affidavits:

- (1) an affidavit of Mr David Cullen, AMP Group General Counsel, affirmed on 4 November 2022;
- (2) an affidavit of Mr Grant McPherson, Head of MasterTrust Operations within the AMP Group, affirmed on 8 November 2022;
- (3) an affidavit of Ms Mary Therese Dharmapala, former Team Leader (Claims Administration) at AMP Life, sworn on 7 November 2022;
- (4) an affidavit of Ms Rachelle Taylor, Head of Customer Resolutions at AMP, sworn on 2 November 2022; and
- (5) two affidavits of Mr Shamus Paul Toomey, General Counsel, Dispute Resolution and Regulatory Response at AMP, sworn on 8 November 2022 and 5 December 2022.

17 Neither Mr Cullen nor Mr McPherson were cross-examined. The remaining witnesses for the
Defendants were cross-examined.

FACTUAL FINDINGS

18 The following findings are based on the SOAF, the affidavits and oral evidence.

The Defendants

19 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 within the meaning of Div 6 of Pt 7.6 of the *Corporations Act* (**Authorised Representatives**) to provide financial

product advice for classes of financial products that included life products and superannuation;

- (b) 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;
- (c) 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
- (d) NM Superannuation held an AFSL, which authorised it to carry on a financial services business of dealing in financial products, including by issuing superannuation products.

20 AMP Limited sold its majority shareholding in AMP Life to the Resolution Life Group effective from 30 June 2020. Since July 2020, the AMP Group has not issued insurance products, including life insurance. In about June 2022, the AMP Group completed the sale of its remaining minority interest in AMP Life.

The products

21 The relevant superannuation products fell into three categories:

- (1) Superannuation products issued pursuant to the AMP Superannuation Savings Trust, by AMP Superannuation as trustee. These products were known as Flexible Lifetime Super, Custom Super, Signature Super and Super Leader.
- (2) Superannuation products issued pursuant to the AMP Retirement Trust, by AMP Superannuation as trustee. These products were known as AMP Flexible Super.
- (3) Superannuation products issued pursuant to the Super Directions Fund, by NM Superannuation as trustee. These products were known as Tailored Super, Simple Super, Super Directions for Business and Super Directions Rollover Section (also known as “NMRP Super Directions”).

22 Upon acquiring one of these superannuation products, an individual became a member of the relevant fund. Members were entitled to acquire life insurance and personal financial advice services and the trustee of the fund was entitled to pay the premiums from the member’s

account in respect of the member's interest in a group life insurance policy issued by AMP Life to each trustee.

23 Upon the death of a member, the relevant trustee was obliged to pay a **death benefit** to the member's nominated (or determined) beneficiary. The death benefit was to comprise the accumulated amount of the member's investment plus any life insurance benefit.

24 Pursuant to the trust deeds and group life insurance policies:

- (1) After the death of a member, the amount in the member's account remained invested, continuing to accrue interest until the death benefit was calculated and paid.
- (2) Following the determination of whether any life insurance claim was payable (including receipt of documentation verifying death and calculation of the death benefit), the trustee was to pay a death benefit to the member's nominated (or determined) beneficiary.

25 Upon the death of a member, the member's obligation to pay advice fees and premiums for life insurance in respect of that member ceased.

26 The products issued by NM Superannuation had been issued by AXA Australia prior to its merger with AMP Life in about 2011. From the AMP Group's perspective, these were legacy products.

The role of the AMP companies

AMP Life

27 In respect of the AMP Superannuation Savings Trust, AMP Retirement Trust and Super Directions Fund, AMP Life:

- (a) performed certain administrative services in connection with those funds; and
- (b) provided life insurance coverage offered as a component of the relevant superannuation products.

28 The group life policies issued by AMP Life to the trustees contained one or both of an investment policy and a life insurance policy:

- (1) the investment policy outlined AMP Life's obligations on notification of a member's death to pay the accumulated amount of the member's investment;

- (2) the life insurance policy outlined the terms of payment by AMP Life of any life insurance benefit;
- (3) AMP Life was entitled to deduct amounts from members' accounts in payment of premiums for life insurance coverage and ongoing advice fees for advice services provided; and
- (4) AMP Life was responsible for processing and paying out claims.

29 Pursuant to a Master Outsourcing Agreement dated 1 July 2014 between AMP Superannuation, AMP Life and AMP Services Limited, AMP Life was to provide certain services in relation to the day-to-day administration and operation of the relevant funds and in a manner consistent with AMP Superannuation's obligations as trustee.

30 From 1 January 2017, AMP Life was appointed by NM Superannuation to provide certain administrative services in respect of the relevant fund and in a manner consistent with NM Superannuation's obligations as trustee.

31 Relevantly, in performance of its contractual obligations, AMP Life:

- (1) deducted amounts from members' accounts in payment of life insurance premiums;
- (2) deducted amounts from members' accounts in payment of advice fees; and
- (3) processed, calculated and paid members' death benefits.

32 The premiums for life insurance formed part of the revenue of AMP Life.

33 In the course of performing its obligations, AMP Life:

- (1) was notified of the death of a member upon being contacted by the member's family member or representative;
- (2) received and dealt with any complaints and inquiries made to it by the deceased member's representative;
- (3) liaised with the deceased member's representative and provided them with relevant documentation to process payments to the deceased member's nominated (or determined) beneficiaries; and
- (4) disbursed payments to the deceased member's nominated (or determined) beneficiaries.

AMP Superannuation and NM Superannuation

34 Under their contractual arrangements with AMP Life, AMP Superannuation and NM Superannuation had certain powers to supervise and monitor AMP Life's performance of its obligations. Those powers included:

- (1) the power to obtain information from AMP Life about the provision of its services;
- (2) the power to conduct on-site visits to AMP Life and obtain copies of any documents or information relating to the provision of services to the trustees; and
- (3) the power to engage independent auditors to investigate AMP Life's business activities relevant to the performance of its obligations under the agreement.

35 AMP Life provided regular reporting to AMP Superannuation and NM Superannuation under a framework called the Business Monitoring Model. That framework was intended to provide for the monitoring and oversight of outsourcing arrangements on behalf of AMP Superannuation and NM Superannuation. A number of committees were in place to support the oversight function of AMP Superannuation and NM Superannuation.

AMP Financial Planning

36 AMP Financial Planning appointed Authorised Representatives pursuant to s 916A of the *Corporations Act* who, relevantly, provided personal advice services to members of the AMP Superannuation Savings Trust, the AMP Retirement Trust and the Super Directions Fund for and on behalf of AMP Financial Planning.

37 Pursuant to the terms of the superannuation products and a facilitation agreement between AMP Life and AMP Financial Planning dated 20 May 2010, AMP Life deducted amounts from member accounts in payment of advice fees.

38 The advice fees were recorded as revenue of AMP Financial Planning. AMP Financial Planning retained a portion of the advice fees which represented licensee fees payable to it by the Authorised Representative and distributed the balance of the advice fee to the Authorised Representative. (Licensee fees were determined as a percentage of an Authorised Representative's "Practice Revenue").

- 39 On the death of a member, either:
- (1) a family member or other representative would notify the Authorised Representative of the member's death and the Authorised Representative would, in turn, notify AMP Life; or
 - (2) AMP Life was notified directly of the death of the member by a representative of the member.

40 As explained further below, at all material times, AMP Financial Planning did not have an adequate system in place which operated to:

- (a) notify it of a member's death by AMP Life or an Authorised Representative;
- (b) cease receipt of advice fees upon notification of a member's death; and
- (c) return to AMP Life any amounts deducted by AMP Life and received by AMP Financial Planning and/or any Authorised Representatives on account of advice fees after a member's death.

AMP Life's product administration systems

41 At all material times, AMP Life operated product administration systems for the administration of the superannuation products. The relevant systems were the U2 product administration system and the Compass product administration system.

42 During the Relevant Period, the products issued by NM Superannuation as trustee were administered on the Compass system and the products issued by AMP Superannuation as trustee were administered on the U2 system.

43 In the Relevant Period, prior to 1 May 2019, the product administration systems did not consistently operate to cease or prevent the continued deduction of premiums and advice fees after AMP Life was notified of a member's death and/or to refund to members' accounts any premiums or advice fees deducted after the date of death.

44 By 18 May 2020, all of the products administered on the Compass system were migrated to the U2 System. The Compass system has since been decommissioned.

The contravening conduct

45 As noted above, upon death:

- (1) the member's obligation to pay premiums for life insurance ceased;

- (2) the member's obligation to pay advice fees ceased;
- (3) the member's nominated (or determined) beneficiary was entitled to be paid a death benefit; and
- (4) any premiums or advice fees deducted after the date of death ought to have been refunded prior to the payment of the death benefit.

46 During the relevant period, after being notified of the death of a member:

- (1) AMP Life continued to deduct and pay itself premiums from the accounts of 1,139 members.
- (2) AMP Life continued to deduct advice fees from the accounts of 27 identified members.
- (3) The advice fees were recorded as revenue of AMP Financial Planning. AMP Financial Planning retained a portion of those fees (representing the licensee fee payable to it by the Authorised Representative) and the balance was distributed to the relevant Authorised Representative.
- (4) AMP Financial Planning failed to return any amounts deducted by AMP Life after a member's death on account of advice fees.
- (5) Prior to or upon payment of the member's death benefit, AMP Life failed to restore:
 - (a) premiums deducted from 2,129 member accounts after the date of the member's death; and
 - (b) advice fees from the identified 27 member accounts after the date of the member's death.

47 During the Relevant Period, the frameworks, systems, policies and procedures established by AMP Superannuation and NM Superannuation to supervise and monitor the services provided by AMP Life in respect of the relevant funds did not operate to detect or prevent the contravening conduct.

Complaints and inquiries received by AMP Life and AMP Financial Planning

48 Between 2007 and mid-2018, from time to time, AMP Life and AMP Financial Planning received complaints and inquiries from representatives of deceased members in relation to the deduction of premiums and/or advice fees after a member's death.

49 The complaints and inquiries (of which AMP Life and AMP Financial Planning are aware) were resolved at the time they were raised by deductions ceasing and the amounts deducted after death being refunded.

50 Ms Taylor gave evidence in her affidavit about AMP's complaints handling system during the Relevant Period. Prior to late 2018, complaints were handled by staff within the business unit in the AMP Group to which the complaint related.

51 The advice business had a complaints handling team. Ms Taylor stated that a complaint relating to advice was generally handled by the complaints handling team within the advice business unit. That team was responsible for the receipt, recording, investigation, resolution and closure of complaints from members or clients (either directly or through a member's or client's adviser) which related to an aspect of the provision of financial services.

52 Ms Taylor stated that a complaint relating to life insurance was handled by the complaints handling function within the AMP Life business unit. It was an agreed fact that the MasterTrust business did not have a separate complaints handling team; rather, complaints were dealt with by frontline staff and administration and operations staff as part of their roles.

53 Ms Taylor's evidence was that complaints were recorded on different systems depending on the complaints handling function and the matter to which the complaint related. Some of the systems on which complaints relating to advice and life insurance included Salesforce (a customer relationship management system), ABLE, the WMS (a workflow management system) and Figtree.

54 The evidence of Mr Toomey was that, based on a review of available records, the staff handling or involved in the handling of complaints received from representatives of deceased members between 2007 and March 2019 were relatively junior and below executive level. One exception related to a complaint made on 2 May 2018 which was handled by more senior employees (including executives and their direct reports). That complaint related to deductions of adviser fees made after the conduct the subject of these proceedings had been identified by senior management as an issue.

Process improvement request

55 Around early June 2016, a claims assessor within the AMP Group raised a concern by email to a Process Improvement and Project Specialist that premiums were continuing to be deducted from a member's account following the member's death, which had been notified in

February 2015. The claims assessor requested that the premiums deducted after notification of death be reversed.

56 In June and July 2016, there was an email exchange between a Process Improvement and Project Specialist within the AMP Group and a Team Leader, Corporate Super Operations.

57 On 8 June 2016, the Process Improvement and Project Specialist forwarded the email from the claims assessor to a Team Leader, Corporate Super Operations, stating, relevantly:

Can you please get someone to refund premiums and **investigate why premiums are still being deducted.**

(emphasis added)

58 That same day, the Team Leader, Corporate Super Operations replied by email:

The current process is to charge until the claim is processed, which triggers a refund.

59 On 10 June 2016, the Process Improvement and Project Specialist replied by email to the Team Leader, Corporate Super Operations, relevantly stating:

I'm not sure if that is correct as **we should stop charging premiums once we were notify [sic] of a death claim.** I don't have a copy of the CU PDS at hand but Retail Products states that we **should cease premium deduction from the date a death claim is lodged/notified. Can I suggest we review the process as it is causing a lot of complaints at the moment?**

(emphasis added)

60 On 10 June 2016, the Team Leader, Corporate Super Operations replied to the Process Improvement and Project Specialist and other personnel stating:

What you are asking for is **reasonable yet is not catered for in U2.** To stop the premiums we would have to remove the cover. **We can raise an enhancement but need more general details as to the nature of the complaints** and who is making them (family, planner, employer?) etc. Once you send me that I will lodge an enhancement request to create a new assessment code for death notified that stops premiums but leaves cover intact. We would want the macro to do this for us.

(emphasis added)

61 That same day, the Process Improvement and Project Specialist informed the Team Leader, Corporate Super Operations and recipients of the email that “[s]omeone from Lifeclaims will provide the information you need next week”.

62 The Team Leader, Corporate Super Operations replied and requested that the Process Improvement and Project Specialist provide specifics including estimated volumes of complaints per month and who complains the most.

63 On 28 June 2016, this chain of correspondence was forwarded by an AMP Business Unit Manager to an AMP Senior Claims Assessor.

64 On 6 July 2016, the Senior Claims Assessor wrote in a draft email she sent to herself:

Would like to bring to your attention today we **received a call from a [sic] annoyed planner in regards to the premiums that have been taken from the above policy after the date of death.** From the below emails you state that the premiums should continue to come of [sic] the policy until we are ready to pay and then that would create a refund of premiums onto the plan...

I cannot understand why the premiums continue to come out once we have been notified of a claim this has caused the following issues [sic]

- *Complaints
- *Policies to be closed due to lack of funds as premiums are continually being taken out

...

Email the trustee about Corporate plans not cease [sic] premiums at time of notification and ask if there is anything in the Trust DEED

The reason this occurs is due to the way macro notifies of a claim on U2 for the Corporate plans, as for the FLS claims which are done in Life claim we completed an assets and Insurance Switch which the notifies the PAS that there is a claim.

(emphasis added)

65 The staff members involved in the process improvement request exchange in 2016 were relatively junior.

66 Mr Toomey's evidence was that senior management became aware of the issues relating to the deduction of fees and premiums in relation to deceased members from April 2018.

67 In mid-2018, following the emergence at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Service Industry of the issue of charging fees to deceased customers, steps were taken by the AMP Group to report the issue to ASIC and to rectify the issue.

Reporting of the conduct to ASIC

68 On 20 June 2018, at a meeting of the AMP Insurance & Wealth Solutions Breach Review Committee, it was determined that AMP Life and AMP Superannuation should lodge a report to ASIC under s 912D of the *Corporations Act* notifying ASIC of a significant breach. The function of the Breach Review Committee was to assess whether conduct needed to be reported to a regulator.

69 Between 26 June 2018 and 4 December 2018, reports under s 912D of the *Corporations Act* and s 297 of the *Superannuation Industry (Supervision) Act 1993* (Cth) were lodged in respect of the contravening conduct. Further reports to ASIC were lodged by AMP Superannuation, NM Superannuation, AMP Life and AMP Financial Planning in respect of the contravening conduct between 9 February 2019 and 8 November 2019.

Advice fee conduct investigation

70 By notice served on 30 June 2020, ASIC requested that NM Superannuation, AMP Superannuation, AMP Life and AMP Financial Planning produce 60 client files for ASIC to investigate for the purposes of identifying the nature of the financial advice provided in consideration for advice fees, the terms and conditions that governed the provision of advice and the advice fees, and the conduct after notification of the client's death.

71 ASIC's investigation was limited to these 60 files. Of these 60 files:

- (a) 27 client files were identified as bearing evidence of the ongoing deduction of advice fees despite notification of the member's death and no evidence of any services provided after the client's death; and
- (b) 33 client files were identified as being incomplete or there was evidence of an Authorised Representative providing some type of service to a representative of the deceased member.

72 By its nature, ASIC's investigation could not identify every client potentially affected by the wrongful charging of advice fees. It must also be recognised that the admissions made by the Defendants were limited to the instances identified in the review of these 60 files.

73 Mr Toomey's evidence was that there was a record in minutes of a board committee that the AMP Group received legal advice in June 2018 concerning the deduction of advice fees from the accounts of deceased members.

Rectification

74 Between June 2018 and May 2019, the AMP Group performed work to enhance its product administration systems, process and policies to ensure that the issues relating to deceased members in respect of premiums and advice fees no longer occurred.

75 An interim manual process was implemented in around September 2018 to switch off and refund premiums and advice fees in relation to deceased members.

76 On 1 May 2019, the AMP Group introduced an *Insurance Premiums and Fees Charged to Deceased Customers Policy* which contained measures for how the AMP Group would treat insurance premiums and fees upon notification of a member's death. Under that policy:

- (a) upon notification of the death of a member, the ongoing deduction of all premiums and adviser service fees from the deceased customer's account is to cease, effective from the date of notification of death; and
- (b) the relevant AMP entity is to refund any premiums or adviser service fees deducted from the account in respect of the period from the date of death to the date of notification of death. Where possible, the refund is to take the form of the reversal of the deduction transaction.

77 On 21 August 2019, the AMP Group introduced its *Ongoing Advice Fees and the Death of a Client Policy* which introduced additional measures to ensure advice fees would cease upon the death of a member. Under that policy:

- (a) upon notification of the death of a client, advisers are to immediately notify any relevant AMP entity to cease charging ongoing advice fees; and
- (b) advisers are to refund any advice fees deducted from an account in respect of the period from the date of death to the date of notification of death to the client's estate.

78 The AMP Group has also developed and improved its systems for monitoring and processing complaints.

Remediation

79 Following the identification of the contravening conduct and of its own volition, the AMP Group commenced the development of a remediation program. It notified ASIC that the remediation work was underway in the first breach report lodged on 26 June 2018.

80 On 8 November 2019, AMP Superannuation, NM Superannuation and AMP Life provided a breach update to ASIC, informing it that, in the period since 1 January 2011, a total of 9,308 members had been impacted by the contravening conduct, with a financial impact on those members estimated to be \$3.8 million.

81 Throughout 2019 and 2020, the AMP Group conducted a remediation program whereby, in respect of the period 1 January 2011 to 2019:

- (a) 10,155 superannuation accounts of deceased members were refunded advice fees and/or premiums by paying amounts to the respective member's estate or representative; and
- (b) the AMP Group refunded a total of \$5,255,105.10 to representatives of deceased members. This amount was comprised of advice fees and/or premiums deducted after the date of death (totalling \$4,241,303.49) together with lost investment earnings (totalling \$1,013,801.61).

82 Letters were sent to the beneficiaries of deceased members regarding the remediation and apologising.

83 On 27 May 2021, the day after ASIC commenced this proceeding, AMP issued an ASX media release which stated:

AMP has taken this matter very seriously and we will now carefully consider the allegations raised by ASIC. We have been assisting ASIC with its investigation and will continue to engage constructively as part of the legal process.

When we discovered the issues, we immediately moved to change our processes and systems and took action to ensure the beneficiaries of customers impacted were fully remediated. AMP apologises to all customers and beneficiaries who were impacted by this matter.

The Affected Members

84 During the Relevant Period, a total of \$601,767.87 in premiums and ongoing advice fees was deducted from and not refunded to the superannuation accounts of 2,156 deceased members (referred to in these reasons as the **Affected Members**) as follows:

- (a) 889 members with AMP Superannuation accounts had premiums totalling \$207,058.66 deducted up to the date of notification of death from, and not refunded to, their superannuation accounts after the date of their death;
- (b) 1,109 members with AMP Superannuation accounts had premiums totalling \$304,028.04 continue to be deducted after the date of notification of death from, and not refunded to, their superannuation accounts after the date of their death;
- (c) 101 members with NM Superannuation accounts had premiums totalling \$10,621.22 deducted up to the date of notification of death from, and not refunded to, their superannuation accounts after the date of their death;

- (d) 30 members with NM Superannuation accounts had premiums totalling \$4,006.95 continue to be deducted after the date of notification of death from, and not refunded to, their superannuation accounts after the date of their death; and
- (e) 27 members with AMP Superannuation accounts had ongoing advice fees totalling \$76,053 deducted from, and not refunded to, their superannuation accounts after the date of their death.

85 As explained above, there was no entitlement to charge these premiums and fees to the Affected Members.

86 It is agreed that the Affected Members and their representatives were entitled to expect that the Defendants would lawfully, efficiently, honestly and fairly administer the deceased member's superannuation and life insurance interests and personal advice, including correctly treating premiums and advice fees.

87 Mr Cullen, as general counsel for the AMP Group, reiterated the AMP Group's unreserved apology for continuing to deduct, and failing to refund, premiums and advice fees following notification of a member's death and acknowledged that the conduct fell below the standard expected of AMP Group.

88 Mr Toomey's evidence was that there were instances of fees and premiums continuing to be deducted after the notification of a member's death until about August 2019.

Dealings between ASIC and AMP regarding the contravening conduct

89 The Defendants cooperated with ASIC during its investigation leading to this proceeding and reached agreement with ASIC as reflected in the SOAF.

Size and circumstances of the Defendants

90 The AMP Group is an Australian financial institution that, during the Relevant Period, offered to customers in Australia and New Zealand a variety of financial solutions across financial advice, investment management, banking, life insurance, superannuation, retirement income and investing.

91 In the financial year ended 31 December 2018, 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) NM Superannuation was the trustee of 541,138 superannuation member accounts across the AMP Group;
- (c) AMP Life administered the superannuation accounts referred to above; and
- (d) there were 1,345,462 superannuation member accounts linked to an Authorised Representative of AMP Financial Planning.

92 As described at [20], AMP Life ceased being part of the AMP Group on 1 July 2020.

93 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 Group Consolidated | AMP Life | AMP Superannuation | AMP Financial Planning | NM Superannuation |
|--------------|--------------------------------|-----------|--------------------|------------------------|-------------------|
| 2015 Revenue | \$1,115m | \$7,697m | \$7,637,829 | \$474,352,000 | \$343,970,672 |
| 2015 NPAT | \$972m | \$575m | \$1,152,051 | -\$9,338,000 | \$908,236 |
| 2016 Revenue | \$527m | \$8,437m | \$9,591,469 | \$472,622,000 | \$376,838,844 |
| 2016 NPAT | -\$344m | \$308m | \$1,792,542 | -\$20,811,000 | \$1,618,464 |
| 2017 Revenue | \$1,072m | \$13,849m | \$932,574,000 | \$480,685,000 | \$561,547,000 |
| 2017 NPAT | \$848m | \$565m | \$1,642,000 | -\$11,992,000 | \$1,826,000 |
| 2018 Revenue | \$728m | \$4,539m | \$891,116,000 | \$469,775,000 | \$600,516,000 |
| 2018 NPAT | \$28m | -\$139m | \$1,389,000 | -\$44,904,000 | \$1,563,000 |

Admitted contraventions

AMP Superannuation and NM Superannuation

94 Although not the subject of the pecuniary penalty, declarations have been sought in relation to admitted contraventions of s 912A of the *Corporations Act* by AMP Superannuation and NM Superannuation. The admitted contraventions are set out below.

AMP Superannuation

95 During the Relevant Period, while AMP Superannuation was trustee of the AMP Superannuation Savings Trust and the AMP Retirement Trust, AMP Superannuation failed to

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

- (a) during that period, AMP Life, engaged by AMP Superannuation to provide administrative services in respect of the AMP Superannuation Savings Trust and the AMP Retirement Trust:
 - (i) deducted premiums from the superannuation accounts of 1,109 members after the date of notification of the member's death and failed to restore those premiums (along with premiums deducted in the period between the member's death and the date of notification of the member's death), and failed to restore the premiums deducted from the superannuation accounts of an additional 889 members where deductions ceased on or by the date of notification of their death; and
 - (ii) deducted ongoing advice fees from the superannuation accounts of 27 members after the date of notification of the member's death and failed to restore those advice fees (along with advice fees deducted in the period between the member's death and the date of notification of the member's death),
prior to or on the payment of those members' death benefits to their beneficiaries; and
- (b) AMP Superannuation's frameworks pursuant to which it sought to monitor and supervise the performance by AMP Life of its obligations did not operate to detect or prevent the conduct in (a).

NM Superannuation

96 During the Relevant Period, while NM Superannuation was trustee of the Super Directions Fund, NM Superannuation failed to do all things necessary to ensure the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act*, in that:

- (a) during that period, AMP Life (and, prior to 1 January 2017, National Mutual Life Association of Australasia Limited), engaged by NM Superannuation to provide administrative services in respect of the Super Directions Fund,

deducted premiums from the superannuation accounts of 30 members after the date of notification of the member's death and failed to restore those premiums (along with premiums deducted in the period between the member's death and the date of notification of the member's death), and failed to restore the premiums deducted from the superannuation accounts of an additional 101 members where deductions ceased on or by the date of notification of their death, prior to or on the payment of those members' death benefits to their beneficiaries; and

- (b) NM Superannuation's frameworks pursuant to which it sought to monitor and supervise the performance by AMP Life of its obligations did not operate to detect or prevent the conduct in (a).

AMP Life and AMP Financial Planning

97 In relation to AMP Life and AMP Financial Planning, pecuniary penalties were sought in relation to admitted contraventions of ss 12CB and 12DI of the *ASIC Act* and declarations were sought in relation to admitted contraventions of s 912A of the *Corporations Act*.

AMP Life

98 During the Relevant Period, AMP Life engaged in conduct that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *ASIC Act*, by:

- (a) deducting premiums from the superannuation accounts of 1,139 members, and advice fees from the superannuation accounts of 27 members, after the notification of those members' deaths, for life insurance and advice services that were not provided to those members; and
- (b) failing to restore the premiums deducted from the superannuation accounts of 2,129 members, and advice fees deducted from the superannuation accounts of 27 members, after the date of the member's death, prior to or on the payment of those members' death benefits to their beneficiaries.

99 During the Relevant Period, AMP Life contravened s 12DI(3) of the *ASIC Act* by accepting payment of premiums deducted from the superannuation accounts of 1,139 members after the notification of those members' deaths, in circumstances where, at the time of acceptance, there were reasonable grounds for believing that AMP Life would not be able to supply the financial services within a reasonable time or at all. Those grounds were:

- (a) the death of each member;
- (b) the notification that each member had died;
- (c) the life insured by the insurance coverage ceasing to exist; and
- (d) each member's obligation to pay premiums ceasing.

100 During the Relevant Period, while AMP Life carried on a financial services business which included issuing the life insurance component of products issued by AMP Superannuation and NM Superannuation and performing administrative services for AMP Superannuation and NM Superannuation in respect of the AMP Superannuation Trust, AMP Retirement Trust and Super Directions Fund, AMP Life failed to do all things necessary to ensure the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act* in that:

- (a) during that period, AMP Life:
 - (i) deducted premiums from the superannuation accounts of 1,139 members after the date of notification of the member's death and failed to restore those premiums (along with premiums deducted in the period between the member's death and the date of notification of the member's death), and failed to restore the premiums deducted from the superannuation accounts of an additional 990 members where deductions ceased on or by the date of notification of their death; and
 - (ii) deducted ongoing advice fees from the superannuation accounts of 27 members after the date of notification of the member's death and failed to restore those advice fees (along with advice fees deducted in the period between the member's death and the date of notification of the member's death),

prior to or on the payment of those members' death benefits to their beneficiaries; and
- (b) while AMP Life had in place systems, policies and processes for the administration of the products the subject of the proceeding, prior to 1 May 2019, those systems did not operate to prevent, or detect, the conduct in (a).

101 In respect of each contravention of s 12DI(3) and s 12CB(1) of the *ASIC Act*, AMP Life breached its general obligation to comply with financial services laws in contravention of s 912A(1)(c) of the *Corporations Act*.

AMP Financial Planning

102 During the Relevant Period, AMP Financial Planning engaged in conduct that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the *ASIC Act*, by:

- (a) accepting payment of the portion of the advice fees deducted from the superannuation accounts of 27 members that represented its licensee fee after notification of those members' deaths, for financial advice that was not provided to those members; and
- (b) failing to return such amounts deducted by AMP Life and received by it and/or its Authorised Representatives after a member's death, to be refunded to members for the benefit of their beneficiaries.

103 During the Relevant Period, AMP Financial Planning contravened s 12DI(3) of the *ASIC Act* by accepting payment of the portion of the advice fees deducted from the superannuation accounts of 27 members that represented its licensee fee after the notification of those members' deaths, in circumstances where, at the time of acceptance, there were reasonable grounds for believing that AMP Financial Planning Authorised Representatives would not be able to supply the financial services within a reasonable time or at all. Those reasonable grounds were:

- (a) the death of each member;
- (b) the notification that each member had died;
- (c) the discharge of the agreement between each member and the relevant AMP Financial Planning Authorised Representative on death; and
- (d) as a consequence of (c), that member's obligation to pay advice fees ceasing.

104 During the Relevant Period, while AMP Financial Planning carried on a financial services business pursuant to which it engaged Authorised Representatives to provide (among other things) financial product advice for classes of financial products that included life products and superannuation, AMP Financial Planning failed to do all things necessary to ensure the financial services covered by its AFSL were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act* in that:

- (a) during that period, AMP Financial Planning failed to return advice fees deducted by AMP Life from the superannuation accounts of 27 members after the date of the member's death and received by it and/or its Authorised Representatives, to be refunded to members for the benefit of their beneficiaries; and
- (b) AMP Financial Planning did not have systems, policies and processes in place which operated in the Relevant Period to prevent, or detect the conduct in (a).

105 In respect of each contravention of s 12DI(3) and s 12CB(1) of the *ASIC Act*, AMP Financial Planning breached its general obligation to comply with financial services laws in contravention of s 912A(1)(c) of the *Corporations Act*.

The cause of the wrongful deductions

106 The contravening conduct identified above essentially fell into two categories:

- (1) Continuing to deduct premiums and advice fees following notification of a member's death.
- (2) Failing to refund premiums and advice fees deducted between the date of a member's death and the date of notification of the member's death.

107 The witnesses called by the Defendants were able to provide limited evidence of the causes of the wrongful deductions. Many of the persons with executive responsibility and direct knowledge of the circumstances surrounding the contravening conduct were no longer employed by the AMP Group, including the individual who was the former Group Executive responsible for Wealth Solutions and Chief Customer Officer.

108 As explained below, based on the evidence before the Court, there were a number of factors which caused the contravening conduct. The product administration systems were not operating in a manner which gave effect to the terms of the policies upon the death of a member. Part of the issue was the lack of interface between the product administration system and the systems on which member death notifications were recorded. Another contributing factor was the decentralised manner in which complaints were handled within the AMP Group which resulted in a system that was incapable of identifying systemic and enterprise wide issues and, as a result, the problems with the product administration systems went undetected.

109 The evidence establishes that the deductions of premiums after the date of notification of death stemmed from a systems design issue in the U2 system for corporate plans which did not facilitate the cessation of deductions for premiums in respect of a particular member whilst keeping the group policy on foot.

110 Mr McPherson was appointed to the role of head of MasterTrust Operations in around July 2021, at which time he became responsible for operational aspects of products that included some of the superannuation products the subject of these proceedings (including Flexible Lifetime Super, Custom Super, Signature Super, Super Leader and AMP Flexible Super). MasterTrust Operations is responsible for the design and enhancement of systems and processes to support those products. Those systems include the product administration system U2.

111 Mr McPherson's evidence was that, before mid to late 2018, no review had been initiated in relation to improving any system or process relating to deduction and refund of premiums or advice fees and that, prior to that time, his team was not responsible for those processes.

112 From around late 2018 to mid-2020, Mr McPherson was the Operations representative on the deceased customer project covering MasterTrust Operations (including the superannuation products the subject of these proceedings). It was through Mr McPherson's involvement in that project (including his involvement as a member of the project's steering committee) that he gained knowledge of the issues that had been identified in the systems and processes that had been in place to manage the superannuation products and the way in which those processes and systems required rectification.

113 Mr McPherson's evidence was that the U2 system needed significant operational development and upgrade in order for automated steps to be included in its operation. Initially, from around September 2018, the steps to improve the processes for products on the U2 system were manual in nature. The automated system changes were ultimately implemented in the U2 system in around March 2020. These automated system changes included:

- (1) automation of the cessation of premium and advice fee payments from a deceased member's account by installing a "flag" which was updated with the date of notification that a member had died once notification had been received; and
- (2) once the flag was updated on a member's account:
 - (a) any insurance premium and advice fee deductions halted; and

- (b) any insurance premiums and advice fees that had been deducted in the period between death and notification of death were refunded to the deceased member's account prior to the calculation of any amounts payable from the member's account to their representative or beneficiary, including the death benefit.

114 From 1 May 2019, AMP implemented controls to ensure the effective operation of its *Deceased Customers Policy* across the AMP Group. In June 2019, a weekly monitoring process was implemented to identify any instances of the continuing deduction of premiums or advice fees from the accounts of members whose death had been notified in the previous week. Since the controls were implemented, few instances where deductions have continued have been detected. Examples of instances where they have occurred involved instances where the automated system was overridden because the account had at one time been exposed to fraud.

115 Mr McPherson's evidence was that process changes relating to advice fees took longer to resolve because those changes affected the Authorised Representative advisers as well as the AMP Group entities. Some advisers considered that they were still providing a level of service to deceased member accounts by supporting deceased member beneficiaries in respect of matters such as submitting death claims and changing investments after date of death. The Court observes that it appears to be agreed that the contract between the deceased member and the Authorised Representative came to an end upon the member's death and did not provide for the charging of fees for such services. However the Court also observes that the admitted unconscionable conduct relates only to those files in respect of which no provision of service after notification of death could be identified.

116 Based on the evidence of Mr McPherson, it is unclear which team within AMP was responsible for the process for deduction and refund of premiums and advice fees in relation to deceased members prior to mid-2018. The evidence filed by the Defendants does not provide any details about the how the errors relating to the process for deduction and refund for premiums and advice fees in relation to deceased member accounts occurred and who was responsible for it. Nor does the evidence explain why, prior to 2019, there was no process for monitoring the operation of the system with a view to ensuring that the system was operating correctly in relation to deceased member accounts.

117 Evidence relating to the Compass system was given by Ms Dharmapala. During the Relevant Period Ms Dharmapala was the manager of the team administering claims relating to the legacy

AXA products at AMP Life. These products were administered on the Compass product administration system. Ms Dharmapala had experience with the Compass system and the processing of death claims on that system from around June 2009.

118 Ms Dharmapala described the steps that a claims administrator was required to take on receipt of a death claim between 2011 and September 2018 in the following terms:

- (1) A death claim was notified to a claims administrator via the WMS. The claim was entered into the WMS by anyone who received the notification, whether they were part of the claims administration team or otherwise, and would typically have originated from either a call to the call centre, receipt of hard-copy mail, or an “Enquiry for Claim” (a work type logged directly onto the WMS to notify the claims administration team that an intention to claim had been received).
- (2) The claims administrator used the policy number contained within that information to cross-check the information about the policy-holder held on Compass. This included checking the member’s name, date of birth, employer, nature of the cover, and whether there was a superannuation component attached to the life insurance policy.
- (3) The claims administrator flagged on Compass that a death claim had been notified. This was done by the claims administrator manually changing the client’s status in Compass from “active” to “received death claim”. The changing of the client’s status in the Compass system had the effect of immediately freezing the billing of any charges, including premiums and any fees, to the member.
- (4) Once the client’s status had been changed, the claims administrator then manually arranged to send out the claim requirements, which was a letter setting out the documentation required to support the claim in order for it to be assessed and a determination to be made by the trustee regarding the beneficiary or beneficiaries to receive distribution of the benefit.
- (5) The claims administration team then waited for the response from the member’s beneficiary or representative enclosing the documentation to support the claim, such as a death certificate. Once this information was received from the member’s beneficiary or representative, the claims administration team confirmed all the necessary information had been received and, if so, completed a portfolio switch via Compass. This process of completing a portfolio switch was manual and required the claims

administration team to secure, at that point in time, funds from the member's investment account and switch it to a low-risk account.

- (6) After the claim had been assessed by the case management team and the trustees had made a determination, the claims administration team received an application for the payment of the policy. The claims administration team then manually determined one aspect of the payment to be made to the client, being the "anti-detriment amount", which was entered into Compass. The anti-detriment amount was an additional lump sum amount paid to the beneficiary or beneficiaries of the deceased member refunding 15% of contributions tax paid by the member during their life. Other amounts for payment were either determined by others (including the case management team) or were generated automatically by the system. Compass then calculated the final payment amounts, which involved complex processes including unit pricing calculations. Once payment details were entered and processed, the case in the WMS for that claim was closed.

119 Although Ms Dharmapala had understood that the Compass system, as part of the process of calculating the final payment amount, refunded amounts of any premiums and fees deducted after the member's date of death, she became aware in September 2018 that Compass did not automatically calculate such refunds. The claims administration team was then given responsibility for manually refunding premium amounts deducted after the date of death as part of the process of finalising a death benefit. Ms Dharmapala did not refer to a process for manually refunding advice fees.

120 Ms Dharmapala did not have direct experience with the U2 system prior to July 2019. Her understanding of the way that system operated was derived from discussions with others and her learnings from July 2019. Her understanding was that, up to September 2018, the U2 system did not operate to freeze deductions from a member's account once that member was manually flagged in the system as deceased.

121 As part of the roles held by Ms Dharmapala at AMP Life, she regularly interacted with representatives of beneficiaries who were submitting death claims and, from time to time, she and members of her team received complaints about aspects of the claims process. Ms Dharmapala and her team tried to resolve complaints within five days. However, if the complaint involved an issue which meant it could not be readily resolved within that time frame, the complaint was referred to the AMP Life complaints team. Ms Dharmapala logged

complaints she received into the Salesforce (a customer relationship management system) or WMS systems. When Ms Dharmapala authorised a payment made to resolve a complaint, the fact that the payment had been made was also logged into the respective system. Ms Dharmapala did not recall ever receiving a complaint from a member's representative or beneficiary about a failure to refund premiums or advice fees deducted after a member's death to that member's account, or the final amount of a death benefit.

122 Ms Dharmapala's evidence was that, when payment of a death claim was made, a letter was issued by the claims administration team to the beneficiary or deceased member's representative setting out the amount of the payment, the accumulation amount in the deceased member's superannuation account, any life insurance benefit, any anti-detriment amount, tax and the net benefit payable. The letter did not separately disclose any refunded premium payment amounts. It could not be discerned from the face of the letter whether premiums deducted after the date of death had or had not been refunded.

123 It is apparent from Ms Dharmapala's evidence that those administering death claims had assumed the system was operating to refund premiums deducted after death and that no deductions were being made from member accounts after a member's death was recorded in the system. In fact, absent a complaint being made, the system did not disclose the necessary details to the claims administrators to enable them to see whether amounts had been deducted after the date of death and whether refunds of those amounts had been made. There is no evidence of any periodic testing or auditing of the systems in relation to the refunds of amounts on account of premiums or advice fees following the death of a member.

124 It is also apparent from Ms Dharmapala's evidence that, although notification of a member's death was logged in the workflow system, the notification of death was not thereupon automatically recorded in the product administration system (either Compass or U2), which was the system recording and processing deductions from member accounts. Although claims administrators accessed both the workflow management systems and the product administration systems, those systems did not interface with each other. A claims administrator entered a death notification into the product administration system at the start of processing a death claim which was after the AMP Group received and recorded the notification of the death in the workflow system.

125 Furthermore, before late 2018, AMP's complaints monitoring system and processes did not identify that there was a systemic issue that resulted in the failure to properly refund to a

member's account premiums or advice fees deducted after a member's death before death claims were ultimately paid.

126 Ms Taylor expressed the opinion that the primary reasons why the complaints monitoring system did not detect this systemic issue were as follows:

- (1) 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, consisting of approximately 18 separate complaints management teams with different business units within AMP using different and distinct systems and processes to record and manage complaints.
- (2) There was no quality assurance of closed complaints to ensure that complaints were managed and resolved effectively and that any systemic issues were flagged for further consideration.

127 Ms Taylor accepted in cross-examination that there was no evidence of internally identified systemic issues appearing in any management or board reporting and that the AMP Group did not during the Relevant Period have a centralised complaints function. Ms Taylor's role as Head of External Dispute Resolution was to effectively centralise external dispute resolution. Part of that centralisation involved putting in place a centralised complaints system using Salesforce. Ms Taylor's evidence was that, prior to late 2019, there was no process or mechanism by which a person handling a complaint could flag that a particular complaint may have been the result of a systemic issue.

128 I accept Ms Taylor's evidence.

129 As set out above, the staff involved in handling complaints and in requesting the improvement to the system in 2016 were relatively junior. The respective boards of each of the Defendants were first notified of the conduct the subject of these proceedings in the second half of 2018. The manner in which complaints were handled seems to the Court to reflect an organisational assumption that complaints would be the result of *ad hoc* issues and mistakes rather than a result of a systemic issue. That assumption was wrong.

DECLARATORY RELIEF

130 The Court has a discretion to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth). In relation to the making of declarations concerning contraventions, the Full Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 (*ABCC v CFMEU*) said, at 87 [90]–[93] (Dowsett, Greenwood and Wigney JJ):

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: *Commonwealth v Director, FWBII* at [59]; *Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2)* (2011) 279 ALR 609 at [7] (overturned by the Full Court in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 on a separate issue). 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: *Re Chemeq Ltd* (2006) 234 ALR 511 (*Chemeq*) at [100]; *Commonwealth v Director, FWBII* at [31], [48], [58].

91 The facts necessary to support the declaration may be established by agreed facts (under s 191 of the *Evidence Act 1995* (Cth)) and admissions: *Minister for Environment, Heritage and the Arts v PGP Developments Pty Ltd* (2010) 183 FCR 10.

92 The Court has a wide discretionary power to make declarations under s 21 of the *Federal Court of Australia Act: Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 (*Forster*) at 437-438 (per Gibbs J, citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448); *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 99 (per Sheppard J). Before making a declaration, the Court should be satisfied that the question is real, not hypothetical or theoretical, that the applicant has a real interest in raising the issue, and that there is a proper contradictor: *Forster* at 437-438.

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: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2007] ATPR 42-140 at [6], and the cases there cited; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [95].

131 The parties propose that declarations be made to the following effect:

- (1) During the Relevant Period, each of AMP Superannuation and NM Superannuation contravened s 912A(1)(a) of the *Corporations Act* because the frameworks pursuant to which each had sought to monitor and supervise AMP Life's performance of the

administrative services AMP Life had been engaged by each to provide did not operate to detect or prevent the conduct set out at [95]–[96] above.

- (2) During the Relevant Period, by engaging in the conduct set out at [98] above, AMP Life engaged in conduct that was unconscionable in contravention of s 12CB(1) of the *ASIC Act*.
- (3) During the Relevant Period by engaging in the conduct set out at [99] above, AMP Life contravened s 12DI(3) of the *ASIC Act*.
- (4) During the Relevant Period, by engaging in the conduct set out at [100] above, AMP Life contravened s 912A(1)(a) of the *Corporations Act*.
- (5) In respect of each contravention of s 12DI(3) and s 12CB(1) of the *ASIC Act*, AMP Life contravened s 912A(1)(c) of the *Corporations Act*.
- (6) During the Relevant Period, by engaging in the conduct set out at [102], AMP Financial Planning engaged in conduct that was unconscionable in contravention of s 12CB(1) of the *ASIC Act*.
- (7) During the Relevant Period, by engaging in the conduct set out at [103], AMP Financial Planning contravened s 12DI(3) of the *ASIC Act*.
- (8) During the Relevant Period, by engaging in the conduct set out at [104], AMP Financial Planning contravened of s 912A(1)(a) of the *Corporations Act*.
- (9) In respect of each contravention of s 12DI(3) and s 12CB(1) of the *ASIC Act*, AMP Financial Planning contravened s 912A(1)(c) of the *Corporations Act*.

132 The Court is satisfied that the agreed facts and admissions provide a proper factual basis for the declarations sought because those agreed facts establish the contraventions the subject of the declarations. The Court is satisfied that the issue concerning the contraventions is real and not hypothetical, ASIC has real interest in raising the question and there is a proper contradictor. The declarations are of utility because they will serve to record the Court's disapproval of the contravening conduct and will assist in deterring other persons from engaging in similar contravening conduct. The Court therefore considers it appropriate to make the declarations substantially in the terms proposed by the parties.

CIVIL PENALTIES

Position of the parties

133 The penalties proposed by each of ASIC, AMP Life and AMP Financial Planning for the contraventions of ss 12CB(1) and 12DI(3) of the *ASIC Act* are as follows:

| Defendant | ASIC's proposed penalty | Defendants' proposed penalty |
|------------------------|-------------------------|------------------------------|
| AMP Life | \$20 million | \$15 million |
| AMP Financial Planning | \$10 million | \$3 million |
| Total | \$30 million | \$18 million |

Applicable principles

134 The principles applicable to the discretion to impose pecuniary penalties have been discussed in numerous cases. The principles were summarised by Moshinsky J in *Australian Competition and Consumer Commission v Trivago N.V. (No 2)* [2022] FCA 417 at [60]–[72] and in *Australian Securities and Investments Commission v AMP Financial Planning* [2022] FCA 1115 at [103]–[114].

135 For present purposes, the following observations are made:

- (1) Unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of securing deterrence. Civil penalties are not concerned with retribution, denunciation or rehabilitation: *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 at [15]–[16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
- (2) A civil penalty “must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business”: *Pattinson* at [17] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
- (3) The prescribed maximum penalty is but one yardstick. In cases involving a very large number of contraventions, calculating a maximum aggregate penalty by reference to such a number may be unhelpful because it raises an aggregate maximum penalty to a number well beyond what this Court would ever impose: *AMP Financial Planning* at [108]; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at 546 [18] and 558 [82] (Allsop CJ); *ABCC v CFMEU* at 98 [143] (Dowsett, Greenwood and Wigney JJ).
- (4) A list of several factors which inform the assessment of a penalty of appropriate deterrent value in the context of the *Trade Practices Act 1974* (Cth) is found in *Trade*

Practices Commission v CSR Ltd [1990] FCA 762; [1991] ATPR ¶41-076. French J, as his Honour then was, stated (at 52,152-53):

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.

His Honour’s statements were affirmed by the plurality in *Pattinson*, who observed (at [18]–[19]) that the factors include matters pertaining both to the character of the contravening conduct and to the character of the contravener. The plurality also cautioned against treating the list of possible relevant considerations as a “rigid catalogue of matters for attention” or a legal checklist, noting that the Court’s task remains to determine what is an “appropriate” penalty in the circumstances of the particular case (at [19]).

- (5) In cases involving a large number of contraventions, it may be helpful to evaluate a potential penalty by identifying one or more courses of conduct. In a civil penalty context, the course of conduct principle recognises that the deterrent effect of a civil penalty (at both a specific and general level) may be measured by reference to the nature of the conduct for which it is imposed. It is therefore important to identify whether multiple contraventions constitute a single course of conduct or separate instances of conduct: *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; (2017) 258 FCR 312 at 447–9 [421]–[428] (Middleton, Beach

and Moshinsky JJ). However, the course of conduct principle does not operate as a *de facto* limit on the penalty to be imposed. As Beach J stated in *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (No 2)* [2016] FCA 698 at [25] (and cited with approval in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 at 60 [141] (Jagot, Yates and Bromwich JJ)):

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.

- (6) 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. Where the Court considers 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] FCA 450; (1997) 145 ALR 36 at 53 (Goldberg J); *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* [2014] FCA 336; (2014) 234 FCR 343 at 358 [101]–[102] (Middleton J).

Application of principles

Maximum penalties

136 The following maximum penalties applied during the Relevant Period:

| Period | Penalty Unit Value | Maximum |
|---------------------------------|--------------------|---------------------|
| 26 May 2015 to 30 July 2015 | \$170 | \$1,700,000 |
| 31 July 2015 to 30 June 2017 | \$180 | \$1,800,000 |
| 1 July 2017 to 12 March 2019 | \$210 | \$2,100,000 |
| 13 March 2019 to 31 August 2019 | \$210 | Up to \$525,000,000 |

137 Premiums and advice fees were deducted on a monthly basis and a contravention occurred each time premiums and advice fees were deducted. There was a contravention of s 12DI(3) every time premiums or advice fees were deducted from a deceased member’s account after notification of the member’s death and a contravention of s 12CB(1) every time a death benefit

was paid without a refund of premiums and advice fees that had been deducted after the date of the member's death. The aggregate maximum penalties produced by multiplying the number of contraventions by the maximum penalty per contravention is well beyond a number that is appropriate.

138 The Defendants submitted that the course of conduct principle may be of assistance. AMP Life identified five courses of conduct, identified by reference to the product administration systems involved. On behalf of AMP Life, it was submitted that the deduction of and failure to refund premiums were referable to the U2 (Retail), U2 (Corporate) and Compass systems, and that the deduction of and failure to refund advice fees were referable to the U2 (Retail) and U2 (Corporate) systems. The contravening conduct was submitted to have arisen out of deficiencies and use of each of those systems.

139 The contraventions of AMP Financial Planning were submitted to have arisen out of a single course of conduct, namely its failure to have in place adequate systems and processes to ensure that it ceased to deduct advice fees after notification of a member's death and that it returned any advice fees deducted between the date of a member's death and the date of notification of that death.

140 It was submitted that applying the course of conduct principle in this way results in a potential maximum penalty for AMP Life of \$10.5 million and for AMP Financial Planning of \$2.1 million.

141 I do not consider the course of conduct principle to be of much assistance in the present case. On the Defendants' own submissions, if applied as submitted on behalf of AMP Life and AMP Financial Planning, it produces a maximum materially below what the Defendants themselves submit is appropriate. The courses of conduct identified have been based on the product administration system involved, and do not take account of the inadequate complaints handling system which resulted in the failures in the product administration system going undetected. Even if I were to accept the descriptions of the courses of conduct, the contravening conduct of AMP Life affected a large number of members and involved a substantial sum of money. Although the Court observes the admitted contravening conduct of AMP Financial Planning related to 27 identified members, the Court is also aware that those 27 members were identified by an examination of a sample. In my view there are material limitations in assessing the deterrence value of a penalty by reference to the number of

contraventions identified as a result of the examination of a sample in isolation from an examination of the nature and circumstances of the contravening conduct.

142 I agree with the observation of Moshinsky J in *AMP Financial Planning* at [122] that, 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 one or more “courses of conduct”.

The nature and extent of the contravening conduct

143 The contravening conduct involved the deduction of, and failure to refund, premiums and fees for which there was no entitlement to charge. There were a large number of members affected, the amounts deducted were significant and the conduct occurred over a long period of time (over four years). As the admitted contraventions demonstrate, the failure to refund premiums and fees that had been deducted after a member’s death where no service could be seen to have been provided prior to paying a death benefit, was unconscionable. The deceased members affected were vulnerable, obviously unable to monitor their accounts and were entirely reliant on the representatives of their estates. The beneficiaries of those estates involved individuals who may be expected to have been emotionally vulnerable and unlikely to be familiar with the terms of a policy not issued to them or on their behalf. The letters issued to them advising them of their death benefits did not disclose the details that would enable them to readily identify amounts deducted after the date of the member’s death. As the Defendants acknowledge, the contravening conduct is very serious wrongful behaviour.

144 The contravening conduct arose from a failure to have systems in place to both prevent the conduct from occurring and to detect and rectify it. The failures extended beyond the defects in the product administration systems (which ought to have operated to cease deductions upon notification of death and to refund amounts deducted from the date of death) but related also to the failure to have in place a process for identifying and addressing complaints that arose from a systemic issue. Members and their representatives were entitled to rely on AMP Life and AMP Financial Planning to deduct only those fees to which those entities were entitled and to administer the member accounts according to the terms governing those accounts.

Loss or damage

145 The contravening conduct caused loss and damage by way of amounts wrongfully deducted and retained, and the loss of earnings on those amounts from the time of deduction. The

Affected Members as well as other members affected by the deduction of advice fees and life insurance premiums after the date of death have been remediated. The Court accepts that the AMP Group has made a significant effort to remediate the loss or damage.

Circumstances of the contravening conduct

146 The Defendants admit that they ought to have known that the contravening conduct was occurring.

147 The evidence was that some employees within the AMP Group were aware that amounts were being deducted after the date of notification of death. However, it does not appear that, prior to the investigation following the issue being raised at the Royal Commission, any employee knew that death benefits paid were not being calculated in a manner that reversed deductions made after the date of death. It had been understood by the Corporate Super Operations team that the system had not been programmed to cease deductions from the date of notification of death, but it was believed by those using the system that the amounts deducted from the date of death would be reversed at the time a death claim was paid. The correspondence and records concerning the process improvement request do not disclose knowledge of, or an intention to not refund, the amounts deducted.

148 Unlike the circumstances in *AMP Financial Planning*, the contravening conduct in this case was not the product of a coding error in the sense of the system not being programmed as expected. In the present case, it was known by at least some employees that the system had not been programmed to cease deductions upon notification of death (and therefore the system had not been programmed to contemporaneously give effect to the product terms) and the assumption that the system would operate to correct the position at the time of paying the death claim proved false. Moreover, the decentralised complaints handling process meant that, notwithstanding complaints were received, the systemic cause for the complaints was not investigated prior to the Royal Commission. Sufficient records of complaints existed and, had they been properly investigated, would have disclosed the nature and extent of the contravening conduct.

149 The Court does not infer, as ASIC had submitted, that the failure to address the deficiencies in the systems arose because the Defendants “did not want to do anything about it, or did not care to do anything about it, in light of the benefits that accrued to them”. In the case of *AMP Financial Planning*, members suffered more than *AMP Financial Planning* directly benefited (because *AMP Financial Planning* only retained a relatively small portion of the

advice fees deducted with the vast proportion paid over to its Authorised Representatives). In the case of AMP Life, and as explained further below, the Court infers that the failure to address the issues giving rise to the contravening conduct resulted from organisational assumptions, oversight failures and organisational paralysis rather than a conscious decision to exploit the dead.

150 However, the conduct remains serious and concerning. The admissions here extend to an admission of engaging in unconscionable conduct. Such conduct is by its nature very serious. The term “unconscionable conduct” signifies the gravity of the conduct. As Gageler J said in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; (2019) 267 CLR 1, in pronouncing conduct as unconscionable, that conduct is denounced as offensive to conscience (at 40 [92]) and outside societal norms of acceptable commercial behaviour (at 43 [104]).

151 The problems with the product administration systems giving rise to the contravening conduct should have been able to be identified, investigated and addressed much earlier than September 2018. There appears to have been an absence of knowledge (as opposed to an assumption) of how the systems were in fact calculating death benefits. It is somewhat astonishing that there was no documentary record of how the systems were programmed to calculate death benefits on life policies issued by a life insurer.

The Defendants’ size and financial position

152 The Defendants’ size and financial position is set out above at [90]–[93]. At the time of the contravening conduct, the Defendants were large companies with large revenues and part of a very large group.

153 Although AMP Financial Planning sought to emphasise that it had operated at a loss in every year of the Relevant Period, the Court observes that its financial position may be expected to have been impacted by intra-group charges, including charges that might be expected to have been paid to AMP Life.

Benefits from contravention

154 As noted above, the benefit obtained by AMP Financial Planning was relatively small because the overwhelming proportion of the wrongfully deducted advice fees was paid over to its Authorised Representatives. For AMP Life, the premiums deducted were in the hundreds of thousands of dollars. However, the benefit to AMP Life was not limited to the premium fees

it derived. It might also be seen in the deferral or avoidance of the expenditure that it would have had to incur to remedy and integrate its information technology systems. In this respect, the Court observes that the material before it discloses that the cost of correcting the product administration system was in excess of \$4 million.

155 It was submitted on behalf of the Defendants that the percentage of member accounts affected was small having regard to the total number of member accounts. The force of that submission is diminished once it is recognised that the accounts affected were those of deceased members. It is inferred that the proportion of accounts affected is largely a reflection of the number of members who died during the Relevant Period.

Cooperation, contrition and corporate culture

156 The AMP Group has remediated the loss or damage suffered as a result of the contraventions. Although initially denying the contraventions, the Defendants cooperated with ASIC by admitting the contraventions and joining in the preparation of the agreed statement of facts which avoided the need for a trial on liability. They have apologised for their contravening conduct. They have also taken steps to improve their complaints handling processes.

157 It was submitted on behalf of the Defendants that the evidence does not establish that any senior employees or officers of AMP Life or AMP Financial Planning were involved in the contravening conduct. The staff handling the claims for death benefits using the U2 and Compass systems to administer accounts were relatively junior, as were the employees handling the complaints (at least up until mid-2018).

158 However that is emblematic of the issue. The lack of oversight and executive management awareness of the issue was part of the problem. The culture of the AMP Group assumed no systemic issues. It resulted in a failure to have a process in place that was capable of identifying, investigating and remediating systemic issues for many years. The failure reflects poorly on the Defendants.

159 The process for requesting and progressing process improvements was itself cumbersome. In this instance, it resulted in problems not being escalated or followed through. The fact that the evidence did not disclose who was responsible or accountable for process improvements is itself concerning.

160 There was no explanation for why it was considered appropriate for the U2 system to be programmed to continue to deduct premiums after notification of death (albeit in the

expectation that those fees and premiums would be deducted upon payment of the final death benefit) or why it took so long to identify that death benefits were not being correctly calculated. Death of a member of a superannuation fund was not an event that was incapable of being anticipated. The lack of explanations does not reflect well on the Defendants.

161 I accept that, by admitting it acted unconscionably, each of AMP Life and AMP Financial Planning acknowledges the seriousness of its conduct. I also accept that the Defendants' reports to ASIC, remediation and rectification steps indicate an improvement in corporate culture.

162 Although the proceedings concerned premiums for life insurance and advice fees, it may be expected that there were deductions for other fees (for example, the complaints schedule indicates deductions for total and permanent disability insurance) and in respect of other products. The potential for further contraventions remains.

Prior similar conduct

163 The existence of prior contraventions is a matter that must be considered. In *AMP Financial Planning*, the Defendants were found to have engaged in conduct contravening s 12DI(3) of the *ASIC Act* in circumstances involving fees for no service by the systemic deduction of fees from superannuation accounts and the U2 product administration system. In *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd* [2020] FCA 69 at [153] (Lee J), AMP Financial Planning was found to have failed to comply with financial services laws and to do all things necessary to ensure financial services are provided efficiently, honestly and fairly.

164 It may be accepted that the contravening conduct in *AMP Financial Planning* occurred over a period that by and large overlaps with the Relevant Period. It is thus not the case that AMP Life and AMP Financial Planning were penalised for conduct and then later continued with that contravening conduct. However, the fact that AMP Life and AMP Financial Planning have been penalised for similar conduct does show the extent of the Defendants' cultural and organisational problems.

CONCLUSION ON PECUNIARY PENALTIES

165 The deficiencies in compliance and governance frameworks relating to the handling of complaints were only part of the cause of the contravening conduct. The contravening conduct arose because amounts were deducted from customer accounts contrary to the terms of the

contracts agreed with the customers. Ultimately, the cause of the contravening conduct was the lack of a centralised complaints handling system coupled with a failure to ensure that information technology systems were programmed to be capable of giving effect to the terms of the products that had been issued. AMP Life’s information technology systems were a disconnected conglomeration of legacy systems involving product administration systems, workflow systems and complaints systems. The systems did not speak to each other and users of one system could not readily access relevant information stored in other systems. There was no evidence of the maintenance of records of how the systems were programmed to calculate death benefits. The systems were heavily reliant upon manual adjustments and lacked centralised oversight. The process for “enhancing” the system was cumbersome. Each “enhancement” required submissions relating to costs and benefits to justify the request — even when the “enhancement” requested was to give effect to the terms of the policy issued. The complaints handling system was premised on an unacknowledged and unwarranted assumption that there would be no systemic issues. Combined, this was a recipe for potential undetected incorrect charging.

166 The contravening conduct involved here is very serious. Both AMP Life and AMP Financial Planning admit to contravening ss 12DI(3) and 12CB(1), which includes engaging in unconscionable conduct. There were a large number of Affected Members over a significant period of time. Despite receiving complaints, the systemic nature of the issues relating to the failure to refund remained undetected. Affected Members were charged amounts unlawfully. Whilst not deliberate, it was extremely serious.

167 Although AMP Financial Planning’s admitted contraventions related to advice fees charged to the accounts of 27 members, as explained above, those 27 members were identified as a result of the investigation of a sample. The penalty imposed is not directed at retribution or punishment for the contraventions that affected those 27 members but is directed at deterring the conduct which gave rise to those contraventions. The contraventions were serious. Furthermore, although limited to 27 members, the amounts deducted from those member accounts were materially higher on a per member basis than the amounts deducted on account of premiums. There is a need for specific and general deterrence in respect of conduct admitted to be unconscionable.

168 The importance of general deterrence must also be recognised. It is incumbent upon sophisticated financial institutions offering financial products and services to devote the

resources necessary to ensure that, as far as reasonably possible, their information technology infrastructure delivers on the terms of the products they offer. The Court does not want to foster a situation in which it is more expedient for a company offering financial services and products to recompense customers and pay a pecuniary penalty for defaulting on the terms of those products and services rather than devoting the time, resources and funds necessary to ensure that their information technology systems are fit for delivering in accordance with the terms of those products and services in the first place.

169 I have had regard to the penalties imposed in other cases but acknowledge that comparisons are of little utility given the diversity of commercial conduct which can result in contraventions and the opacity that inheres in the process of instinctive synthesis. I have been mindful of the penalty imposed on AMP Financial Planning in *AMP Financial Planning* and note that that case did not involve unconscionable conduct.

170 For these reasons, I consider it appropriate to impose the following pecuniary penalties:

- (1) AMP Life pay a pecuniary penalty in the amount of \$18 million in respect of its contraventions of ss 12CB(1) and 12DI(3) of the *ASIC Act*; and
- (2) AMP Financial Planning pay a pecuniary penalty in the amount of \$6 million in respect of its contraventions of ss 12CB(1) and 12DI(3) of the *ASIC Act*.

I certify that the preceding one hundred and seventy (170) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Hesse.

Associate:



Dated: 19 May 2023

SCHEDULE OF PARTIES

VID 280 of 2021

Defendants

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

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