Equity Division
Supreme Court
New South Wales

Case Name:	**In the matter of Fiducian Investment Management Services Pty Ltd**
Medium Neutral Citation:	[2026] NSWSC 959
Hearing Date(s):	6 August 2026
Date of Orders:	11 August 2026
Date of Decision:	11 August 2026
Jurisdiction:	Equity - Corporations List
Before:	Nixon J
Decision:	Declarations made, pecuniary penalties totalling $7.3m imposed
Catchwords:	CORPORATIONS – Australian Securities and Investments Commission – civil penalty proceeding – where the Defendant operated a managed investment fund that was promoted as focussed on environmental, social and governance (ESG) objectives – where the underlying investments of the fund included investments in companies with substantial revenue from fossil fuels – where senior management were aware of issues being raised regarding misalignment between the investment objectives and the underlying investments – the Defendant admitted making misleading statements about the fund and failing to exercise care and diligence in relation to the fund – the parties prepared a statement of agreed facts and jointly proposed declarations of contravention and a pecuniary penalty – whether declaratory relief should be granted – whether proposed pecuniary penalty is an appropriate penalty
Legislation Cited:	*Australian Securities and Investments Commission Act* ss 12BAB, 12DF, 12GBA(3), 12GBA(6)(b), 12GBB(3), 12GBCA(2), *Corporations Act 2001* (Cth) ss 1317E, 1317G, 601FC(1)(b)

Crimes Act 1914 (Cth) s 4AA
Australian Consumer Law s 34

Cases Cited:

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2017) 254 FCR 68; [2017] FCAFC 113
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2018) 262 CLR 157; [2018] HCA 3
Australian Building and Construction Commissioner v Pattinson (2022) 274 CLR 450; [2022] HCA 13
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited [2015] FCA 330
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 634
Australian Competition and Consumer Commission v Employsure Pty Ltd [2023] FCAFC 5
Australian Competition and Consumer Commission v Google LLC (No 2) [2021] FCA 367
Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181
Australian Competition and Consumer Commission v Telstra Corporation Ltd (2010) 188 FCR 238
Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640; [2013] HCA 54
Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2) [2012] FCA 629
Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 790
Australian Securities and Investments Commission v LGSS Pty Ltd [2024] FCA 587
Australian Securities and Investments Commission v LGSS Pty Ltd (No 3) [2025] FCA 205
Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited [2024] FCA 850
Australian Securities and Investments Commission v MLC Limited (2023) 168 ACSR 122; [2023] FCA 539
Australian Securities and Investments Commission v Youi Pty Ltd [2020] FCA 1701
Australian Securities and Investments Commission v Vanguard Investments Australia Ltd (No 2) [2024] FCA 1086
Australian Securities and Investments Commission v Westpac Banking Corp (No 2) (2018) 266 FCR 147; [2018] FCA 751

	Australian Securities and Investments Commission v Wooldridge [2019] FCAFC 172 *Carbone v Fowler Homes Pty Ltd* [2024] NSWCA 192 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46 *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* 260 FCR 68; [2018] FCAFC 53 *Hili v R; Jones v R* (2010) 242 CLR 520; [2010] HCA 45 *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29 *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569; [2012] VCA 91 *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary* (2018) 96 NSWLR 762; [2018] NSWCA 39 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 *Trade Practices Commission v CSR Limited* [1991] ATPR ¶41-076; [1990] FCA 521
Category:	Principal judgment
Parties:	Australian Securities and Investments Commission (Plaintiff) Fiducian Investment Management Services Limited (Defendant)
Representation:	Counsel: I Ahmed SC and S Speirs (Plaintiff) D Thomas SC and M Ellicott (Defendant) Solicitors: Corrs Chambers Westgarth (Plaintiff) Herbert Smith Freehills Kramer (Defendant)
File Number(s):	2025/379274
Publication Restriction:	Nil

JUDGMENT

1 By Originating Process filed 2 October 2025, the Australian Securities and Investments Commission (**ASIC**) seeks declarations that the Defendant, Fiducian Investment Management Services Limited (**FIMS**), contravened s 12DF of the *Australian Securities and Investments Commission Act* (***ASIC Act***) and s 601FC(1)(b) of the *Corporations Act 2001* (Cth), by making false or misleading statements in relation to the Diversified Social Aspirations Fund (**DSA Fund**) and by failing to discharge its duty to act with care and diligence in relation to the DSA Fund.

2 FIMS admits that it contravened each of s 12DF of the *ASIC Act* and s 601FC(1)(b) of the *Corporations Act*.

3 On 15 July 2026, a joint Statement of Agreed Facts and Admissions (**SAFA**) was filed with the Court. Each of the facts in the SAFA is an "agreed fact" for the purposes of this proceeding, within the meaning of s 191 of the *Evidence Act 1995* (NSW), upon which the Court may rely to pronounce judgment and make orders.

4 The parties have agreed on a proposed form of orders, including declarations of contravention, pecuniary penalties in a total amount of $7.3m, and an order for costs. The parties filed joint written submissions in support of the orders sought.

5 The **Relevant Period** in which the conduct occurred is defined in the SAFA as the period between 24 September 2014 and 31 May 2024. However, the **Contravening Period** – that is, the period in respect of which the conduct occurred that is the subject of the proposed declarations and orders – was (by reason of limitation issues) from 3 October 2019 to 31 May 2024.

6 I set out below a summary of the relevant factual background, which is based on the SAFA and the parties' joint submissions, and then address each of the contraventions admitted by FIMS, before considering the parties' joint

submissions on the proposed orders and, in particular, the proposed pecuniary penalties.

Factual Background to Contraventions

7 All of the matters set out in this section of the reasons for Judgment applied throughout the Relevant Period, unless otherwise stated.

FIMS and Fiducian Group

8 FIMS is a provider of funds management and investment services, including in respect of a suite of registered managed investment schemes known as the "**Fiducian Funds**".

9 Since 27 February 2015, FIMS has been the holder of Australian Financial Services Licence number 468211.

10 FIMS is a wholly owned subsidiary of **Fiducian Group** Limited.

11 Another wholly owned subsidiary of Fiducian Group is Fiducian Financial Services Pty Ltd (**FFS**), which operates a business which includes providing financial planning services to clients through a network of financial advisers who are employees or franchisees of FFS (**Fiducian Financial Planners**).

The DSA Fund

12 In the period between 2 November 2015 and 30 May 2024, FIMS operated and was the Responsible Entity of the DSA Fund.

13 The DSA Fund was created in response to requests from Fiducian Financial Planners who had reported to FIMS that there was demand from clients for a Fiducian Fund which was focused on "ethical investing" or "Environmental, Social and Governance" (**ESG**) investment objectives (**Ethical Investment Objectives**). Concerns had been raised by some Fiducian Financial Planners that clients would be lost if such a fund was not offered.

14 The total number of retail investors in the DSA Fund across the approximately nine-year period of its operation was 453. The highest number of investors in any one year was 309.

15 At the time of its closure on 30 May 2024:

(1) there were 158 investors remaining in the DSA Fund; and

(2) the DSA Fund had approximately $15.57 million in funds under management.

16 Over its nine years of operation, the DSA Fund delivered an annualised return of 7.62%, and a total return since inception of 86.61%.

Manage-the-Manager System

17 The DSA Fund was operated and managed by FIMS using the "**Manage-the-Manager**" investment system, which was also adopted in relation to other Fiducian Funds.

18 Pursuant to the Manage-the-Manager System, FIMS allocates investor funds in a Fiducian Fund to multiple funds or investments (**Underlying Investments**), each managed by a different investment manager (**Underlying Managers**). FIMS is responsible for selecting the Underlying Investments and Underlying Managers in which each Fiducian Fund is invested.

The Underlying Investments

19 At all times in the Relevant Period, the DSA Fund was invested in two Underlying Investments, as follows:

(1) between 2 November 2025 (when the DSA Fund first opened to investment) and March 2022, the two Underlying Investments of the DSA Fund were the Solaris Mandate and the Candriam Fund; and

(2) from March 2022 until the closure of the DSA Fund, the two Underlying Investments of the DSA Fund were the Candriam Fund and the Perpetual Wholesale Ethical SRI Fund (which from 1 October 2022 was renamed the Perpetual ESG Australian Share Fund) (**Perpetual Fund**).

20 The Solaris Mandate was managed by **Solaris** Investment Management Limited and was a wholesale Australian ESG fund with exposure to Australian shares.

21 The Candriam Fund was operated by **Ausbil** Investment Management Limited and was an ESG fund exposed to listed global equities selected from the MSCI World Index.

22 The Perpetual Fund was managed by **Perpetual** Investment Management Limited.

Investment Screens of the Underlying Investments

23 Each of the Underlying Investments of the DSA Fund had specified "investment screens", being a set of investment rules or filters applied by the Underlying Manager to determine which companies or shares were aligned with the specific ESG standards or objectives of that fund.

24 At no stage during the Contravention Period did any of the Underlying Investments completely exclude investments in shares or companies that derived revenue wholly or substantially from fossil fuels.

Candriam Fund Investment Screens

25 While the Candriam Fund excluded investments in certain shares based on particular criteria, it only imposed "materiality limits" in respect of the following categories of shares or companies:

(1) alcohol, company revenue must not exceed 10% without a responsible policy;

(2) tobacco, 5% revenue limit;

(3) nuclear power, 30% revenue limit;

(4) gambling, 10% revenue limit;

(5) adult content, 5% revenue limit; and

(6) activities in oppressive regimes, 1% revenue limit.

(**Candriam Investment Screens**)

26 On or around 30 September 2022, the Candriam Investment Screens were amended. From this date, through to 30 May 2024 (when the DSA Fund was closed), the Candriam Investment Screens imposed the following materiality limits on investments in certain categories of shares or companies, as follows:

(1) adult content media, 5% revenue limit;

(2) alcohol, 10% revenue limit;

(3) genetic modifications, 10% revenue limit without the presence of an applicable responsible policy;

(4) nuclear power, 30% revenue limit for developed markets and 5% revenue limit for emerging markets;

(5) animal testing, exclude all companies without a responsible policy and no legal requirement to test; and

(6) activities exercised in oppressive regimes.

27 During the period from 3 October 2019 to 30 May 2024, the Candriam Fund, at various times, held shares in BHP Group PLC, Woodside Petroleum Ltd and Royal Dutch Shell A.

Solaris Investment Screens

28 The DSA Fund's investment in the Solaris Mandate was subject to an **Investment Management Agreement** executed by FIMS and Solaris on 1 August 2015.

29 The Investment Management Agreement required Solaris to take into account "Investment Objectives", which provided that Solaris was to exclude all shares that derive greater than 10% of revenues from the following activities:

(1) alcohol production or sales;

(2) armaments production or sales;

(3) coal fired power generation;

(4) gambling;

(5) pornography production or sales;

(6) thermal coal mining or sales;

(7) tobacco production or sales; and

(8) uranium mining or sales.

(**Solaris Investment Screens**)

30 The Investment Objectives under the Investment Management Agreement provided that Solaris would also undertake a qualitative ESG assessment, which would consider a company's approach to environmental, social and governance issues and exclude stocks "where the issue is deemed to present so great a risk or concern that the stock is considered non investment grade".

31 While Solaris was required to have regard to the Investment Objectives in investing and managing the portfolio, the Investment Objectives under the

Investment Management Agreement were guidelines only, and not legally binding on Solaris.

32 During the period from 3 October 2019 to around February 2022, the Solaris Mandate held, at various times, equities in Santos Ltd, BHP Group Ltd, and Woodside Petroleum Ltd.

Perpetual Investment Screens

33 During the period that the Perpetual Fund was an Underlying Investment of the DSA Fund, Perpetual issued product disclosure statements dated 1 June 2021 (**2021 Perpetual PDS**), 1 October 2022 (**2022 Perpetual PDS**) and 1 November 2023 (**2023 Perpetual PDS**) (together, the **Perpetual PDSs**).

34 Each of the Perpetual PDSs provided for investment screens in respect of the Perpetual Fund (**Perpetual Investment Screens**).

35 The 2021 Perpetual PDS excluded companies or issuers that derived a material proportion of their revenue, being 5% or more, from:

(1) the manufacture or sale of alcohol or tobacco;

(2) the operation of gambling facilities or the manufacture or supply of gambling products;

(3) fossil fuels (upstream);

(4) uranium and nuclear;

(5) animal cruelty (cosmetic testing);

(6) genetic engineering;

(7) pornography; and

(8) armaments (including weapons).

36 The remaining shares, after the Perpetual Investment Screens were applied pursuant to the 2021 Perpetual PDS, were also subject to a Socially Responsible Investment (**SRI**) Screening. This was a qualitative assessment which assessed companies according to a combination of environmental, social and governance factors (**Perpetual Qualitative SRI Screen**).

37 The 2022 Perpetual PDS amended the Perpetual Investment Screens to exclude investment in companies involved in the manufacture of nicotine alternatives.

38 The 2023 Perpetual PDS amended the Perpetual Investment Screens, to:

(1) exclude companies that derived revenue from tobacco (production);

(2) exclude companies that derived revenue from weapons (nuclear);

(3) exclude companies that derived revenue from weapons (Military Controversial);

(4) exclude companies or issuers that derived a material proportion of their revenue, being 5% or more from "tobacco retailing"; and

(5) amend the factors incorporated into the Perpetual Qualitative SRI Screen by renaming it to the "ESG Exclusionary Screen" which included a list of 15 environmental, social and governance factors.

Roles and responsibilities within FIMS

39 The FIMS corporate structure comprised three levels.

(1) The **Investment Team** was responsible for the day-to-day management of FIMS's business, including, relevantly, managing the Fiducian Funds. The role of the Investment Team included monitoring the Underlying Investments of Fiducian Funds, reviewing the product disclosure statements of Fiducian Funds, and making recommendations to the

Investment Committee about Fiducian Funds, as well as reporting on the performance of the Fiducian Funds and any compliance issues identified to the Investment Committee.

(2) The **Investment Committee** comprised four members. It met quarterly, was responsible for reviewing and considering reports received from the Investment Team, was required to undertake quarterly reviews of the performance of the Fiducian Funds, and was responsible for monitoring whether the Fiducian Funds had a valid product disclosure statement in place which accurately recorded the risks and characteristics of the fund.

(3) The **FIMS Board** had overall governance responsibility for the investment services provided by FIMS (including as to the Fiducian Funds), and was responsible for monitoring and assessing the performance of the Investment Team, approving the investment objectives of the Fiducian Funds, and ensuring compliance with all applicable legal and regulatory requirements. The FIMS Board was also charged with overall responsibility for managing risk, including ensuring that adequate policies and internal controls and procedures were in place in relation to risk identification and management.

Policies and procedures

40 FIMS had a number of documented policies and procedures in place during the Contravention Period. Those policies and procedures which are relevant to the admitted contraventions include those set out below.

41 From June 2019 until the end of the Relevant Period, FIMS had in place a documented **Investment Governance Framework**, which set out the responsibilities and roles of the FIMS Board, FIMS Investment Committee and FIMS Investment Team.

42 From at least June 2017 to the end of the Relevant Period, the documented Fiducian Group **Risk Management Framework**, as amended from time to time, applied to FIMS. The Risk Management Framework was defined to include:

"...the totality of systems, structures, policies, processes and people within its operations that identify, assess, manage, mitigate and monitor all internal and external sources of inherent risk that could have an adverse material impact on [Fiducian Group] and its subsidiary companies ... business operations or the interests of shareholders."

43 The Risk Management Framework comprised various other additional documents, including:

(1) a **Risk Appetite Statement**, which identified risk categories, including:

(a) "Governance risks", defined as "risks associated with the composition, quality and operation of the Board, adequacy of resources, and the policies and procedures applied to the management of the business"; and

(b) "Investment Governance and investment risks", defined as "risks associated with investment governance framework to manage investments in the interests of its clients. In addition, risks associated with investment of client funds to meet investment objectives";

(2) **Risk Registers**, which recorded risk events, controls and risk ratings, and which were maintained by the Chief Risk Officer.

44 From at least July 2017 to the end of the Relevant Period, a Master **Compliance Plan** was in place which applied to all Fiducian Funds. Relevantly, the Compliance Plan set out the measures that FIMS was to apply in operating the Fiducian Funds to ensure compliance with the *Corporations Act* and the Constitutions of the Fiducian Funds, including through the "Quality Control Assessment Program" and "Tickit" system, and defined "**Compliance Obligations**" to mean the obligations "allocated to the relevant Compliance Executive that details the requirements to be satisfied by that Compliance Executive's Operational Unit to ensure the Responsible Entity complies with the *Corporations Act*, the Constitution and the Compliance Plan, which are contained in Tickit".

45 From around August 2015 to the end of the Relevant Period, Fiducian Group used a risk and compliance management program called Tickit, which maintained records of the Risk Registers, Compliance Obligations and events (as defined in the Risk Management Framework) in electronic form. The Tickit System formed part of the Quality Control Assessment Program.

46 The Breach and Incident Policy which applied to FIMS, as amended from time to time, relevantly required employees to report all "Incidents" in Tickit (**Tickit Event**). An "Incident" is defined in the Breach and Incident Policy as:

> "a breakdown in a control, process or procedure. It may or may not result in an actual breach, or in a significant or materially adverse breach. For the purposes of this procedure the use of the term event or incident/s is deemed to include both incidents and breaches".

47 From around June 2017 to the end of the Relevant Period, FIMS had in place a documented Quality Assurance Policy (**QA Policy**), which required **External Communications** to pass through a "**Quality Assurance Process**". "External Communications" is defined in the QA Policy as "any documentation relating to the Fiducian Group that is prepared for a third party", and includes:

(1) all adviser communications (non-standard);

(2) all client communications (non-standard);

(3) all marketing advertisements and communications;

(4) presentation materials (PowerPoint presentations, handouts etc); and

(5) technical papers.

48 The QA Policy also outlined a "**PDS Production Process**" which included the following steps:

(1) the Legal and Compliance Department, an operational unit within Fiducian Group which provides services to FIMS, was to:

(a) produce the PDS and ensure that it complied with the "**PDS Checklist**", which identified specific requirements directed to meeting obligations imposed on FIMS pursuant to the *Corporations Act*; and

(b) liaise with all relevant stakeholders to ensure accuracy and obtain all necessary consents in relation to the produced PDS;

(2) the PDS was required to pass through the Quality Assurance Process; and

(3) the Legal and Compliance Department was to ensure that the PDS was circulated to the FIMS Board for review and comment, and then again (after any comments were addressed) for final approval by resolution.

DSA Fund PDSs

49 Across the Relevant Period, FIMS published eleven separate Product Disclosure Statements in respect of the DSA Fund (**DSA Fund PDSs**).

50 Each version of the DSA Fund PDS was published on the Fiducian Group website for at least the period in which it was in force.

51 There were six versions of the DSA Fund PDS published during the Contravention Period, being those in force during the following periods:

(1) 3 October 2019 – 31 August 2020 (**PDS Version A**);

(2) 1 September 2020 – 30 June 2021 (**PDS Version B**);

(3) 1 July 2021 – 29 June 2022 (**PDS Version C**);

(4) 30 June 2022 – 29 June 2023 (**PDS Version D**);

(5) 30 June 2023 – 31 January 2024 (**PDS Version E**); and

(6) 1 February 2024 – 30 May 2024 (**PDS Version F**).

52 Each version of the DSA Fund PDS published during the Relevant Period contained the following statements:

(1) "Share portfolios comprise investments in companies that aim to be positive for society and for the environment and aim to avoid investments in harmful activities";

(2) "Managers are not expected to sacrifice ethics for returns, but they shall strive to achieve competitive returns. Some of the companies to be avoided are those that:

(a) pollute air, land and water unnecessarily;

(b) extract or create goods or services harmful to humans and animals;

(c) deceive or mislead in their promotional activities;

(d) encourage military activity or armaments;

(e) exploit people through low wages or poor working conditions;

(f) discriminate on the basis of race, religion or sex; or

(g) impede human rights";

(3) "portfolio exposure, operations and performance of all of our fund managers are routinely monitored"; and

(4) "Fiducian constantly monitors the Fund's underlying investment managers to ensure that they maintain their investment styles and processes".

53 The statements set out in paragraphs (1)-(4) are referred to below as the **ESG Statements**. In addition, the statements in paragraphs (3)-(4) are referred to below as the **Systems and Processes Statements**.

54 None of these statements was withdrawn or amended or qualified in any way during the Relevant Period. Nor did any version of the DSA Fund PDS contain any statement which provided the reader with sufficient information to understand the ESG characteristics of the Underlying Investments of the DSA Fund. For example, the DSA Fund PDSs did not contain any reference to the "Investment Screens" of the Underlying Investments.

Communications during the Contravention Period regarding the DSA Fund

55 During the Contravention Period, FIMS received a number of communications from some Fiducian Financial Planners in relation to the Underlying Investments of the DSA Fund and their alignment with the fund's Ethical Investment Objectives. For example:

(1) on 27 February 2020, a Fiducian Financial Planner sent an email to the FIMS Head of Administration, which included the following statements:

> "I had a meeting last week with a lady who has over $900k in FSS. She really wants to know that her money is 'doing good' and this is more important to her than the returns – a concept that is alien to all on the investment team/committee/board despite us repeatedly telling them that this is what some clients are asking for.
>
> The Fid Div Social Aspirations fund has BHP and RIO in the top 10 holdings, so it's a tough sell for us when people want ethical funds that don't have exposure to fossil fuels."

(2) on 13 August 2020, a Fiducian Financial Planner sent an email to the Executive Chairman of FFS, referring to a potential client who worked in the renewable energy sector and who might generate further business through their range of contacts. This email contained the following statements regarding this client:

> "This client is in the market for pre-retirement advice and has around $1.2 Million to invest. However, we would need to be able to offer them

a broader range of products than the Fiducian Social Aspirations Fund (stupid bloody name) which is potentially the least 'green' investment product in the sustainable market at present."

56 In June 2020, FIMS introduced a "Drill Down Function" on the Fiducian Group website, which enabled investors to view the shares or companies held by mandates (to the extent a mandate was an Underlying Investment of a Fiducian Fund).

57 Of the Underlying Investments of the DSA Fund during the Relevant Period, the Solaris Fund was the only mandate. As a result, the Drill Down Function enabled investors in the DSA Fund to view the shares in which the Solaris Fund was invested in the period between June 2020 (when the Drill Down Function launched) and February 2022 (when the Solaris Fund was replaced by the Perpetual Fund).

58 After the launch of the Drill Down Function, FIMS received a number of notifications from investors or Fiducian Financial Planners about the alignment of shares held by the Underlying Investments with the Ethical Investment Objectives of the DSA Fund. For example:

(1) on 18 January 2021, a Fiducian Financial Planner sent an email to the FIMS Head of Administration, which was forwarded to FIMS's General Counsel on the next day, and which contained the following statements:

> "I am meeting with [a Fiducian Funds investor] tomorrow morning. ... [The investor] is very interested in ethical investments and is especially concerned about slavery and mining. I have no confidence in the Fiducian diversified social aspirations fund being 'fit for purpose' and there is nowhere to hide now, with the drilldown looking like this:
>
> [Screenshot showing holdings in various entities, including BHP Group, Woodside Petroleum, Rio Tinto and Orica]
>
> I have raised this via planner council several times to no avail, but I can't in good conscience recommend the DSA fund as an ethical investment when the biggest domestic position is BHP and there are significant allocations to RIO, WPL and Orica etc Is there any way we can add a 'real' ethical fund to her portfolio like, for example, Australian Ethical w/s Diversified, which a few of my FIS clients hold?"

(2) on 5 February 2021, a Fiducian Financial Planner sent an email to the Executive Chairman of FFS, forwarding an email from an investor in the Fiducian Funds. The Fiducian Financial Planner's email contained the following statements:

> "I am appealing to you in frustration concerning the Fiducian Diversified Social Aspirations Fund. I 'agitated' for some time to get Fiducian to establish an ESG fund and was eventually successful when the Fiducian Diversified Social Aspirations Fund was launched a few years ago.
>
> ...
>
> As it turned out, my clients (and I) have been very disappointed with the resulting Fiducian Diversified Social Aspirations Fund. As you can see in the new 'drill down' function (attached), three of the largest holdings in the fund (representing 16.15% of the portfolio) are large mining companies (BHP, Rio Tinto and Woodside). There are eight mining companies in the fund overall. ...
>
> I now question the probity of even presenting this fund to clients who are interested in an ESG option. ...
>
> The composition of this fund puts us in a compromised position....I feel extremely uncomfortable in even offering it to clients."

59 On 5 October 2021, a member of the Investment Team sent an email to members of the FIMS Board and the Head of Investments. This email attached a "Fiducian Funds ESG Update", which provided an overview of trends in "ESG investing" in the market generally, as well as specific issues relating to the DSA Fund (**ESG Update**). In particular, the ESG Update stated that:

> "The top three issues that ESG conscious investors are searching for are not excluded from the Social Aspirations Fund, with the most significant included sector being fossil fuels. The Fund currently includes holdings in Woodside, Oil Search and Shell.
>
> ...
>
> ... To maintain relevance and appeal to investors, exclusion of fossil fuels from the Social Aspirations Fund should be considered. For Australian Equities, this could be achieved by modifying the mandate with Solaris, or alternatively appointing a new manager. A number of our existing managers, including Ausbil, offer quality funds that exclude fossil fuels. For the international component, Candriam would to be replaced given their best of sector approach will not exclude fossil fuels. Solaris and Candriam also both appear light on relative to peers with reporting on ESG engagement issues."

60 The ESG Update also stated that:

> "... [a] growing subset of the population is seeking to exclude fossil fuels from their investments,
>
> ... There is an opportunity to incorporate this into the Social Aspirations Fund, and make the offering more relevant for clients that have a deeper interest in ESG issues, without materially changing the risk and return characteristics of the fund."

61 On 6 October 2021, the day after the ESG Update was sent, Mr Burge, the Executive Chair of FIMS and Head of Investments responded to the email, stating that: "[o]ur total exposure to ESG funds is less than 0.3% of total funds under management and as such we should not be spending too much in terms of time or resources on this small sub-sector of the market. In my view ESG is still a fad that will in time implode from its own irrationalities".

62 On 11 October 2021, Mr Singh (as a member of the FIMS Board and Investment Committee) responded to the above emails of 5 and 6 October 2021, stating that "there is no need to promote the topic unless we receive planner pressure".

63 No substantive amendments in response to the matters identified in the emails of 5 and 6 October 2021 (set out above) were made to the DSA Fund prior to it being closed permanently on 30 May 2024.

The Admitted Contraventions

Contraventions of s 12DF of the ASIC Act

64 FIMS admits that six contraventions of s 12DF of the *ASIC Act*, being one contravention in respect of each of the six DSA Fund PDSs which were published in the Contravention Period. Each of those contraventions relates to the ESG Statements and the Systems and Processes Statements, which were made in each of the six PDSs in identical terms.

Relevant Principles

65 Section 12DF(1) of the *ASIC Act* provides as follows:

> A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services.

66 Section 12DF(1) is in similar terms to s 34 of the *Australian Consumer Law* (***ACL***), except that s 34 of the *ACL* pertains to "services" rather than "financial services".

67 In their joint submissions, the parties agreed on the principles relevant to establishing a contravention of s 12DF of the *ASIC Act*. The following summary is drawn primarily from those submissions.

68 Determining whether a person has engaged in misleading or deceptive conduct involves four steps: first, identifying the "conduct" said to contravene the relevant provision; second, considering whether the identified conduct was conduct "in trade or commerce"; third, considering what meaning that conduct conveyed; and fourth, determining whether that conduct in light of that meaning was misleading or deceptive or likely to mislead or deceive: *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587 at [25] (O'Callaghan J).

69 The cases decided under ss 33 and 34 of the *ACL* and precursor provisions suggest that no narrow or technical meaning should be attributed to the terms "nature", "characteristics" or "suitability for their purpose". The same approach should be taken to the interpretation and application of s 12DF given that it has a similar purpose and is drafted using similar language: *Australian Securities and Investments Commission v Westpac Banking Corp (No 2)* (2018) 266 FCR 147; [2018] FCA 751 at [2311] (Beach J).

70 Conduct is misleading or deceptive, or likely to mislead or deceive, if it has a tendency to lead into error: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; [2013] HCA 54 at [39] (French CJ, Crennan, Bell and Keane JJ). A statement is misleading or deceptive, or likely to mislead or deceive, if there is a real and not remote possibility, be it more or less than a chance of 50%, of the statement leading into error the readers at

whom it is directed: *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569; [2012] VCA 91 at [60] per Nettle JA (Warren CJ and Cavanough AJA agreeing at [33]).

71 The term "liable to mislead", which appears in s 12DF, has been held to apply to a narrower range of conduct and to require "an actual probability that the public would be misled": *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634 at [44] (Allsop CJ).

72 As regards the requirement that the conduct was liable to mislead "the public", a representation will be made to the public if the approach is general and the number of people who are approached is sufficiently large, or if the approach is to all within a sufficient segment of the community at large: *Australian Competition and Consumer Commission v Google LLC (No 2)* [2021] FCA 367 at [127] (Thawley J).

73 The term "financial services" is defined in s 12BAB of the *ASIC Act*. Relevantly, s 12BAB(1)(d) provides that a person (or responsible entity) provides a financial service if they "operate a registered scheme". FIMS operated the DSA Fund, which was a registered scheme, and therefore provided financial services within the meaning of s 12BAB.

Admitted Contraventions - ESG Statement Representations

74 FIMS admits each of the matters set out in paragraphs [75]-[79] below.

75 By making the ESG Statements during the Contravention Period, and by failing to withdraw or qualify those statements, FIMS represented that:

(1) the DSA Fund would only make investments (including through any Underlying Investments) in companies that were considered to be positive for society and the environment;

(2) the DSA Fund would avoid making investments (including through any Underlying Investments) in companies that were considered to have activities that were harmful for society or the environment; and

(3) the DSA Fund would avoid making investments (including through any Underlying Investments) in companies that:

(a) polluted the air, land or water unnecessarily;

(b) extracted or created goods or services harmful to humans and animals;

(c) deceived or misled in their promotional activities;

(d) encouraged military activity or armaments;

(e) exploited people through low wages or poor working conditions;

(f) discriminated on the basis of race, religion or sex; or

(g) impeded human rights,

(each an **ESG Statement Representation**).

76 Each of the ESG Statement Representations made during the Contravention Period was a continuing representation until the end of the Contravention Period.

77 Each of the ESG Statement Representations was a representation with respect to a future matter within the meaning of s 12BB of the *ASIC Act*.

78 At the time of making each of the ESG Statement Representations during the Contravention Period, and at each time until the end of the Contravention Period, FIMS did not have reasonable grounds for the ESG Statement Representations by reason of the following matters:

(1) during the Relevant Period and in respect of the DSA Fund PDSs, there were four instances where the PDS Checklist had not been completed and two instances where Board approval was not obtained in a manner consistent with the PDS Production Process;

(2) in relation to the Solaris Mandate, the "Investment Objectives" in the Investment Management Agreement were only guidelines and not legally binding on Solaris (although Solaris was required to have regard to them in investing and managing the portfolio);

(3) FIMS did not receive, and took no steps to ensure that it received, a complete list of the securities or shareholdings held by the Perpetual Fund, and at no point was provided with a complete list of the securities or shareholdings held by the Perpetual Fund;

(4) in relation to the Candriam Fund and Solaris Mandate, although FIMS was provided with a list of the shareholdings held by those Underlying Investments on a monthly or quarterly basis, FIMS at no time applied any formal process for reviewing the underlying shareholdings of those Underlying Investments against the Ethical Investment Objectives or ESG Statements;

(5) in relation to the Candriam Fund and Perpetual Fund, there was no obligation on the Fund Managers to notify FIMS of an investment or shareholding in the Candriam Fund or Perpetual Fund that was inconsistent with the Ethical Investment Objectives or ESG Statements of the DSA Fund, or that was inconsistent with the Investment Screens of those Underlying Investments;

(6) the ESG Statements in the PDS were not reviewed and compared to the investment strategies of the Underlying Investments, including the Investment Screens applied by each of the Underlying Investments throughout the Contravention Period in order to ensure alignment

between the ESG Statements in the DSA Fund PDS and the investment strategies of the Underlying Investments;

(7) the Investment Team did not monitor the DSA Fund for compliance with its Ethical Investment Objectives or the ESG Statements;

(8) to the extent the Investment Committee monitored the DSA Fund, it only did so by reference to its financial performance. It did not monitor the DSA Fund for alignment with its Ethical Investment Objectives or the ESG Statements; and

(9) from at least 17 May 2019, FIMS was on notice of communications in relation to the underlying securities or shareholdings of the DSA Fund, including as referred to in paragraphs [55]-[62] above.

79 By reasons of the matters in the preceding paragraph:

(1) each of the ESG Statement Representations was liable to mislead the public; and

(2) by virtue of making the ESG Statement Representations during the Contravention Period, FIMS engaged in conduct that was liable to mislead the public as to the nature and characteristics of financial services in contravention of s 12DF of the *ASIC Act*.

Admitted Contraventions - Systems and Processes Statement Representations

80 FIMS admits each of the matters set out in paragraphs [81]-[85] below.

81 By making the Systems and Processes Statements during the Contravention Period, and by failing to withdraw or qualify those statements, FIMS represented that:

(1) the portfolio exposure of the DSA Fund (including exposure through the Underlying Investments) would be routinely monitored;

(2) the portfolio exposure of the DSA Fund (including exposure through any Underlying Investments) would be monitored to ensure that such exposure was in accordance with the ESG Statements; and

(3) the investment managers making investments on behalf of the DSA Fund (including through the Underlying Investments) would be constantly monitored to ensure that they maintained their investment styles and processes.

(each a **Systems and Processes Statement Representation**)

82 Each of the Systems and Processes Statement Representations made during the Contravention Period was a continuing representation until the end of the Contravention Period.

83 Each of the Systems and Processes Statement Representations was a representation with respect to a future matter within the meaning of s 12BB of the *ASIC Act*.

84 At the time of making each of the Systems and Processes Statement Representations during the Contravention Period, and at each time until the end of the Contravention Period, FIMS did not have reasonable grounds for the Systems and Processes Statement Representations by reason of the following matters:

(1) each of the matters set out in subparagraphs [78(1)]-[78(9)] above; and

(2) at no time during the Contravention Period did any of the Risk Registers maintained by FIMS contain any controls for monitoring investments of the Underlying Investments or Underlying Managers in respect of the DSA Fund.

85 By reasons of matters in the previous paragraph:

(1) each of the Systems and Processes Statement Representations was liable to mislead the public; and

(2) by virtue of making the Systems and Processes Statement Representations during the Contravention Period, FIMS engaged in conduct that was liable to mislead the public as to the nature and characteristics of financial services in contravention of s 12DF of the *ASIC Act*.

Contravention of s 601FC(1)(b) of the Corporations Act

86 FIMS admits a single contravention of s 601FC(1)(b) of the *Corporations Act* during the Contravening Period, as outlined below.

Relevant Principles

87 Section 601FC(1)(b) of the *Corporations Act* provides as follows:

> **601FC Duties of responsible entity**
>
> (1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
>
> ...
>
> (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position.

88 In *In the matter of Macquarie Investment Management Ltd* [2016] NSWSC 1184 at [72]-[85], Barrett AJA made the following observations regarding the duty in s 601FC(1)(b) (emphasis in original):

> "[72] *First*, the duty of the RE under s601FC(1)(b) is to exercise care and diligence in exercising its powers and carrying out its duties as the RE of the relevant scheme. Those powers and duties include the power to invest the scheme property and the responsibility to do so pursuant to the mandate of the scheme, subject to the Act.
>
> [73] *Second*, s 601FC(1)(b) is cast in similar terms to the duty of care and diligence of a director of a corporation contained in s 180(1) of the Corporations Act. Accordingly, authorities on s 180(1) may be relevant in terms of the

standard of care and diligence required although the position of an RE is not identical to that of a company director.

[74] *Third*, it is self-evident that the provision requires care and diligence to be exercised. The *degree* of care and diligence is to be measured against that which would be expected of a reasonable person if they were in the RE's position. By requiring the RE to exercise 'the degree of care and diligence that a *reasonable person* would exercise if they were in the RE's position', the provision sets out an objective test to measure the reasonableness of the actions taken by the RE in exercising its powers and carrying out its duties (similarly to s 180(1)).

[75] *Fourth*, the fact that the statutory duty refers to the standard by reference to the reasonable person, 'if they were in the responsible entity's position', means that in determining the scope of the duty of care and diligence, and whether there has been a breach of that duty, it is important to have regard to the circumstances of the relevant RE's position, and the registered scheme, including: the type of scheme, the provisions of its constitution, the size and nature of its operations, the functions to be performed, the experience or skills of the RE and the circumstances of the specific case: see *ASIC v Maxwell* (2006) 59 ACSR 373 at 397 at [100]; and see *ASIC v Rich* [2009] NSWSC 1229 at [7201].

[76] *Fifth*, the standard of care imposed by the provision, like s 180(1), is similar to that imposed by the law of negligence: see *Vines v ASIC* (2007) NSWLR 451 at [137], [142]. It follows that it may be appropriate to refer to the principles developed under law of professional negligence in determining the content of the duty: *ASIC v Vines* (2005) 55 ACSR 617 at [1070] ff.

[77] *Sixth*, the scope and content of the duty are heavily influenced by the purpose of the particular power being exercised or duty being carried out, and the known reliance and vulnerability of those dependent on the carrying out of the duty: see, in the context of directors' duties, *ASIC v Vines* (2005) 55 ACSR 617 at [1085]. This is particularly relevant to the placing at risk of the scheme property of a registered scheme.

[78] *Seventh*, as a general matter, and subject to the terms of the particular trust (or here a managed investment scheme), a trustee is expected to exercise a degree of *restraint*, against the duty of a company director to display 'entrepreneurial flair': *Australian Securities Commission v AS Nominees Limited* (1995) 62 FCR 504 at 516-518 per Finn J. In the context of professional trustee companies, who hold themselves out as having certain expertise, there is a 'requirement of caution': *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504; 133 ALR 1; 18 ACSR 459. This is sometimes referred to as the prudent investor rule and applies to the exercise by the trustee of its power of investment. This duty of a trustee is applicable to a RE exercising its powers and the standard of care applicable when considering s 601FC(1)(b).

[79] In *Wallace Funds Management Pty Ltd v Wallace Absolute Return Ltd* [2009] NSWSC 190, Palmer J said that 'Where the trustee managing investments for others is a professional, the duty of prudence and skill is judged according to professional, rather than lay standards: *see e.g. Armitage v Nurse [1998] Ch 241; s 14A Trustee Act 1925 (NSW).*'

[80] In *Bartlett v Barclay's Bank Trust Co Ltd (No 1)* [1980] 1 Ch 515 at 534, Brightman J observed that:

> Just as under the law of contract, a professional person possessed of a particular skill is liable for breach of contract if he neglects to use the skill and expertise which he professes, so I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special skill which it professes to have.

[81] In *In re Whiteley* (1886) 33 Ch D 347 at 355, it was held that where a trustee makes an investment, the trustee is to exercise the degree of care that an ordinary prudent person would take if he or she was minded to make an investment for the benefit of other people to whom he or she felt morally bound to provide.

[82] *Eighth*, nonetheless, the exercise of prudence and caution must be considered through the prism of the particular registered scheme in question, having regard to its constitution and particular investment mandate, and the profile of the accepted risks and potential returns the subject of the investments that may be undertaken pursuant to the registered scheme. In *Hanrahan, Funds Management in Australia*, (LexisNexis Butterworths, 2007) at [2.34], the author states:

> So how does the requirement of caution apply in the context of commercial investment trusts? The general law standard of care in relation to trustee investments does not work in such a way as to prohibit a funds management company from making high-risk investments. The rule does not require the company to eschew a high-risk investment strategy where that is the nature of the scheme that has been marketed to investors. Rather, it requires the company to implement the advertised strategy prudently. Although its application in a commercial context is yet to be fully explored fully by an Australian court, Dr Paul Ali has concluded that 'it is likely that Australian courts will interpret this rule as requiring fiduciaries to assess proposed investments in the context of their impact on the risk profile and return objectives of the entire trust fund, having regard to modern investment models and techniques'.
>
> In other words, the fund management company is not required to alter the advertised investment strategy to accord with the requirement of caution; instead, it must implement that investment strategy (whatever it is) in a manner consistent with the requirement. (footnotes omitted)

...

[84] *Ninth*, whilst an RE is entitled to place reliance on others, including advisers, there is a core and irreducible requirement of diligence: see in the context of directors' duties, *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at [108] to [109].

[85] *Tenth*, while it has been noted that the point seems open to argument at the appellate level, there is authority that the standard of care and diligence required is not lowered by the fact that a breach of the provision could give rise to a civil penalty: *ASIC v Vines* (2005) 55 ACSR 617 at [1094]."

Admitted Contravention – s 601FC(1)(b)

89 FIMS admits each of the matters set out in paragraphs [90]-[92] below.

90 At all times during the Contravention Period:

(1) FIMS was the Responsible Entity of the DSA Fund;

(2) FIMS knew:

(a) the Ethical Investment Objectives of the DSA Fund;

(b) the ESG Statements and Systems and Processes Statements as published in the DSA Fund PDSs;

(c) the representations made in various External Communications in relation to the DSA Fund and in relation to ESG Investing by Fiducian;

(d) the Investment Screens of the Underlying Investments of the DSA Fund, being the Candriam Investment Screens, the Solaris Investment Screens, and the Perpetual Investment Screens;

(e) that the Candriam Investment Screens did not, at any time during the Contravention Period, completely exclude investments in shares or companies that derived revenue wholly or substantially from fossil fuels, or the categories identified in paragraphs [25]-[26] above;

(f) that the Solaris Investment Screens (or the Investment Objectives of the Solaris Fund) were guidelines only and not legally binding on Solaris but Solaris was required to have regard to them;

(g) that the Perpetual Investment Screens did not, at any time during the Contravention Period, completely exclude investments in shares or companies that derived revenue wholly or substantially from fossil fuels, or the categories identified in paragraph [35] above;

(h) that on 5 October 2021, a member of the Investment Team proposed that the DSA Fund exclude investments in fossil fuels (see paragraphs [59]-[60] above);

(3) FIMS, in its capacity as a Responsible Entity, was:

(a) responsible for monitoring the DSA Fund, including as expressly documented in the Investment Governance Framework;

(b) required to take steps to address "risk categories" (or material risks) with the DSA Fund in accordance with the Risk Management Framework and the Risk Appetite Statement;

(c) required to lodge an Incident or Breach or Tickit Event in the Tickit system in accordance with the Incident and Breach Reporting Policy;

(d) required to have in place adequate controls to address identified risks or risk categories in its Risk Register;

(e) required to comply with the Compliance Obligations and processes set out in the Compliance Plan; and

(f) required to comply with the QA Policy in relation to External Communications.

91 As the Responsible Entity of the DSA Fund, with the knowledge and responsibilities as set out in the previous paragraph, FIMS should have, in accordance with the duty in s 601FC(1)(b) of the *Corporations Act* to act with care and diligence:

(1) understood that there was a risk that the underlying securities or shareholdings of the DSA Fund were not aligned with the Ethical Investment Objectives of the DSA Fund, or the ESG Statements in the DSA Fund PDSs;

(2) understood that at least some investors and/or Fiducian Financial Planners did not consider the underlying securities or shareholdings of the DSA Fund aligned with the Ethical Investment Objectives of the DSA Fund, or the ESG Statements in the DSA Fund PDSs;

(3) reviewed the securities or shareholdings of the Underlying Investments of the DSA Fund to check for their alignment with the Ethical Investment Objectives of the DSA Fund, and the ESG Statements in the DSA Fund PDSs;

(4) reviewed the PDS and investment strategies of the Underlying Investments, including the Investment Screens applied by each of the Underlying Investments during the Contravention Period (as amended from time to time) for compliance with the Ethical Investment Objectives of the DSA Fund and the ESG Statements in the DSA Fund PDSs;

(5) reviewed the External Communications, and the statements made in those documents, as against the underlying securities and shareholdings of the DSA Fund, and in accordance with the Quality Assurance Process;

(6) recognised that the Underlying Investments of the DSA Fund did not align with the Ethical Investment Objectives of the DSA Fund or the ESG Statements in the DSA Fund PDSs; and

(7) taken steps either:

    (a) to cause the Ethical Investment Objectives of the DSA Fund to be amended to reflect alignment with the underlying holdings;

(b) to cause the DSA Fund PDS to be amended to reflect, and align with, the securities or shareholdings of the Underlying Investments of the DSA Fund; or

(c) to change the Underlying Investments of the DSA Fund.

92 Throughout the Contravention Period, FIMS failed to take all of the steps in previous paragraph, and as a result, failed to discharge its duties with the degree of care and diligence that a reasonable person would exercise if they were a Responsible Entity in FIMS's position, thereby contravening s 601FC(1)(b) of the *Corporations Act*.

Declaratory Relief

93 Section 12GBA of the *ASIC Act* relevantly provides as follows:

> *Application for declaration of contravention*
>
> (1) ASIC may apply to a Court for a declaration that a person has contravened a civil penalty provision.
>
> (2) ASIC must make the application within 6 years of the alleged contravention.
>
> *Declaration of contravention*
>
> (3) The Court must make the declaration if it is satisfied that the person has contravened the provision.
>
> (4) The declaration must specify the following:
>
> (a) the Court that made the declaration;
>
> (b) the civil penalty provision that was contravened;
>
> (c) the person who contravened the provision;
>
> (d) the conduct that constituted the contravention.
>
> ...
>
> *Meaning of **civil penalty provision***
>
> (6) The following provisions are **civil penalty provisions**:
>
> ...

> (b) a provision of Subdivision D (other than section 12DA);
>
> ...

94 Having regard to the matters set out in paragraphs [64]-[85] above, I am satisfied that FIMS has contravened s 12DF(1) of the *ASIC Act.*

95 Section 12DF(1) is in Subdivision D of the *ASIC Act* and is therefore a civil penalty provision: s 12GBA(6)(b).

96 It follows that, pursuant to s 12GBA(3), the Court must make a declaration of contravention.

97 Section 1317E of the *Corporations Act* relevantly provides as follows:

> (1) If a Court is satisfied that a person has contravened a civil penalty provision, the Court must make a declaration of contravention.
>
> (2) The declaration must specify the following:
>
> (a) the Court that made the declaration;
>
> (b) the civil penalty provision that was contravened;
>
> (c) the person who contravened the provision;
>
> (d) the conduct that constituted the contravention;
>
> ...
>
> (3) In this Act:
>
> (a) a provision specified in column 1 of the following table is a ***civil penalty provision***; ...

98 Having regard to the matters set out in paragraphs [90]-[92] above, I am satisfied that FIMS has contravened s 601FC(1)(b) of the *Corporations Act.*

99 A responsible entity which contravenes s 601FC(1) thereby contravenes s 601FC(5), which is a civil penalty provision: see s 1317E.

100 It follows that, pursuant to s 1317E(1), the Court must make a declaration of contravention.

101 I am satisfied that the proposed declarations are in an appropriate form, as they meet the requirements of s 12GBA(4) of the *ASIC Act* and s 1317E(2) of the *Corporations Act*, and also "specifically and succinctly identify the gist of the relevant conduct and its relationship to contravention": *Carbone v Fowler Homes Pty Ltd* [2024] NSWCA 192 at [29]-[30] per Leeming JA (Ward P and Mitchelmore JA agreeing), referring to *Australian Securities and Investments Commission v Youi Pty Ltd* [2020] FCA 1701 at [69] per Allsop CJ.

102 For those reasons, I am satisfied that declarations of contravention should be made in the form proposed by the parties.

Pecuniary Penalties

103 The parties proposed that a pecuniary penalty in the amount of $2.3m be imposed in respect of FIMS's six admitted contraventions of s 12DF(1) of the *ASIC Act* and a pecuniary penalty in the amount of $5m be imposed in respect of FIMS's one admitted contravention of s 601FC(1)(b) of the *Corporations Act*.

Relevant Provisions

104 Each of s 12GBB(3) of the *ASIC Act* and s 1317G(1) of the *Corporations Act* provides that, if the Court has made a declaration of contravention of a civil penalty provision, the Court "may" order that person to pay a pecuniary penalty to the Commonwealth in relation to the contravention.

105 Each of s 12GBCA(2) of the *ASIC Act* and s 1317G(4) of the *Corporations Act* provides for the same "maximum penalty", being the greater of:

> (a) 50,000 penalty units; and
>
> (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and
>
> (c) either:
>
> > (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

106 The value of a penalty unit is fixed by s 4AA of the *Crimes Act 1914* (Cth). It was $210 between 1 July 2017 and 30 June 2020; and $222 between 1 July 2020 and 30 May 2024.

107 The parties have calculated that, when these figures are applied to the "maximum" penalty of "50,000 penalty units" as contemplated by s 12GBCA(2), it results in a penalty of $10.5 million (for the first contravention of s 12DF) and $11.1 million for each of the other five s 12DF contraventions (or a total of $66 million).

108 Section 12GBB(5) of the *ASIC Act* and s 1317G(6) of the *Corporations Act* are, relevantly, in the same terms and provide that, in determining the pecuniary penalty, the Court must take into account "all relevant matters", including:

(1) the nature and extent of the contravention;

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

(3) the circumstances in which the contravention took place; and

(4) whether the person has previously been found by a court to have engaged in any similar conduct.

Relevant Principles

General and specific deterrence

109 In *Australian Building and Construction Commissioner v* ***Pattinson*** (2022) 274 CLR 450; [2022] HCA 13, the plurality stated (at [15]) that it has long been recognised that "civil penalties are primarily, if not solely, for the purpose of deterrence". Their Honours cited (at [15]) with approval the statement by French J in *Trade Practices Commission v* ***CSR*** *Limited* [1991] ATPR ¶41-076;

[1990] FCA 521 that the object of imposing civil penalties under s 76 of the *Trade Practices Act 1974* (Cth) was to "attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act".

110 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157; [2018] HCA 3 at [116], Keane, Nettle and Gordon JJ observed that, in considering whether a penalty achieves the object of "specific deterrence of the contravener and, by his or her example, general deterrence of other would-be contraveners", it is necessary to consider the extent of the "sting or burden" which the penalty imposes on the contravener. Their Honours said that:

> "Other things being equal, it is assumed that the greater the sting or burden of the penalty, the more likely it will be that the contravener will seek to avoid the risk of subjection to further penalties and thus the more likely it will be that the contravener is deterred from further contraventions; likewise, the more potent will be the example that the penalty sets for other would-be contraveners and therefore the greater the penalty's general deterrent effect. Conversely, the less the sting or burden that a penalty imposes on a contravener, the less likely it will be that the contravener is deterred from further contraventions and the less the general deterrent effect of the penalty. Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition."

Factors relevant to assessment of penalty

111 In addition to the mandatory matters for consideration set out in s 12GBB(5) of the *ASIC Act* and s 1317G(6) of the *Corporations Act*, the authorities have referred to a number of other (or overlapping) factors which may be relevant to the assessment of an appropriate penalty.

112 For example, in an oft-cited passage from *CSR*, French J identified (at [42]) the following factors as being relevant to the "assessment of a penalty of appropriate deterrent value":

> "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."

113 In *Pattinson* at [18]–[19], Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ quoted this passage from *CSR*, and commented that:

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

114 In *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2023] FCAFC 5 at [42], the Full Court of the Federal Court (Rares, Stewart and Abraham JJ) observed that the process of determining an appropriate penalty involves "an intuitive or instinctive synthesis of all of the relevant factors", adding that: "[i]nstinctive synthesis is the method by which the judge identifies all the factors that are relevant to the penalty and, after weighing all of those factors, reaches a conclusion that a particular penalty is the one that should be imposed" (see also *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary* (2018) 96 NSWLR 762; [2018] NSWCA 39 at [150] per Bathurst CJ (with whom Gleeson and Simpson JJA agreed)).

Consideration of maximum penalty

115 In *Pattinson* at [54], the plurality emphasised that "the maximum penalty is 'but one yardstick that ordinarily must be applied' and must be treated 'as one of a number of relevant factors'" to inform the assessment of a penalty of appropriate deterrent value (quoting from the decision of the Full Court of the Federal Court (Jagot, Yates and Bromwich JJ) in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 at [155]-[156]).

116 Further, the plurality in *Pattinson* observed that:

(1) the Court should not proceed on the basis that the maximum penalty is reserved exclusively for the worst category of contravening conduct (at [49]); and

(2) the maximum penalty does not constrain the exercise of the Court's discretion, beyond requiring "some reasonable relationship between the theoretical maximum and the final penalty imposed", and this relationship of "reasonableness" may be established by reference to the circumstances of the contravener as well as by the circumstances of the conduct involved in the contravention (because these circumstances may overlap, and either set of circumstances may have a bearing upon the extent of the need for deterrence in the penalty to be imposed) (at [55]).

117 Their Honours observed (at [60]) that:

> "... in some cases, the circumstances of the contravenor may be more significant in terms of the extent of the necessity for deterrence than the circumstances of the contravention. In this regard, it is simply undeniable that, all other things being equal, a greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather than to adhere to its preferred policy than will be necessary to persuade a poorly resourced contravenor that its unlawful policy preference is not sustainable."

118 Although the contravener's size and financial resources are relevant to the determination of penalty, they do not alone justify a higher penalty than might

otherwise be imposed: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330 at [92] (Allsop CJ).

Consideration of "comparable" cases

119 Reference to the penalties imposed in other cases, where the combination of circumstances was different, does not assist in establishing a "range" of penalties appropriate to the circumstances of the particular case before the Court: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 at [60] (Keane CJ, Finn & Gilmour JJ). The Full Court there quoted, with approval, the following observations of Middleton J in *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238 at [215]:

> "It is apparent that there are many difficulties in simply referring to penalties previously imposed for contraventions of legislation in widely differing circumstances or in circumstances where some of the factors are similar but others dissimilar to those of the present proceeding. In each case, the Court must take into account the deterrent effect of the penalty and the fact that the penalties 'should reflect the will of Parliament that the commercial standards laid down in the Act must be observed but not be so high as to be oppressive'..."

120 The consistency that is sought is "consistency in the application of the relevant legal principles," and this is not demonstrated by "numerical equivalence": *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29 at [23]-[24] (North, McKerracher and Jagot JJ), referring to *Hili v R; Jones v R* (2010) 242 CLR 520; [2010] HCA 45 at [48]-[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

121 Accordingly, while "[c]omparables may give some broad guidance", the Court "does not work back or forward from other more or less serious cases", but "evaluates all the circumstances of the case at hand": *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* 260 FCR 68; [2018] FCAFC 53 at [69] (Allsop CJ, Davies and Wigney JJ).

"Course of Conduct" Principle and "Totality" Principle

122 In circumstances where there are multiple contraventions, the assessment of an appropriate total penalty requires consideration of the "course of conduct" principle and the "totality" principle. Each of these principles is "concerned to ensure that an offender or contravener is not punished more than the law requires that they deserve in all of the circumstances of their past conduct"; in other words, each is "concerned with the reasonableness, appropriateness, or proportionality of the penalty in relation to the seriousness of the contravention in light of all the circumstances": *Pattinson* at [97] per Edelman J.

123 In an appropriate case involving multiple contraventions, the Court should consider whether those multiple contraventions arose from a course or separate courses of conduct. If the contraventions arose out of a course of conduct, the penalties imposed in relation to the contraventions should generally reflect that fact, otherwise there is a risk that the respondent will be doubly punished in respect of the relevant acts or omissions that make up the multiple contraventions: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68; [2017] FCAFC 113 at [148] (Dowsett, Greenwood and Wigney JJ).

124 In cases where there are multiple contraventions, the totality principle is applied as a "final check". This is to ensure that, overall, the penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 at [26] (Greenwood, Middleton and Foster JJ). This principle has been repeatedly applied in relation to civil penalties to ensure that the penalty is proportionate to the gravity of the contraventions, and is just and appropriate: *Pattinson* at [94] per Edelman J.

Approach to jointly proposed penalties

125 In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46, French CJ, Kiefel, Bell, Nettle and Gordon JJ

summarised the principles that apply in circumstances where the parties to a civil penalty proceeding have settled that proceeding, and have agreed, and have jointly proposed, a penalty to the Court. Those principles include that:

(1) there is an important public policy involved in promoting predictability of outcome in civil penalty proceedings, and the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers (at [46]);

(2) such predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention (at [46]);

(3) because fixing the quantum of a civil penalty is not an exact science, there is a permissible range in which "courts have acknowledged that a particular figure *cannot necessarily be said to be more appropriate than another*" (at [47], emphasis in original);

(4) accordingly, the Court will not depart from the submitted figure "merely because it might otherwise have been disposed to select some other figure" (at [47]);

(5) however, the Court is not bound by the figure suggested by the parties (at [48]);

(6) the question for the Court is "whether their proposal can be accepted as fixing an *appropriate* amount" and, for that purpose, the Court must satisfy itself that the submitted penalty is appropriate (at [48], emphasis in original);

(7) in civil proceedings, there is "very considerable scope" for the parties "to agree upon the appropriate remedy and for the court to be persuaded that it is an appropriate remedy" (at [57]); and

(8) subject to the Court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is an appropriate remedy in the circumstances thus revealed, it is consistent with principle and highly desirable in practice for the Court to accept the parties' proposal and therefore impose the proposed penalty (at [58]).

126 Their Honours added (at [60]) that "it is the function of the relevant regulator to regulate the industry in order to achieve compliance and, accordingly, it is to be expected that the regulator will be in a position to offer informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance".

127 Similarly, Keane J observed (at [109]) that the regulator's decision that a particular remedy is appropriate "can be expected to reflect a pragmatic assessment by the authority charged by the legislature with the effective investigation and enforcement of the regulatory regime that the public interest is best served by bringing the proceedings to a conclusion on agreed terms as to penalty", and that such a decision "may be informed by a perceived need to conserve resources for the pursuit of other wrongdoing and wrongdoers, and to avoid the risks and uncertainties usually associated with litigation". His Honour added (at [110]) that, nonetheless, the regulator's submissions, or joint submissions, must be assessed on their merits, and the Court must be wary of the possibility that the agreed penalty may be the product of the regulator having been too pragmatic in reaching the settlement.

Consideration of relevant factors

Nature, extent and circumstances of the contraventions (s 1317G(6)(a), (c) of the *Corporations Act*; s 12GBB(5)(a), (c) of *ASIC Act*)

128 I have set out the nature, extent and circumstances of the contravening conduct in paragraphs [7]-[92] above.

129 The parties in their joint submissions drew attention to the following matters.

130 First, all of the contravening occurred with respect to the DSA Fund alone. The funds under management in the DSA Fund at the time of its closure at the end of May 2024 (being approximately $15.57m) represented around 0.5% of the total $3.114 billion net funds under management invested in Fiducian Funds. Over the period of its operation, the DSA Fund had a total of 453 retail investors, and delivered an annualised return of 7.62%.

131 Secondly, the DSA Fund was created in response to demand from investors for an "ethical" or "socially responsible investment" fund, and to address concerns raised by some Fiducian Financial Planners that clients would be lost if FIMS did not offer such a fund.

132 Thirdly, despite having in place a number of documented policies and procedures (including those referred to in paragraphs [40]-[48] above), FIMS did not implement, follow or apply its own documented processes and policies in its management and operation of the DSA Fund. In particular, FIMS did not adequately monitor or review the Underlying Investments of the DSA Fund at any point during the Relevant Period.

133 Fourthly, the DSA Fund was operated for a period of nine years, with the Contravention Period running for a period of approximately four and a half years. As set out in paragraphs [58]-[62] above, from early 2021 onwards, senior employees at FIMS were aware of communications from investors or Fiducian Financial Planners raising issues about the alignment of shares held by the Underlying Investments with the Ethical Investment Objectives of the DSA Fund.

Nature and extent of any loss or damage suffered because of the contravention (s 1317G(6)(b) of *Corporations Act*, s 12GBB(5)(b) of *ASIC Act*)

134 The parties agree that there is no evidence of any direct financial loss suffered by retail investors of the DSA Fund.

135 The parties agree that there was the potential for indirect harm insofar as:

(1) retail investors were denied the opportunity to make an informed choice between the DSA Fund and other ESG funds available in the market; and

(2) there was potential for indirect harm insofar as FIMS's contravening conduct eroded confidence in the financial system and consumers' trust in statements made by responsible entities.

136 In that regard, the parties referred to the following statements by ASIC in Information Sheet 271:

> "Greenwashing distorts relevant information that a current or prospective investor might require in order to make informed investment decisions. It can erode investor confidence in the market for sustainability-related products and poses a threat to a fair and efficient financial system".

Any prior finding of similar conduct (s 1317G(6)(d) of *Corporations Act*, s 12GBB(5)(d) of *ASIC Act*)

137 FIMS has not been found by a court to have engaged in any similar contravening conduct and has not been found by a court to have engaged in any conduct contravening the *Corporations Act*.

Whether the contravention was the result of deliberate, reckless or negligent conduct

138 The parties agree that:

(1) FIMS did not deliberately or recklessly engage in the conduct that amounted to the breach of s 12DF(1) of the *ASIC Act* or s 601FC(1)(b) of the *Corporations Act*; and

(2) FIMS acted with a lack of care, having regard to the matters identified at paragraphs [90]-[92] above.

Duration of contravening conduct

139 The contravening conduct is admitted to have occurred over a period of approximately four and a half years, between 3 October 2019 and 30 May 2024, with there being repeated failures during this period of time.

140 Although the Contravention Period for the purposes of this litigation commences on 3 October 2019, FIMS acknowledges that the relevant representations in the DSA Fund PDSs which are the subject of the contraventions were made from the inception of the DSA Fund on 2 November 2015. The parties agree that in assessing the need for deterrence, the Court may have regard to this as part of the relevant circumstances, and that these matters underscore the general weight of the conduct in which FIMS engaged: see *Australian Securities and Investments Commission v MLC Limited* (2023) 168 ACSR 122; [2023] FCA 539 at [96] (Moshinsky J), citing *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 at [9] (Beach J).

The seniority of employees responsible for the contravention

141 The parties agree that:

(1) the contravening conduct involved conduct at senior levels, by persons who were (during the Contravention Period) the Executive Chair and Head of Investments of FIMS (Mr Burge), and a member of the FIMS Board and the Investment Committee (Mr Singh); and

(2) the conduct and involvement of senior employees in the contravening conduct persisted for the entirety of the Relevant Period. For example:

(a) Mr Singh and Mr Burge (who were respectively, at the relevant time, the Executive Chair of FIMS and the Head of Investments) were involved in the creation of the DSA Fund, including the selection and approval of the Underlying Investments;

(b) Mr Singh was (as Executive Chair of FIMS) involved in the drafting of the first version of the DSA Fund PDS, and subsequently (as a member of the Investment Committee and FIMS Board) gave approval for later versions of the DSA Fund PDS (in which he was joined by Mr Burge, as the Head of Investments and Executive Chair of FIMS during the Contravention Period); and

(c) Mr Burge (as Executive Chair of FIMS and the Head of Investments) and Mr Singh (as Executive Chair of Fiducian Group and a member of the FIMS Board and Investment Committee), were recipients of the 5 October 2021 email which specifically raised concerns about the DSA Fund's exposure to investments in shares or companies exposed to fossil fuels, and which discussed the possibility that FIMS exclude fossil fuels from the DSA Fund (see paragraph [59]-[60] above). In response to this email, Mr Burge expressed the view that "ESG is still a fad" and suggested that "we should not be spending too much in terms of time or resources on this small sub-sector of the market"; and Mr Singh stated that "there is no need to promote the topic unless we receive planner pressure" (see paragraphs [61]-[62] above). No substantive amendments were made to the DSA Fund after 5 October 2021 or prior to it being closed permanently on 30 May 2024.

FIMS's compliance systems

142 At all relevant times, FIMS had in place systems, policies and procedures directed at ensuring compliance.

143 However, FIMS accepts that, with respect to the specific conduct the subject of these proceedings, there were failures of compliance in that FIMS:

(1) did not comply with the key operational compliance measures set out in the Compliance Plan, including by distributing DSA Fund PDSs and External Communications that were liable to mislead the public;

(2) did not comply with the Quality Assurance Process as required in respect of:

(a) External Communications relating to the DSA Fund; and

(b) the DSA Fund PDS (including, specifically, non-compliance with the PDS Production Process as outlined in the Quality Assurance Process, namely four instances where the required PDS Checklist had not been completed and two instances where Board approval was not obtained in a manner consistent with the PDS Production Process); and

(3) did not provide any specific training to staff in relation to ESG, SRI or ethical investing.

144 Importantly, the parties agree that since the commencement of the proceedings, FIMS has taken steps to address the contravening conduct, including by:

(1) engaging an independent expert to review the wording of all current Fiducian Fund PDSs to ensure that they accurately reflect the aims, processes and investment objectives of the Underlying Investments (as set out in the PDSs and Investment Management Agreements of those Underlying Investments); and

(2) increasing resources through the creation of a new Investment Operations Team, having added two team members whose role includes responsibility for oversight of the Fiducian Funds.

FIMS's size and financial position

145 In their joint submissions, the parties referred to the following matters regarding FIMS's size and financial position:

(1) during the Contravention Period, FIMS operated fourteen Fiducian Funds;

(2) in FY2024, FIMS had a total of $5.17 billion in assets under management across the Fiducian Funds it operated;

(3) in respect of the DSA Fund, at the time of its closure FIMS managed $15.57 million in funds;

(4) the DSA Fund had 453 investors in total over the nine-year period of its operation; and

(5) FIMS did not derive a profit from the operation of the DSA Fund. The gross revenue earned by FIMS from the DSA Fund from inception to closure was $641,000, against total costs incurred by FIMS with respect to the DSA Fund of $1,378,000. This results in a net loss to FIMS across the life of the DSA Fund's operation of $737,000.

146 The parties agreed that the Court may have also regard to the size and resources of Fiducian Group when assessing an appropriate penalty. At the time of the DSA Fund's closure in May 2024, Fiducian Group's market capitalisation was $235 million. According to its FY24 annual report, Fiducian Group's annual revenue was $80.8 million ($22.07 million for funds management, $27.70 million for financial planning and $31.03 for platform administration and corporate services), and it had a net profit after tax of $15.04 million.

Contrition and co-operation by FIMS

147 FIMS has shown contrition for its contravening conduct and has co-operated with ASIC from shortly after commencement of this proceeding. In particular,

FIMS sought a court-ordered mediation, agreed to facts and admissions sufficient to establish the contraventions, and agreed to a proposed penalty (subject to court approval). Through this co-operation, FIMS has avoided the need for a contested hearing.

148 In addition, since the proceeding has commenced, FIMS has taken the steps to address its contravening conduct as set out in paragraph [144] above.

149 I accept the parties' joint submission that FIMS's acceptance of wrongdoing, its cooperation throughout the proceeding, and its contrition are mitigating factors in favour of FIMS.

Penalties in other decisions

150 While acknowledging that reference to the penalties imposed in other decisions is of limited assistance (for the reasons given in paragraphs [119]-[121] above), the parties drew the Court's attention to the following authorities, which involved the imposition of civil penalties upon large financial institutions in relation to ESG or "greenwashing cases" in the last 24 months. Each of the below cases concerned misleading or deceptive conduct in contravention of ss 12DB(1) or 12DF(1) of the *ASIC Act*. The level of funds under management differed materially in those cases, as set out below.

151 In *Australian Securities and Investments Commission v LGSS Pty Ltd (No 3)* [2025] FCA 205, ActiveSuper was found to have contravened ss 12DB and 12DF of the *ASIC Act* in relation to its claims that it had excluded investments in "gambling", "coal" and "oil sands" when it had in fact, maintained exposure to them. The Court ordered a pecuniary penalty of $10.5 million. ActiveSuper had funds under management of $14.7 billion for 86,547 members (at [15]).

152 In *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited* [2024] FCA 850, Mercer claimed its "Sustainable Plus" options excluded investments in fossil fuels, gambling, and alcohol, but the fund retained holdings in 19 companies involved in those industries. The Court imposed a pecuniary penalty of $11.3 million. Mercer Super Trust had

approximately 850,000 members and managed assets of approximately $65 billion (at [14]). Within the trust, the Mercer Sustainable Plus option had 2,477 unique members and total managed assets to the value of approximately $174 million (at [131]).

153 In *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd (No 2)* [2024] FCA 1086, Vanguard admitted that a significant proportion of securities in its "Ethically Conscious" fund were not screened against ESG criteria. The Court imposed a pecuniary penalty of $12.9 million. Vanguard had $104.6 billion in funds under management across its Australian business (at [92]).

Conclusion on penalty

154 I accept the parties' joint submission that FIMS's contraventions of s 12DF may appropriately be analysed as one course of conduct. This is because, across the Contravening Period, the content of each DSA Fund PDS was relevantly identical, and the reasons why the relevant representations were misleading and deceptive and false, and why FIMS's conduct was liable to mislead, were the same, such that there is a close factual and legal commonality between the contraventions.

155 Further, I accept the parties' joint submission that the application of the "totality" principle, as a final consideration of whether the cumulative total of the penalty is just and appropriate and in proportion to the contravening conduct considered as a whole, supports the penalty proposed in this case.

156 I am satisfied that pecuniary penalties in the total amount of $7.3m will provide the necessary sting or burden to achieve the objects of deterring future contraventions of a similar kind, whether by FIMS or other persons.

157 I am also satisfied that a penalty of $5 million in relation to the contravention of s 601FC(1)(b) of the *Corporations Act*, and a penalty of $2.3 million in relation to the contraventions of s 12DF(1) of the *ASIC Act*, is appropriate, as it takes into account the extent of FIMS's failures over a period of several years, and in

particular its failure to discharge its duties to act with care and diligence, and also takes into account FIMS's contrition and co-operation, as well as the steps which it has taken to improve its systems and processes.

158 Having regard to all the circumstances of this case, I am satisfied that a pecuniary penalty in a total amount of $7.3m is proportionate to the gravity of FIMS's contraventions, and is just and appropriate.

Other relief

159 In addition to the agreed declarations and pecuniary penalties, the parties sought an order, pursuant to s 12GLB(1)(a) and/or s 12GLA(1) and (2)(d) of the *ASIC Act*, that FIMS, within 30 days of the date of the Court's orders, take all reasonable steps to send to each person who was a DSA Fund member during the Contravention Period, at FIMS's own expense, a notice in terms agreed by the parties. The agreed form of the proposed notice was provided to the Court at the hearing.

160 Section 12GLB(1)(a) of the *ASIC Act* provides that the Court may, on application by ASIC, make an adverse publicity order in relation to a person who has been ordered to pay a pecuniary penalty under s 12GBB. An "adverse publicity order" is defined in s 12GLB(2) as follows:

> In this section, an **adverse publicity order**, in relation to a person, means an order that:
>
> (a) requires the person to disclose, in the way and to third parties specified in the order, such information as is so specified, being information that the person has possession of or access to; and
>
> (b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

161 Section 12GLA(1) of the *ASIC Act* provides that the Court may, on application by ASIC, make one or more of the orders mentioned in subs (2) in relation to a person who has engaged in contravening conduct, which include, relevantly, "an order requiring the person to publish, at the person's expense and in the

way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order" (s 12GLA(2)(d)).

162 In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd (No 2)* [2012] FCA 629 at [143], Murphy J observed that authorities reveal various rationales for the making of such orders, including:

(1) to alert affected persons to the fact that there has been misleading conduct;

(2) to protect the public interest by dispelling incorrect or false impressions that were created by the misleading conduct; and

(3) to support the primary orders and to assist in preventing repetition of the contravening conduct.

163 I accept the parties' submission that the Court should make the order sought in this case, having regard to the period over which the misleading or deceptive representations were made, and the numerous failures by FIMS resulting in its breach of duty in s 601FC(1)(b).

164 Finally, it is agreed that FIMS should pay ASIC's costs of the proceeding in a fixed sum. An order will also be made to this effect.

ORDERS

165 For the reasons set out above, I make the following orders:

(1) The Defendant contravened s 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) by publishing each version of the Product Disclosure Statement (**PDS**) of the Diversified Social Aspirations Fund which contained the ESG Statements and Systems and Processes Statements, which were not amended or qualified, and which were liable to mislead the public as to the nature and/or the characteristics of financial services:

(a) PDS Version A, published between 3 October 2019 and 31 August 2020;

(b) PDS Version B, published between 1 September 2020 and 30 June 2021;

(c) PDS Version C, published between 1 July 2021 and 29 June 2022;

(d) PDS Version D, published between 30 June 2022 and 29 June 2023;

(e) PDS Version E, published between 30 June 2023 and 31 January 2024; and

(f) PSD Version F, published between 1 February 2024 and 30 May 2024.

(2) The Defendant contravened s 601FC(1)(b) of the *Corporations Act 2001* (Cth), in its capacity as the responsible entity of the DSAF, by failing to discharge its duties to act with the care and diligence that a reasonable person would exercise if they were a Responsible Entity in the Defendant's position in relation to the DSAF, by reason of its failure to:

(a) adequately monitor the shares or companies that the Underlying Investments were invested in for alignment with the ESG Statements in the PDS;

(b) take steps to review or amend the PDS to reflect, and align with, the securities or shareholdings of the Underlying Investments of the DSAF;

(c) review the investment strategies of the Underlying Investments, including the Investment Screens applied by each of the Underlying Investments, for compliance with the Ethical

Investment Objectives of the DSAF, and the ESG Statements in the PDS.

(d) take steps to change the Underlying Investments of the DSAF to align with the ESG Statements in the PDS.

THE COURT ORDERS

(3) Pursuant to s 12GBB(1) of the *ASIC Act*, the Defendant pay to the Commonwealth of Australia within 14 days of the date of these orders a pecuniary penalty in the amount of $2,300,000 in respect of its contraventions of s 12DF of the *ASIC Act* referred to in declaration 1 above.

(4) Pursuant to s 1317G(1) of the *Corporations Act*, the Defendant pay to the Commonwealth of Australia within 14 days of the date of these orders a pecuniary penalty in the amount of $5,000,000 in respect of its contraventions of s 601FC(1)(b) of the *Corporations Act* referred to in declaration 2 above.

(5) Pursuant to s 12GLB(1)(a) and/or s 12GLA(1) and (2)(d) of the *ASIC Act* the Defendant, within 30 days of the date of these orders, take all reasonable steps to send to each person who was a DSAF member during the Contravention Period, at the Defendant's own expense, a notice on such terms and in a manner and form as agreed between the parties, by sending a copy of the notice to the last known email or postal address for each relevant person.

(6) The Defendant to pay the Plaintiff's costs, fixed in the amount of $650,000, within 14 days of these Orders.

(7) The proceeding otherwise be dismissed.

(8) Liberty to apply on 3 days' notice.

****

I certify that the 165 preceding paragraphs

are a true copy of the reasons for judgment

herein of Justice Nixon

Dated 11 August 2026

....

Associate to Nixon J