

# FEDERAL COURT OF AUSTRALIA

## **Australian Securities and Investment Commission v Port Philip Publishing Pty Ltd [2019] FCA 1483**

File number: VID 1639 of 2018

Judge: **O'CALLAGHAN J**

Date of judgment: 29 August 2019

Date of publication of reasons: 10 September 2019

Catchwords: **CORPORATIONS** – parties seeking agreed penalties and declarations for contraventions of ASIC Act and Corporations Act – joint submissions – penalties and declarations appropriate

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA(1), 12DB(1), 12GBA(2)  
*Corporations Act 2001* (Cth) ss 912A(1), 1041H(1)

Cases cited: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; (2007) ATPR 42-140  
*Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25  
*Australian Securities & Investments Commission v Malouf Group Enterprises Pty Ltd* [2018] FCA 80  
*Australian Securities and Investments Commission v Padbury Mining Ltd* [2016] FCA 990; (2016) 116 ACSR 208  
*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482  
*Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421  
*Kerkhoffs v Registrar of Aboriginal and Torres Strait Islander Corporations* [2014] FCAFC 66  
*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285  
*Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346  
*Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* [2002] NSWSC 483;

(2002) 42 ACSR 80

*Trade Practices Commission v CSR Ltd* [1991] ATPR 52

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## ORDERS

VID 1639 of 2018

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

**AND:**                        **PORT PHILLIP PUBLISHING PTY LTD**  
First Defendant

**KRISTAN LEWIS SAYCE**  
Second Defendant

**JUDGE:**                    **O'CALLAGHAN J**

**DATE OF ORDER:**    **29 AUGUST 2019**

**ON THE FACTS STATED IN THE STATEMENT OF AGREED FACTS DATED 27  
AUGUST 2019, THE COURT MAKES THE FOLLOWING DECLARATIONS:**

1.     A declaration pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) that the first defendant (**PPP**), by:

- (a)    preparing a document entitled “Everyday Australians Now Legally ‘Piggybacking’ ‘the Future Fund’ ... and collecting extra monthly income injections of \$540 right up to \$6,667” (**Promo Letter**) and causing it to be published on PPP’s websites [www.moneymorning.com.au](http://www.moneymorning.com.au) and [www.marketsandmoney.com.au](http://www.marketsandmoney.com.au) (**Websites**) and emailed to approximately 200,000 subscribers between September 2017 and January 2018; and
- (b)    preparing a document entitled “*Your Quick Start Guide to ‘Piggybacking’ the Future Fund*” (**Guide**) and causing it to be sent to 833 subscribers of PPP,

has engaged in conduct that was:

- (c)    in this jurisdiction, in relation to a financial product or a financial service, and was misleading or deceptive or likely to mislead or deceive, in contravention of s 1041H of the *Corporations Act 2001* (Cth) (**Corporations Act**); and
- (d)    in trade or commerce, in relation to a financial service, and was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**),

in circumstances where:

- (e) the Promo Letter and the Guide promoted an investment strategy targeted towards retiree investors and investors approaching retirement amongst others which involved investing in a portfolio of specific listed investment companies and exchange traded funds which was said to mimic the performance of the Australian Government's Future Fund (**Investment Strategy**);
- (f) the Promo Letter made representations which were misleading or deceptive or likely to mislead or deceive as follows:
  - (i) that the Promo Letter represented the recommendations and opinions of its retirement-income expert, Editor A (name intentionally withheld), when in fact the Promo Letter did not in all respects represent the opinions of Editor A having been in parts substantially copied by one of PPP's copywriters from a promotion published by a related entity of PPP in the United States entitled "*Americans Now Legally Piggybacking Canadian Social Security ... And Collecting Extra Monthly Checks from \$400 to \$4,700*" and Editor A was not a retirement-income expert in that he had no qualifications or experience as a retirement-income expert;
  - (ii) that Editor A had conducted more than 900 hours of research in relation to the Investment Strategy when in fact Editor A had conducted 900 hours of research in relation to the individual assets recommended in the Investment Strategy but not in relation to the Investment Strategy itself;
  - (iii) that Editor A had connected with over 5,400 investors who had generated income by adopting the Investment Strategy when in fact Editor A had in June 2017 sent feedback requests to over 5,400 of PPP's 'Total Income' subscribers but had not connected with 5,400 people who had generated income by adopting the Investment Strategy, and there was no evidence that any of the alleged 5,400 investors referred to in the Promo Letter had generated income by adopting the Investment Strategy as it had never previously been promoted to PPP's subscribers;
  - (iv) that by adopting the Investment Strategy, investors could receive regular, monthly income without disclosing that the Investment Strategy involved investment in the securities of exchange traded funds and listed entities which only paid dividends on a quarterly or half-yearly basis;

- (v) that by adopting the Investment Strategy, investors could receive regular monthly income of between \$540 to \$6,667, without disclosing that in order to generate such returns investors had to invest approximately \$154,286 and \$1.9 million respectively;
- (vi) that by adopting the Investment Strategy an investor could mimic the performance of the Future Fund and thereby generate the same or substantially similar annual returns to those achieved by the Future Fund and expose an investor to assets having the same or substantially similar levels of risk as that adopted by the Future Fund in September 2017, when in fact:
  - i. an investor could not mimic the performance of the Future Fund by adopting the Investment Strategy because (1) the Future Fund has access to some strategies and markets that are unavailable to an individual investor; (2) the Future Fund is highly diversified globally whereas the Investment Strategy is more highly concentrated in Australian equities; (3) the Future Fund has access to global managers; and (4) the Investment Strategy was more heavily weighted in favour of growth assets than defensive assets, as compared to the Future Fund in September 2017; and
  - ii. as a consequence of the matters in (i) above, adopting the Investment Strategy was likely to have generated lower returns than the returns promoted in the Promo Letter and exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017.
- (g) the Guide made representations which were misleading or deceptive or likely to mislead or deceive in that by adopting the Investment Strategy an investor could mimic the performance of the Future Fund and thereby generate the same or substantially similar annual returns to that achieved by the Future Fund and expose an investor to assets having the same or substantially similar levels of risk as that adopted by the Future Fund in September 2017, when in fact:
  - (i) an investor could not mimic the performance of the Future Fund by adopting the Investment Strategy because (1) the Future Fund has access to some strategies and markets that are unavailable to an individual

investor; (2) the Future Fund is highly diversified globally whereas the Investment Strategy is more highly concentrated in Australian equities; (3) the Future Fund has access to global managers; and (4) the Investment Strategy was more heavily weighted in favour of growth assets than defensive assets, as compared to the Future Fund in September 2017; and

- (ii) as a consequence of the matters in (i) above, adopting the Investment Strategy was likely to have generated lower returns than the returns promoted in the Promo Letter and exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017.

2. A declaration pursuant to s 21 of the Federal Court Act that PPP, by:

- (a) naming Investor A (name intentionally withheld) (as “Jolly”) in the Promo Letter and representing that he had received returns of around \$6,667 per month by adopting the Investment Strategy when in fact he:
  - (i) had never adopted the Investment Strategy;
  - (ii) had been investing for more than 30 years and had a portfolio worth more than \$1 million;
  - (iii) held a portfolio which only included one of the seven securities promoted by the Investment Strategy; and
  - (iv) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy;
- (b) naming Investor B (name intentionally withheld) (as “Leon M”) in the Promo Letter and representing that he had received returns of around \$540 per month by adopting the Investment Strategy when in fact he:
  - (i) had never adopted the Investment Strategy;
  - (ii) held a portfolio which included 18 securities, only six of which were securities promoted by the Investment Strategy; and
  - (iii) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy;
- (c) naming Investor C (name intentionally withheld) (as “MH”) in the Promo Letter and representing that he had received returns of around \$1,437.50 per month by adopting the Investment Strategy when in fact he:

- (i) had never adopted the Investment Strategy;
- (ii) held a portfolio which included ten securities, only one of which were securities promoted by the Investment Strategy;
- (iii) held a portfolio of which only 20% was invested in securities, the remainder being held as cash; and
- (iv) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy,

has, in trade or commerce, in connection with the promotion of the supply or use of financial services, made false or misleading representations that purported to be testimonials, or that concerned testimonials, in contravention of ss 12DB(1)(c) and (d) of the ASIC Act.

3. A declaration pursuant to s 21 of the Federal Court Act that PPP, by engaging in the conduct referred to in paragraphs 1 and 2 above has failed to:

- (a) do all things necessary to ensure that it provided financial services honestly, efficiently and fairly in contravention of s 912A(1)(a) of the Corporations Act; and
- (b) comply with the financial services laws, in contravention of s 912A(1)(c) of the Corporations Act.

4. A declaration pursuant to s 21 of the Federal Court Act that the second defendant (**Mr Sayce**), by:

- (a) commissioning, reviewing, amending and approving for publication the Promo Letter and causing it to be published on the Websites and emailed to approximately 200,000 subscribers between September 2017 and January 2018; and
- (b) commissioning the Guide and causing it to be sent to 833 paid subscribers of PPP,

in circumstances where:

- (c) the Promo Letter made the representations referred to in paragraph 1(f)(i) to (vi) above which were misleading or deceptive or likely to mislead or deceive; and
- (d) the Guide made the representations referred to in paragraph 1(g)(i) to (ii) above which were misleading or deceptive or likely to mislead or deceive,

Mr Sayce has engaged in conduct that was:

- (e) in trade or commerce, in relation to a financial service, and was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act.
5. A declaration pursuant to s 21 of the Federal Court Act that Mr Sayce, by:
- (a) naming Investor A (as “Jolly”) in the Promo Letter and representing that he had received returns of around \$6,667 per month by adopting the Investment Strategy;
  - (b) naming Investor B (as “Leon M”) in the Promo Letter and representing that he had received returns of around \$540 per month by adopting the Investment Strategy; and
  - (c) naming Investor C (as “MH”) in the Promo Letter and representing that he had received returns of around \$1,437.50 per month by adopting the Investment Strategy,

has, in trade or commerce, in connection with the promotion of the supply or use of financial services, made false or misleading representations that purported to be testimonials, or that concerned testimonials, in contravention of ss 12DB(1)(c) and (d) of the ASIC Act.

**AND THE COURT ORDERS:**

1. There be leave to the plaintiff to file its amended originating process dated 27 August 2019.
2. Pursuant to s 12GBA(1)(a) of the ASIC Act that PPP pay a pecuniary penalty of \$600,000 in respect of its contraventions of ss 12DB(1)(c) and (d) of the ASIC Act.
3. Pursuant to s 12GBA(1)(a) of the ASIC Act that Mr Sayce pay a pecuniary penalty of \$50,000 (with \$20,000 payable by 30 September 2019 and two further payments of \$15,000 each, payable by 30 September 2020 and 30 September 2021, respectively) in respect of his contraventions of ss 12DB(1)(c) and (d) of the ASIC Act.
4. Pursuant to s 12GLA(2)(b) of the ASIC Act, that PPP, at its own expense, will establish a Compliance, Education and Training Program (**Compliance Program**) in accordance with the terms and form contained in Annexure A to these Orders.
5. Pursuant to s 12GLD(1) of the ASIC Act, that Mr Sayce be disqualified from managing corporations for a period of 12 months from the date of this order.



6. Pursuant to ss 12GLA(2)(c) and (d) of the ASIC Act, that PPP make corrective disclosures and publish corrective advertising as follows:
  - (a) within 7 days of the date of these orders, PPP must place a notice (in the form of Annexure B to these Orders) [not here reproduced], in a prominent part of the homepage of the Websites notifying readers of the declarations and orders made, and must keep such notice on the Websites for a period of one month;
  - (b) within 14 days of the date of these orders, PPP must send a communication (in the form of Annexure C to these Orders) [not here reproduced], by email, to each person who became a subscriber of 'Total Income' after the date of the Promo Letter, notifying them of the declarations and orders made; and
  - (c) within 14 days of the date of these orders, PPP must send a communication (in the form of Annexure D to these Orders) [not here reproduced], by email, to each person who was a subscriber of the Websites as at the date of the Promo Letter.
7. The first defendant pays the plaintiff's costs of the Proceeding.

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

## ANNEXURE A

### **Requirements for Compliance, Education and Training Program**

Port Phillip Publishing Pty Ltd (ACN 117 765 009) (**PPP**) will establish a Compliance, Education and Training Program (**Compliance Program**) that complies with each of the following requirements:

#### **1. General**

- 1.1. PPP will pay all of its own costs associated with implementing the Compliance Program, including but not limited to the appointment of the Consultant (defined **below** at paragraph 2.1).

#### **2. Appointments – External Consultant**

- 2.1. Within seven (7) days of the date of the Court Order, PPP will engage a suitably qualified, independent external compliance consultant (**Consultant**) whose:
  - 2.1.1. terms of appointment are to be based on the matters set out at paragraphs 3 and 7 below; and
  - 2.1.2. whose appointment and terms of appointment are to be approved by the plaintiff in writing, such approval not to be unreasonably withheld.

#### **3. Initial review**

- 3.1. PPP will instruct the Consultant to conduct an initial review and risk assessment in accordance with 3.2.1 to 3.2.4 **below** (**Initial Review**) and prepare the report referred to in 3.4, to be completed within two (2) months of the Court Order or such further time as the Consultant requires, with any extension of time to be approved by the plaintiff, such approval not to be unreasonably withheld.
- 3.2. The Initial Review must:
  - 3.2.1. identify areas where PPP is at risk of breaching Part 2 of Division 2 of the *Australian Securities & Investments Commission Act 2001* (Cth) (**ASIC Act**) having regard to, amongst other things, ASIC Regulatory Guide 234 – *Advertising financial products and services (including credit)*;
  - 3.2.2. identify where there may be gaps in PPP's existing policies, procedures and systems for managing these risks;
  - 3.2.3. undertake a review of PPP's bonus structures, including a review of the criteria for eligibility for bonuses, to identify whether the bonus structure and/ or eligibility criteria are at risk of encouraging PPP employees or contractors to engage in conduct that may contravene the ASIC Act; and

- 3.2.4. provide recommendations for action having regard to the assessment.
- 3.3. PPP will provide all reasonable assistance to the Consultant to enable the Consultant to complete the Initial Review.
- 3.4. The Consultant will prepare a written report setting out:
  - 3.4.1. a description of the methodology, parameters and limitations applicable to the review, including evidence gathered and examined;
  - 3.4.2. the findings of the review; and
  - 3.4.3. recommendations made as a consequence of the Initial Review.
- 3.5. PPP will provide a copy of the report prepared in accordance with paragraph 3.4 **above** to the plaintiff within three (3) days of receiving it from the Consultant.

#### **4. Compliance Policy**

- 4.1. Within three (3) months of the date of the Court Order, or 1 month from receipt of the Consultant's report in accordance with paragraph 3.4 above (whichever is the later), PPP will issue a revised compliance policy (**Compliance Policy**) that:
  - 4.1.1. is written in plain language;
  - 4.1.2. contains a statement of commitment to compliance with Part 2 of Division 2 of the ASIC Act;
  - 4.1.3. contains a strategic outline of how commitment to ASIC Act compliance will be realised within PPP;
  - 4.1.4. incorporates all recommendations made by the Consultant in the Initial Review;
  - 4.1.5. contains a requirement for all staff to report any Compliance Program related issues and ASIC Act compliance concerns to a member of PPP's compliance team;
  - 4.1.6. ensures that remuneration for employees, agents and representatives of PPP is not determined by reference to revenue derived by PPP through failures to comply with or practices which do not comply with the Compliance Policy;
  - 4.1.7. contains a clear statement that PPP will take action internally including through clawback or withholding bonuses, against any persons who are knowingly or recklessly concerned in a contravention of the ASIC Act and will not indemnify them in the case of investigation and prosecution by ASIC.

#### **5. Education & Training**

- 5.1. PPP will ensure that the Compliance Program provides for regular (at least once a year) and practical training for all directors, officers, employees and representatives of PPP.
- 5.2. PPP must ensure that the training is designed and conducted by a suitably qualified compliance professional or legal practitioner with expertise in the ASIC Act (**Compliance Trainer**).
- 5.3. PPP must provide to the Compliance Trainer, for the purposes of conducting the training, copies of:
  - 5.3.1. the Court Order;
  - 5.3.2. the Compliance Policy;
  - 5.3.3. the complaints handling system; and
  - 5.3.4. all reports prepared by the Consultant as at the date the training is scheduled.
- 5.4. PPP will ensure that the Compliance Program includes a requirement that awareness of the Compliance Policy, complaints handling system and ASIC Act compliance issues form part of the induction of all new directors, officers, employees and representatives of PPP.

## **6. Supply of the Compliance Program Documents to the Applicants**

- 6.1. Within three (3) months of the date of the Court Order or six weeks from receipt of the Consultant's report in accordance with paragraph 3.4 above (whichever is the later), PPP will provide the plaintiff with copies of each document constituting the Compliance Program.

### **Compliance Reviews**

- 6.2. PPP will instruct the Consultant to conduct a further review of the Compliance Program (**Compliance Review**) to be carried out in accordance with paragraphs 6.3.1 to 6.3.5 **below** and prepare the Compliance Review Report (defined in paragraph 6.5 **below**) by [insert date].
- 6.3. The Compliance Review must:
  - 6.3.1. review the extent to which the Compliance Program includes all of the requirements detailed in paragraphs 4.1 to 5.4 **above**;
  - 6.3.2. review the extent to which the Compliance Program adequately addresses the matters identified and recommendations made in the Initial Review or any subsequent review;
  - 6.3.3. review the effectiveness of the ASIC Act training;

- 6.3.4. review the effectiveness of the complaints handling system; and
- 6.3.5. make recommendations for rectifying any deficiencies in 6.3.1 to 6.3.4 **above** that the Consultant considers are reasonably necessary to ensure that PPP maintains and continues to implement the Compliance Program in accordance with the Court Order.
- 6.4. PPP will provide all reasonable assistance to the Consultant to enable the Consultant to complete the Compliance Review.
- 6.5. The Consultant will prepare a written report (**Compliance Review Report**) setting out:
  - 6.5.1. a description of the methodology, parameters and limitations applicable to the review, including evidence gathered and examined;
  - 6.5.2. the findings of the review; and
  - 6.5.3. recommendations and actions made to ensure the continuing effectiveness of the Compliance Program.
- 6.6. PPP will provide a copy of the Compliance Review Report to the plaintiff within three (3) days of receiving it from the Consultant.

## 7. Recommendations

- 7.1. PPP shall implement promptly and with due diligence any recommendations made by the Consultant or required by the plaintiff that are reasonably necessary to ensure that PPP maintains and continues to implement the Compliance Program in accordance with the Court Order.
- 7.2. If requested by the plaintiff, PPP shall, at its own expense, provide the plaintiff with copies of documents and information in respect of matters that are the subject of the Compliance Program.
- 7.3. PPP will, in the event that the Compliance Review Report identifies any recommendations or actions that have not been implemented provide ASIC with a written plan (**Remedial Action Plan**) setting out the:
  - 7.3.1. action PPP proposes to take to ensure that those recommendations and actions are implemented; and
  - 7.3.2. specific timeframe(s) within which such action will be taken.
- 7.4. PPP will provide the Remedial Action Plan to the plaintiff within seven (7) days of the Compliance Review Report being provided to the plaintiff.
- 7.5. PPP will implement any Remedial Action Plan within the timeframe specified in paragraph 7.3.2 **above**, except that if the plaintiff requires any reasonable

modifications to any Remedial Action Plan then PPP will implement the Remedial Action Plan as so modified.

## REASONS FOR JUDGMENT

**O'CALLAGHAN J:**

### Introduction

- 1 On 29 August 2019, I made the above orders and declarations. I now provide my reasons for doing so.
- 2 This proceeding concerns two publications made by the first defendant (**PPP**), which, it is agreed, constituted contraventions by PPP of the *Corporations Act 2001* (Cth), and contraventions by both PPP and the second defendant (**Mr Sayce**) of the *Australian Securities and Investment Commission Act 2001* (Cth). The first publication was a letter entitled “Everyday Australians Now Legally ‘Piggybacking’ ‘the Future Fund’ ... and collecting extra monthly income injections of \$540 right up to \$6,667” (the **Promo Letter**), which was published on PPP’s websites (the **websites**) and emailed to approximately 200,000 subscribers between September 2017 and January 2018. The second was a document entitled “Your Quick Start Guide to ‘Piggybacking’ the Future Fund” (the **Guide**), which it sent to 833 subscribers of PPP.
- 3 The Promo Letter and the Guide were directed at retired investors and investors approaching retirement, among others. They promoted an investment strategy or portfolio which involved investing in a portfolio of seven specific listed investment companies and exchange traded funds which was said to “mimic” the Australian Government’s Future Fund (the **Future Fund**), the precise details of which were said to be contained in the Guide (the **Investment Strategy**). The Investment Strategy was referred to in the Promo Letter as “piggy-backing the Future Fund”.
- 4 The Promo Letter also contained testimonials related to returns supposedly achieved through the Investment Strategy.
- 5 The Future Fund is Australia’s sovereign wealth fund. Established in 2006 and independent of Government, it is mandated to invest money from budget surpluses and other public assets to generate high, risk adjusted returns over the long term. As at 30 June 2017, the Future Fund had \$133 billion investments under management.
- 6 The parties have reached agreement on the terms on which they seek the resolution of this proceeding and have filed a joint submission, an agreed statement of facts (**SOAF**) (see

Annexure 1), and proposed orders. Broadly, I agree with the contents of these documents, as will be seen in the reasons below.

7 The relevant legal principles are well established, and I do not propose to refer to them in any detail.

### **The contraventions**

8 ASIC alleges, and PPP admits, that PPP contravened ss 912A(1)(a) and (c) and 1041H(1) of the *Corporations Act 2001* (Cth) (the **Corporations Act**) and ss 12DA(1) and 12DB(1)(c) and (d) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) in relation to the Promo Letter and the Guide.

9 Mr Sayce admits that he contravened ss 12DA(1) and 12DB(1)(c) and (d) of the ASIC Act in relation to the Promo Letter and the Guide.

10 In respect of PPP's contraventions, ASIC and PPP jointly seek the following relief:

- (a) declarations regarding the contraventions;
- (b) a pecuniary penalty of \$600,000 (for its breaches of the ASIC Act);
- (c) orders as to a compliance program and corrective disclosure and advertising;  
and
- (d) that PPP pay ASIC's costs.

11 In respect of Mr Sayce's contraventions, ASIC and Mr Sayce seek the following relief:

- (a) declarations regarding the contraventions;
- (b) a pecuniary penalty of \$50,000, with \$20,000 to be paid upfront followed by 2 annual payments of \$15,000; and
- (c) orders pursuant to s 12GLD(1) of the ASIC Act disqualifying Mr Sayce from managing corporations for a period of one year.

### **Applicable Legislation**

12 Section 12DA(1) of the ASIC Act provides:

A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

13 Section 12DB(1) of the ASIC Act provides relevantly



A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

...

- (c) make a false or misleading representation that purports to be a testimonial by any person relating to services; or
- (d) make a false or misleading representation concerning:
  - (i) a testimonial by any person; or
  - (ii) a representation that purports to be such a testimonial; relating to services ...

14 Section 1041H of the Corporations Act provides:

A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

15 Section 912A(1) of the Corporations act provides relevantly:

A financial services licensee must:

- (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
- ...
- (c) comply with the financial services laws ...

### **Contraventions by PPP**

#### ***Contravention of s 1041H of the Corporations Act and s 12DA of the ASIC Act***

16 The conduct of PPP which gives rise to a contravention of s 1041H of the Corporations Act and s 12DA of the ASIC Act consists of a series of representations made in the Promo Letter and the Guide. The representations and the relevant statements giving rise to each of the representations are set out in [17] and [19]-[25] of the SOAF (in relation to the Promo Letter) and [28]-[31] of the SOAF (in relation to the Guide). The representations made by PPP in the Promo Letter related to: the expertise and opinions of the author of the Promo Letter, the extent of research conducted by the author in relation to the Investment Strategy, and the income that could be obtained by adopting the Investment Strategy. These representations were misleading or deceptive for the reasons identified in the SOAF (see [20]-[25] of the SOAF) in that the Promo Letter did not disclose facts relevant to the income that could be obtained, and the size of returns and risk exposure from adopting the Investment Strategy.

- 17 The representations made by PPP in the Guide also related to the promoted Investment Strategy. These representations were misleading or deceptive for the reasons identified in the SOAF (see [32] of the SOAF) in that the Guide failed to disclose certain relevant facts and risks associated with the Investment Strategy. The facts and risks which were not disclosed concern the frequency of dividend returns, the amount required to be invested to achieve the dividend returns and the risk that adopting the promoted Investment Strategy was likely to have generated lower returns than the returns promoted in the Promo Letter and exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017.
- 18 The parties agree that by publishing and disseminating both the Promo Letter and the Guide, PPP engaged in conduct that was:
- (a) in relation to a financial product or a financial service, and was misleading or deceptive or likely to mislead or deceive, in contravention of s 1041H of the Corporations Act; and
  - (b) in trade or commerce, in relation to a financial service, and was misleading or deceptive or likely to mislead or deceive in contravention of s 12DA(1) of the ASIC Act.

***Contravention of ss 12DB(1)(c) and (d): Testimonials***

- 19 The conduct of PPP which gives rise to a contravention of s 12DB(1) of the ASIC Act consists of the publication of testimonials in the Promo Letter. The representations and the relevant statements are set out in [33]-[34] of the SOAF.
- 20 The contravention occurred because the Promo Letter represented that the testimonials related to returns achieved through the Investment Strategy promoted in the Promo Letter when in fact the returns had no connection to the Investment Strategy.
- 21 The Promo Letter:
- (a) named Investor A (as “Jolly”) and represented that he had received returns of around \$6,667 per month by adopting the Investment Strategy (SOAF, [34(a)]);
  - (b) named Investor B (as “Leon M”) and represented that he had received returns of around \$540 per month by adopting the Investment Strategy (SOAF, [34(b)]);
- and

- (c) named Investor C (as “MH”) and represented that he had received returns of around \$1,437.50 per month by adopting the Investment Strategy (SOAF, [34(c)]).

22 The above representations were misleading for the reasons identified in the SOAF (see [36]-[47] of the SOAF) in that none of the above three investors had adopted the Investment Strategy.

23 The parties submit that PPP’s conduct contravened both ss 12DB(1)(c) and (d) of the ASIC Act, although note that it may be that there is a relevant distinction between the two provisions, in the sense that s 12DB(1)(c) only applies to representations purporting to be testimonials, and s 12DB(1)(d) only applies to representations concerning (real) testimonials.

***Other contraventions by PPP***

24 The parties also submit that PPP’s contravention of s 1041H of the Corporations Act, s 12DA of the ASIC Act and its representations in the Promo Letter as to testimonials which were false or misleading (from Investors A, B and C) to attract subscribers to its “Total Income” service, in contravention of ss 12DB(1)(c) and (d) of the ASIC Act, are sufficiently serious departures from reasonable standards of performance that they involved a failure to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly in contravention of s 912A of the Corporations Act.

25 I agree.

26 The parties further submit that the contraventions of ss 12DA(1) and 12DB(1)(c) and (d) of the ASIC Act admitted by PPP also amount to a contravention of s 912A(1)(c) of the Corporations Act, because “financial services laws” is defined in section 761A of the Corporations Act to include, relevantly: “(c) a provision of Division 2 of Part 2 of the ASIC Act”.

27 I agree.

***Contraventions by Mr Sayce***

28 The parties agree that, in respect of PPP’s conduct referred to above (that constituted a contravention of s 12DA(1) of the ASIC Act), that conduct was also engaged in by Mr Sayce. See SOAF, [76].

29 The parties also agree that, in respect of PPP's conduct referred to above that constituted a contravention of ss 12DB(1)(c) and (d) of the ASIC Act, that conduct was also engaged in by Mr Sayce. See SOAF, [77].

**Appropriateness of declaratory relief sought**

30 ASIC, PPP and Mr Sayce seek declarations as to the contraventions committed by PPP and Mr Sayce. Those declarations are sought under s 21 of the *Federal Court of Australia Act 1976* (Cth). The making of such declarations is discretionary.

31 The relevant discretionary factors referred to by the High Court in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 include:

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

32 Here:

- (a) there is a real question as to whether PPP contravened the ASIC Act and Corporations Act in publishing the statements and testimonials contained in the Promo Letter and the Guide and whether Mr Sayce contravened the ASIC Act in relation to the same publications;
- (b) ASIC has a real interest in litigating the question as the statutory regulator discharging its functions in the public interest in bringing these proceedings; and
- (c) there are proper contradictors given that PPP and Mr Sayce had an interest in opposing the relief.

33 The declarations are also appropriate in a case of this nature because they validate ASIC's claims, and record the Court's disapproval, of the contravening conduct.

**Corrective disclosures and advertising**

34 PPP and ASIC also sought orders requiring corrective disclosure and advertising pursuant to ss 12GLA(2)(c) and (d) of the ASIC Act, which I find to be appropriate. The substance of each of these corrective publications is contained at Annexure 2.

### **The Court's role in relation to joint submissions for pecuniary penalties and disqualification**

35 Where a regulator and a defendant reach an agreement whereby the defendant concedes a contravention of a civil penalty provision and the parties jointly propose a figure (or a range) as the appropriate penalty to be imposed by the court, the court should ordinarily limit its role to determining whether the parties' proposal should be accepted as fixing an appropriate penalty. See *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 at 291 and *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 503-504, [46]-[48].

36 Section 12GBA(2) of the ASIC Act provides that in determining the appropriate penalty, the following factors should be taken into account:

- (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission;
- (b) the circumstances in which the act or omission took place; and
- (c) whether the person has previously been found by the Court in proceedings under Subdivision 2 to have engaged in any similar conduct.

37 In *Trade Practices Commission v CSR Ltd* [1991] ATPR 52,135 at 52, 152-153, French J set out various matters relevant to determining appropriate penalties (in relation to a similar provision in the *Trade Practices Act 1974* (Cth)), which, as the court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 explains, may be regarded as elaborations of the statutory requirement to consider "the circumstances in which the act or omission took place". Those matters are as follows:

- The size of the contravening company.
- The degree of power it has, as evidenced by its market share and ease of entry into the market.
- The deliberateness of the contravention and the period over which it extended.
- Whether the contravention arose out of the conduct of senior management or at a lower level.
- 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.
- 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.

38 In *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 a number of additional factors were identified. They include whether the contravener has engaged in practice of this nature in the past, the financial position of the contravener, and, whether the contravening conduct was systematic, deliberate or covert.

39 The power to make a disqualification order under s 12GLD of the ASIC Act may be exercised if the Court is satisfied that the person has contravened a provision of Subdivision C or D (other than s 12DA) and that the disqualification is justified. This power is substantially identical to the power of the Court to make a disqualification order under s 206C of the Corporations Act. In determining whether a disqualification is justified under s 12GLD(1), the Court may have regard to:

- (a) the person's conduct in relation to the management, business or property of any corporation; and
- (b) any other matters that the Court considers appropriate.

40 In *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80, Santow J at [56] summarised the principles applicable to disqualification orders under ss 206C and 206E of the Corporations Act. The parties submit that these principles are equally applicable to a disqualification order under s 12GLD of the ASIC Act. The principles were restated by Gordon J in *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 at [220], relevantly as follows:

- (1) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards.
- (2) Disqualification orders are designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office.
- (3) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors.
- (4) A disqualification order is protective against present and future misuse of the corporate structure.
- (5) The order has a motive of personal deterrence, though it is not punitive.
- (6) The objects of general deterrence are also sought to be achieved.
- (7) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company.

- (8) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty.
- (9) In assessing the appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public.
- (10) It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct.
- (11) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming.
- (12) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 are influential. The criteria were character of the offenders, nature of the breaches, structure of the companies and the nature of their business, interests of shareholders, creditors and employees, risks to others from the continuation of offenders as company directors, honesty and competence of offenders, hardship to offenders and their personal and commercial interests and offenders' appreciation that future breaches could result in future proceedings.
- (13) Factors which lead to the imposition of the longest periods of disqualification (of 25 years or more), were large financial losses, high propensity that defendants may engage in similar activities or conduct, activities undertaken in fields in which there was potential to do great financial damage, lack of contrition or remorse, disregard for law and compliance with corporate regulations, dishonesty and intent to defraud and previous convictions and contraventions for similar activities.
- (14) In cases in which the period of disqualification ranged from 7 to 12 years, the factors included serious incompetence and irresponsibility, substantial loss, defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense, but with lesser degrees of dishonesty, continued, knowing and wilful contraventions of the law and disregard for legal obligations and lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform.
- (15) The factors leading to the shortest disqualifications, that is disqualification for up to three years, were although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated, the defendants had no immediate or discernible future intention to hold a position as manager of a company and the defendant had expressed remorse and contrition, acted on the advice of professionals and had not contested the proceedings.

### **Appropriateness of penalties for PPP**

- 41 The statutory maximum applicable to a corporation for a contravention of s 12DB of the ASIC Act as at September 2017 (i.e. the time of the contraventions) was \$2.1 million.

- 42 PPP's contraventions were the result of deliberate choices and acts by PPP in the sense that PPP intended to publish the Promo Letter and the Guide, knowing that the testimonials of Investors A, B and C had no connection to the Investment Strategy promoted in the Promo Letter and the Guide. However, the parties do not submit that PPP deliberately set out to contravene the law.
- 43 The Promo Letter was published on the websites and was therefore available to a wide audience. The Investment Strategy promoted in the Promo Letter and the Guide was directed at investors including retired investors or investors approaching retirement, among others. The Promo Letter was sent via email to approximately 200,000 subscribers of the websites. 823 recipients of the Promo Letter were induced to pay at least \$49 to receive the Guide and to receive a subscription to the "Total Income" service.
- 44 At the time of the contraventions, while PPP had a written compliance policy, it did not have a written policy in relation to testimonials. See [84]-[87] of the SOAF. The compliance policy was ineffective, because the compliance manager was only required to check the currency of the testimonials, and not the context in which they were to be used. See [86] of the SOAF. PPP has recently made changes to its compliance policies to strengthen its compliance in respect of the use of testimonials. PPP has not previously been found by a Court in proceedings under Subdivision 2 to have engaged in similar conduct, although it has received two previous infringement notices by ASIC in relation to misleading or deceptive conduct.
- 45 The contravening conduct involved senior management, namely the conduct of Mr Sayce, who was PPP's publisher and a director of PPP.
- 46 As to loss and damage, the parties submit that there is no evidence of anyone suffering actual loss due to the Promo Letter or Guide, although they submit that the Investment Strategy was likely to have generated lower returns than the returns promoted in the Promo Letter and exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017.
- 47 The size and financial position of the company, and parent company (or corporate group) is a relevant factor to the assessment of penalties. See *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 at 64, [158(2)] (per Jagot, Yates, and Bromwich JJ). PPP's parent company, Agora Holdings (Cyprus) Limited, had gross and net revenues for 2017 and 2018 of USD\$178 million and



USD\$21 million, and USD\$169 million and USD\$12 million, respectively. PPP's gross and net revenues for 2017 and 2018, year to date for 2019 and projections for entire year are at [88]-[89] of the SOAF. During the Relevant Period, PPP employed approximately 60 to 70 people.

48 I agree with the parties that, having regard to the factors referred to above, including the maximum penalty, the nature and seriousness of the conduct engaged in by PPP, the involvement of senior management, the poor compliance practices that were demonstrated in relation to the publication of the Promo Letter and the Guide (which have now been rectified) and the need for specific and general deterrence, the penalty of \$600,000 is appropriate. Such an amount represents approximately 30% of the statutory maximum (i.e. \$2.1 million).

**Appropriate disqualification and pecuniary penalty for Mr Sayce**

49 In circumstances where a court may impose both a pecuniary penalty and a period of disqualification, the totality principle requires the Court to consider the appropriateness of both the pecuniary penalty and the disqualification order to ensure that the total penalty imposed on the individual is appropriate. See *Kerkhoffs v Registrar of Aboriginal and Torres Strait Islander Corporations* [2014] FCAFC 66, at [18]-[19].

50 Where both pecuniary penalties and disqualification orders are sought, the Court generally considers disqualification before pecuniary penalties. See *Australian Securities and Investments Commission v Padbury Mining Ltd* [2016] FCA 990; (2016) 116 ACSR 208, at [70] (per Siopsis J).

51 Mr Sayce's conduct was serious because it was not inadvertent, and because of the extent of his involvement in the contraventions. Mr Sayce was a director and the publisher of PPP at the time of the contraventions and admits that he came up with the idea for the Promo Letter. The idea for the Promo Letter to refer to the Future Fund was also Mr Sayce's and he commissioned the Promo Letter. Mr Sayce also reviewed, edited and authorised the Promo Letter to be published.

52 The parties submit that while Mr Sayce now accepts that he has contravened the law in relation to the conduct the subject of this proceeding and expresses remorse and contrition for his conduct, during his s 19 examination he did not accept that the use of the testimonials was inappropriate, which they say shows a lack of insight as to the seriousness of the contravening conduct at the time.

- 53 While Mr Sayce was a director and the publisher of PPP at the time PPP received two infringement notices in February 2016 in relation to misleading and deceptive conduct, he has never been found to have contravened the ASIC Act, Corporations Act or any other legislation.
- 54 Mr Sayce took on a new directorship, namely of Money Digest Pty Ltd, on 28 November 2018. This suggests an intention to hold the directorship of a company, unless restrained.
- 55 In light of the above matters, ASIC and Mr Sayce submit that a disqualification order is appropriate in order to achieve the objectives of both personal and general deterrence, but that Mr Sayce's conduct falls into the lowest category identified by Santow J in *Re HIH Insurance Ltd (in prov liq)*; *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 at [56], namely the category requiring a disqualification period of less than three years. It is therefore submitted that a period of disqualification of one year is appropriate. I agree with these submissions.
- 56 As to a pecuniary penalty, the statutory maximum applicable for a contravention by an individual of s 12DB of the ASIC Act as at September 2017 was \$420,000.
- 57 For the financial year ending 30 June 2017, Mr Sayce received a base salary of \$200,000 and a bonus of \$434,194. The incentive bonus was calculated as 5% of net profit of PPP. This proceeding has resulted in Mr Sayce resigning from PPP and his agreement to be disqualified from managing corporations will have an impact on his future earnings.
- 58 Having regard to the above factors, and to the impact of the period of disqualification on Mr Sayce, the parties submit that a penalty of \$50,000 is appropriate. I agree.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan.

Associate:



Dated: 10 September 2019

**ANNEXURE 1**  
**STATEMENT OF AGREED FACTS**

**A Introduction**

- (1) This statement of facts is made jointly by the plaintiff (**ASIC**), the first defendant (**PPP**) and the second defendant (**Sayce**) and is agreed by the parties for the purposes of s 191 of the *Evidence Act 1995* (Cth). This document identifies the facts relevant to the contraventions admitted by the Defendants for the purpose of these proceedings only. The facts agreed, and the admissions made, are for the purpose of these proceedings only and do not constitute any admission outside the context of these proceedings.

**B The Parties**

- (2) ASIC is and was, at all material times, a body corporate:
- (a) established by s 7 of the *Australian Securities and Investments Commission Act 1989* (Cth);
  - (b) continuing in existence by s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
  - (c) entitled to sue in its corporate name pursuant to s 8 of the ASIC Act.
- (3) PPP is and was during the period September 2017 to January 2018 (the **Relevant Period**):
- (a) incorporated in Australia under the *Corporations Act 2001* (Cth) (**Corporations Act**);
  - (b) engaged in trade or commerce within Australia;
  - (c) an online publisher of financial commentary, economic analysis, stock market forecasts and investment recommendations;
  - (d) the holder of Australian Financial Services License (**AFSL**) No. 323988 pursuant to which it was permitted to provide general financial product advice to retail and wholesale clients; and
  - (e) The owner, registrant and operator of the websites [www.moneymorning.com.au](http://www.moneymorning.com.au) and [www.marketsandmoney.com.au](http://www.marketsandmoney.com.au) (**Websites**).
- (4) Throughout the Relevant Period, and in the conduct of its business, PPP provided financial services:
- (a) within the meaning of s 12BAB(5) of the ASIC Act; and
  - (b) within the meaning of s 7668 of the Corporations Act,

by providing financial product advice through the publication of articles, newsletters, special reports and updates, via email, other online media and the Websites.

- (5) During the Relevant Period, Sayce was :
- (a) a director of PPP;
  - (b) PPP's chief executive officer;
  - (c) PPP's publisher; and
  - (d) one of three Responsible Managers on PPP's AFSL.

**C The Business of PPP and the role of Sayce**

- (6) PPP was incorporated on 6 January 2006 and was granted an AFSL on 30 April 2008.
- (7) During the Relevant Period, PPP operated from its registered address at 96-98 Bridport Street, Albert Park VIC 3206.
- (8) During the Relevant Period, PPP's principal activity was the publication of free content and paid periodicals in relation to financial products and services. The free publications, which were available to the public on the Websites, comprised financial commentary and the paid content, which was available on subscription only, included investment recommendations.
- (9) Sayce was actively involved in the day to day administration of PPP and was responsible for the decision as to whether an article or other promotional material was suitable for publication. Sayce took ultimate responsibility, as publisher, for all material which PPP published and distributed including newsletters, updates and other articles.
- (10) During the Relevant Period, one of PPP's paid subscriptions was Total Income, a financial newsletter subscription service that focused on stocks that generated income through dividends. The editor of Total Income was Editor A. As at September 2017, Total Income had approximately 5,605 subscribers.
- (11) The Total Income subscription comprised a monthly newsletter, researched and prepared by Editor A which focussed on one or two stock(s) that were recommended to its subscribers. It also included weekly updates which were in the form of an email and shorter in content.
- (12) PPP used social media and direct marketing to promote its paid subscriptions, including Total Income, to the public and to direct its subscribers to the Websites. One marketing technique used by PPP to promote its paid subscriptions was called a promotional letter. The goal of a promotional letter was to create interest in the target reader, with a view to enticing the reader to subscribe to the promoted paid subscription. The Promo Letter (referred to in paragraph 14 below) is an example of a promotional letter.

- (13) In addition to the monthly newsletters and weekly updates, Editor A prepared, from time to time, special reports which were made available to subscribers of Total Income. The Guide (referred to in paragraph 26 below) is an example of a special report.

#### **D Facts Relevant to PPP's Liability**

##### ***Conduct relevant to contravention of s 12DA(1) of ASIC Act and s 1041H of the Corporations Act***

- (14) During the Relevant Period, PPP prepared a document entitled “Everyday Australians Now Legally ‘Piggybacking’ ‘the Future Fund’ ... and collecting extra monthly income injections of \$540 right up to \$6,667” (**Promo Letter**) and caused it to be published on PPP’s websites and emailed to approximately 200,000 subscribers.
- (15) The Promo Letter was directed at retired investors and investors approaching retirement, amongst others. A true copy of the Promo Letter dated September 2017 is attached to this statement of agreed facts and admissions at Annexure A [not here reproduced].
- (16) The Promo Letter and the Guide promoted an investment strategy or portfolio which involved investing in a portfolio of specific listed investment companies and exchange traded funds which was said to mimic the Australian Government’s Future Fund (**Future Fund**) and the precise details of which were said to be contained in the Guide (**Investment Strategy**). The Promo Letter remained available and accessible on the Websites until January 2018.
- (17) The Promo Letter included the statements set out below, which have been highlighted for ease of reference in the copy of the Promo Letter at Annexure A:
- (a) “Dear Reader, I recently heard some fascinating claims about a potential ‘loophole’ in the Australian Government Future Fund...A loophole that could allow Australians of any location, age or income level to begin collecting income cheques running from \$540 up to \$6,667 per month” (page 1);
  - (b) “I decided to conduct a full investigation into these claims. I reached out to thousands of Australians and spent months researching the situation.” (page 2);
  - (c) “What I discovered was completely unexpected...thousands of Australians have managed to ‘sneak into’ the Future Fund – and are collecting regular, monthly income hits between \$540 and \$6,667, right now as a result...” (page 2);
  - (d) “Here are a few examples from some of our subscribers who are seeing amazing results by ‘piggybacking’ the Future Fund. Folks like:

*77-year-old 'MH', a retired farmer living in South Australia... He made a smart move a few years back and began to piggyback the Future Fund. Since then, he's received monthly income amounts like \$81.66 and \$1,437.50.*

*Retiree Leon M switched on the piggybacking strategy inside his self-managed super fund...and collects a monthly income stream of around \$540... ” (page 3);*

- (e) “To paint a picture of the results you could see when you begin to ‘piggyback the Future Fund’...let me introduce you to a gentleman named Jolly...” (page 4);
- (f) “...for the last 37 years, he’s relied on an extraordinary government-sanctioned income ‘loophole’ to fund his retirement lifestyle” (page 4);
- (g) “Today, this ‘loophole’ allows him to collect an average \$6,667 income stream every month” (page 4);
- (h) “All Jolly had to do was follow a plan similar to the one I’ll map out for you in this letter. Now an average of \$6,000 plus rolls into his bank account each and every month...” (page 5);
- (i) “And this is the part I want you to remember...the establishment of the Future Fund has also opened up the potential for regular Aussie investors to mimic the Future Fund’s outperformance” (page 9);
- (j) “In just a few minutes, I’ll reveal how you can use this opportunity to seed yourself inside these world-class, income-producing assets for yourself” (page 9);
- (k) “By ‘piggybacking’ Future Fund style investments – the way I’ll show you today – you too could become a part-owner in these high income payers” (page 11);
- (l) “That’s exactly how Jolly from Queensland collects an average of \$6,667 every month” (page 11);
- (m) “My name is [Editor A]... I work exclusively as Port Phillip Publishing’s retirement income expert” (pages 11-12);
- (n) “Along the way I have conducted more than 900 hours of detective work” (page 12);

- (o) “I’ve connected with over 5,400 Australian investors who generate income this way” (page 12);
- (p) “And I’ve packed all my analysis...everything I’ve uncovered on piggybacking the Future Fund into a brand new, special investor report” (page 12);
- (q) “It’s called: Your Quick Start Guide to Piggybacking the Future Fund... You can download this report today...” (page 12)
- (r) “Here’s how you could access the Future Fund...and potentially collect income hits between \$540 and \$6,667 every month” (page 15);
- (s) “I want to show you how to create a financially-stable retirement by building out a portfolio that mirrors the performance of the Future Fund...so you too can begin collecting potential income cheques from \$540...right up to \$6,667” (page 15);
- (t) “In fact, my analysis reveals that Future Fund-style investments I’ll introduce you to in the next couple of minutes could outperform Australia’s largest sovereign wealth fund by a wide margin” (page 15);
- (u) “The Future Fund has achieved standout success by investing in billions across a spectrum of eight high performing, income-producing asset classes” (page 15);
- (v) “And I’ve handpicked a mini-portfolio of seven investments designed to mimic the Future Fund’s success in every way. Think of it as your Future Fund ‘starter’ portfolio” (page 15);
- (w) “You’ll find each piggyback play inside a brand-new special investor report I’ve just published” (page 16);
- (x) “Inside your special investor report, you’ll find my full analysis on your first seven Future Fund-style investments I recommend you buy immediately. Plus, you’ll discover an A to Z blueprint on how piggybacking works...alongside the risks and rewards” (page 16);
- (y) “It’s called: Your Quick Start Guide to ‘Piggybacking’ the Future Fund” (page 16);
- (z) “This is a comprehensive guide on how to strategically create a winning investment portfolio – a portfolio that mirrors the Future Fund’s outsized performance and could pay you for LIFE” (page 16);

(aa) “Everything you need to know on all seven Future Fund piggyback plays – including the ticker symbol, the rationale for buying now, and the maximum buy-up-to price – is inside your report: ‘Your Quick Start Guide to ‘Piggybacking’ the Future Fund... You can download this report right now” (page 24);

(bb) “Sincerely, [Editor A], Editor, Total Income” (page 30).

(18) The Future Fund is Australia’s sovereign wealth fund. Established in 2006 and independent of Government, it is mandated to invest money from budget surpluses and other public assets to generate high, risk adjusted returns over the long term. As at 30 June 2017, the Future Fund had \$133 billion under investment.

***Misleading & Deceptive Conduct – Promo Letter***

(19) By reason of the statements referred to in paragraph 17, the Promo Letter made representations which were misleading or deceptive or likely to mislead or deceive as set out below.

***Opinions of Editor A***

(20) The Promo Letter represented that it contained the recommendations and opinions of its retirement-income expert, Editor A, when in fact:

- (a) the Promo Letter did not in all respects represent the opinions of Editor A, having been in parts substantially copied by one of PPP’s copywriters from a promotion published by an American related entity of PPP in the United States entitled “*Americans Now Legally Piggybacking Canadian Social Security ... And Collecting Extra Monthly Checks from \$400 to \$4,700*”; and
- (b) Editor A was not a retirement-income expert in that he had no qualifications or experience in the subject matter of retirement-income.

***Research conducted by Editor A***

(21) The Promo Letter represented that Editor A had conducted more than 900 hours of research in relation to the Investment Strategy when in fact Editor A had conducted 900 hours of research in relation to the individual assets recommended in the Investment Strategy (in the context of preparing other publications for the Total Income newsletter subscription service) but not in relation to the Investment Strategy itself.

(22) The Promo Letter represented that Editor A had connected with over 5,400 investors who had generated income by adopting the Investment Strategy when in fact:



- (a) Editor A had in June 2017 sent feedback requests to over 5,400 of PPP's 'Total Income' subscribers;
- (b) Editor A had not connected with 5,400 people who had generated income by adopting the Investment Strategy; and
- (c) there was no evidence that any of the alleged 5,400 investors referred to in the Promo Letter had generated income by adopting the Investment Strategy, as it had never previously been promoted to PPP's subscribers.

*Regular monthly income*

- (23) The Promo Letter represented that by adopting the Investment Strategy, investors could receive regular, monthly income without disclosing that the Investment Strategy involved investment in the securities of exchange traded funds and listed entities which only paid dividends on a quarterly or half-yearly basis.

*Non-disclosure of size of investment required*

- (24) The Promo Letter represented that by adopting the Investment Strategy, investors could receive regular monthly income of between \$540 to \$6,667, without disclosing that in order to generate such returns investors had to invest approximately \$154,286 and \$1.9 million respectively.

*Size of returns and risk exposure*

- (25) The Promo Letter represented that by adopting the Investment Strategy an investor could mimic the performance of the Future Fund and thereby generate the same or substantially similar annual returns to those achieved by the Future Fund and expose an investor to assets having the same or substantially similar levels of risk as that adopted by the Future Fund in September 2017, when in fact:

- (a) an investor could not mimic the performance of the Future Fund by adopting the Investment Strategy because: (1) the Future Fund has access to some strategies and markets that are unavailable to an individual investor; (2) the Future Fund is highly diversified globally whereas the Investment Strategy is more highly concentrated in Australian equities; (3) the Future Fund has access to global managers; and (4) the Investment Strategy was more heavily weighted in favour of growth assets than defensive assets, as compared to the Future Fund in September 2017; and
- (b) as a consequence of the matters in (a) above, adopting the Investment Strategy was likely to have generated lower returns than the returns promoted in the

Promo Letter and exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017.

***The Guide***

- (26) In about September 2017, PPP published a document titled “*Your Quick Start Guide to ‘Piggybacking’ the Future Fund*” (**Guide**). The Guide was promoted in the Promo Letter, in that the Promo Letter expressly referred to the Guide, by name, on 11 separate occasions. The Guide was authored by Editor A and could only be accessed if an investor paid a subscription fee, in the amount of (i) \$49 for a one-year subscription to Total Income; (ii) \$99 for a two-year subscription to Total Income; and (iii) \$279 for a lifetime subscription to Total Income. A true copy of the Guide dated September 2017 is attached to this statement of agreed facts and admissions at Annexure B [not here reproduced].
- (27) After receiving a copy of the Promo Letter, 833 people signed up and received a copy of the Guide. In addition to these new subscribers, approximately 5,605 existing subscribers received a copy of the Guide in September 2017 when it was made available to them through PPP’s online member portal.
- (28) The Guide contained the following statements which have been highlighted for ease of reference:
- (a) “However, while the Future Fund remains purely the province of public servants, the good news is that you too can mimic its performance” (page 2);
  - (b) “What I want to show you today, though, is what I believe is the best way to piggyback the Future Fund” (page 3);
  - (c) “What I’m trying to achieve with our own Future Fund portfolio is to give you a portfolio that generates reliable, steady and growing income, while trying to minimise risk as best we can” (page 3); and
  - (d) “As I said at the beginning, the aim is to give you a core income portfolio to mimic the performance of the Future Fund, paying steady income, while trying to minimise risk” (page 14).
- (29) The Guide also set out the Future Fund’s asset allocation as at 30 June 2017 at page 2. The Guide at page 13, recommended investment in the following eight exchange traded funds (**ETFs**) and listed investment companies (**LICs**), of which the ETFs and LICs in (a) to (e) below were suggested to correspond to the equivalent asset classes of the Future Fund:
- (a) Australian Equities – WAM Capital Ltd and BKI Investments Ltd;

- (b) Global equities – Platinum Capital Ltd;
- (c) Property and Infrastructure – Vanguard Australia Property Securities Index ETF;
- (d) Debt Securities/ fixed interest – Vanguard Australian Fixed Interest ETF;
- (e) Alternative asset classes – BetaShare Australian Top 20 Equity Yield Maximiser Fund and Australian Leaders Fund; and
- (f) Cash – Australian High Interest Cash ETF.

***Misleading and Deceptive Conduct – The Guide***

- (30) The Promo Letter promoted the Investment Strategy and stated that the Guide contained further details about the Investment Strategy.
- (31) By reason of the statements made in the Guide as referred to in paragraphs 28 and 29, taken together with the statements made about the Investment Strategy in the Promo Letter, the Guide represented that by adopting the Investment Strategy an investor:
  - (a) could mimic the performance of the Future Fund;
  - (b) could generate the same or substantially similar annual returns to that achieved by the Future Fund; and
  - (c) would be exposed to assets having the same or substantially similar levels of risk as that adopted by the Future Fund in September 2017.
- (32) The representations referred to in paragraph 31 were misleading and deceptive or likely to mislead or deceive because:
  - (a) an investor could not mimic the performance of the Future Fund by adopting the Investment Strategy because: (1) the Future Fund has access to some strategies and markets that are unavailable to an individual investor; (2) the Future Fund is highly diversified globally whereas the Investment Strategy is more highly concentrated in Australian equities; (3) the Future Fund has access to global managers; and (4) the Investment Strategy was more heavily weighted in favour of growth assets than defensive assets, as compared to the Future Fund in September 2017; and
  - (b) as a consequence of the matters in (a) above, adopting the Investment Strategy was likely to have generated lower returns than the returns promoted in the Promo Letter and exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017.

***Conduct relevant to contravention of s 12DB(1)(c) and (d) of the ASIC Act – Testimonials***

(33) During the Relevant Period, PPP published testimonials in the Promo Letter which contained the following statements:

- (a) “Here are a few examples from some of our subscribers who are seeing amazing results by ‘piggybacking’ the Future Fund. Folks like: 77 year-old ‘MH’, a retired farmer living in South Australia... He made a smart move a few years back and began to piggyback the Future Fund. Since then, he’s received monthly income amounts like \$81.66 and \$1,437.50. Retiree Leon M switched onto the piggybacking strategy inside his self-managed superfund...and collects a monthly income stream of around \$540”;
- (b) “What I discovered was completely unexpected...thousands of Australians have managed to ‘sneak into’ the Future Fund – and are collecting regular, monthly income hits of between \$540 and \$6,667, right now as a result...”;
- (c) “To paint a picture of the results you could see when you begin to ‘piggyback the Future Fund’...let me introduce you to a gentleman by name of Jolly...for the last 37 years, he’s relied on an extraordinary government-sanctioned income ‘loophole’ to fund his retirement lifestyle”;
- (d) “Today, this ‘loophole’ allows him to collect an average \$6,667 income stream every month” and
- (e) “All Jolly had to do was follow a plan similar to the one I’ll map out for you in this letter. Now an average of \$6,000 plus rolls into his bank account each and every month...”.

(34) By reason of the statements referred to in paragraph 33 above, the Promo Letter contained the following representations:

- (a) Investor A, named as “Jolly”, had received returns of around \$6,667 per month by adopting the Investment Strategy;
- (b) Investor B, named as “Leon M”, had received returns of around \$540 per month by adopting the Investment Strategy; and
- (c) Investor C, named as “MH”, had received returns of around \$1,437.50 per month by adopting the Investment Strategy.

(35) The representations referred to in paragraph 34 were false or misleading as set out below.

***False and Misleading Statements –Testimonials***

- (36) On 21 June 2017, PPP sought feedback from its subscribers by sending out an email containing a “special request for feedback” to the mailing list of Total Income subscribers (**Feedback Request**). The Feedback Request included the following:

*“...we want to show them how much income our members are making from my recommendations.*

*Perhaps you bought into WAM Capital [ASX:WAM] when I first recommended it in April 2015....*

*Or maybe it could be Hotel Property Investments [ASX:HPI] ...*

*Or it could be Generation Healthcare [ASX:GHC] ...*

*It doesn't matter if you bought into these picks before I recommended them, as some have shared about Rural Funds Group [ASX:RFF], and the aforementioned WAM Capital. The story we're after is the tangible results for you.*

*What we'd like to hear is how much my recommendations are generating for you. We need you to be as specific as possible. It might be a few hundred dollars, or it could be many multiples of that. What we want to share is how income investing is helping you; we want to show that the income our stocks are generating is real.”*

- (37) The Feedback Request did not seek feedback about the Investment Strategy or the specific portfolio of investments promoted in the Promo Letter and the Guide, as that strategy and portfolio had not yet been promoted by PPP.
- (38) On 21 June 2017, PPP received email responses from subscribers to the Feedback Request, which provided details of their investments and income from dividends. Included in the email responses from subscribers were responses from Investors A, B and C.

***Investor A***

- (39) On 21 June 2017, Investor A emailed PPP and provided a response to the Feedback Request. In that email, Investor A stated the following:

*“Dear Matt, I am a recent subscriber to Total Income so only recently bought 13000 shares in WAM Capital @ \$2.30 each plus brokerage and GST. My wife & I are self-funded retirees aged 87 and 83 and have no money in Superannuation...Our investment income including imputation credits is just over \$80,000 per annum and unless I can make a major jump of \$12,000 per annum, I need to keep our joint incomes below the \$83,600 limit for the Commonwealth Seniors Health Card...Our joint portfolios are worth just under \$1mill and contain capital gains of about \$468,000...”*

- (40) On or about 28 July 2017, a PPP copywriter decided to use the feedback of Investor A to feature as a testimonial in the Promo Letter. The copywriter requested Editor A contact Investor A as the copywriter wanted to highlight Investor A's story in the Promo Letter. On 28 July 2017, Editor A spoke with Investor A who informed Editor A that he had started investing in the 1980s. Editor A conveyed that information to PPP's copywriter by email on 31 July 2017.
- (41) Investor A:
- (a) had never adopted the Investment Strategy;
  - (b) had been investing for more than 30 years and had a portfolio worth more than \$1 million;
  - (c) held a portfolio which only included one of the eight securities promoted by the Investment Strategy (i.e. WAM); and
  - (d) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy.

*Investor B*

- (42) On 21 June 2017, Investor B emailed PPP and provided a response to the Feedback Request. In that email, Investor B stated the following:
- "Hi Matt, I apply the Total Income recommended stocks to my Family Super Fund (SMSF). I am fully retired. The results are summarised below, in the format of Stock Code...*
- ALF...ARF...AST...BEAR...BKI...DLX...FGG...HPI...HVST...MOC...PMC...RFF...SGP...S*
- HL...VAF...VCX...WAM...YMAX...*
- Total Investment \$135,000..."*

- (43) Investor B:
- (a) had never adopted the Investment Strategy;
  - (b) held a portfolio which included 18 securities, only six of which were among the eight securities promoted by the Investment Strategy (i.e. ALF, BKI, PMC, VAF, WAM, YMAX); and
  - (c) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy.

*Investor C*

- (44) On 21 June 2017, Investor C emailed PPP and provided a response to the Feedback Request. In that email, Investor C stated the following:

*“Dear Matt,*

*In reply to your letter and an idea of my investing...I will list my investments to give you an idea of my direction. It includes both personal and SMSF, but does not list property assets.*

*Number of shares.*

*WAM 115,000*

*WAX 40,000*

*WLE 50,000*

*ANZ 800*

*IVC 12000*

*CAD 1500000*

*AST 10,000*

*NCK 5000*

*NHF 3000*

*SKI 10,000... ”*

(45) Investor C:

- (a) had never adopted the Investment Strategy;
- (b) held a portfolio which included ten securities, only one of which was among the eight securities promoted by the Investment Strategy (i.e. WAM);
- (c) held a portfolio of which only 20% was invested in securities, the remainder being held as cash; and
- (d) had generated his returns through his own portfolio as described above, and not by adopting the Investment Strategy.

(46) The responses from Investor A, Investor B and Investor C to the Feedback Request were adapted by the copywriter for inclusion, in the form of testimonials, in the Promo Letter under the following pseudonyms:

- (a) Investor A was referred to in the Promo Letter as “Jolly”;
- (b) Investor B was referred to as “Leon M”; and
- (c) Investor C was referred to as “MH”.

(47) During the Relevant Period, PPP had no evidence of any investor having invested in the Investment Strategy because the Investment Strategy had never previously been promoted to PPP’s readers or subscribers.

- (48) By publishing the Promo Letter and the Guide, PPP during the Relevant Period engaged in conduct that was:
- (a) in this jurisdiction;
  - (b) in trade or commerce;
  - (c) in the case of the Promo Letter and the Guide generally, in relation to financial services, namely the provision of financial product advice by PPP; and
  - (d) in the case of the preparation and use of testimonials by Investor A, B and C, in connection with the promotion of the supply or the use of financial services, namely the provision of financial product advice by PPP.
- (49) During the Relevant Period, in approximately January 2018, PPP prepared a document entitled “If you have less than \$1.49 million in your super, **READ THIS NOW!**” (**Lazy Paycheques Promo Letter**) and caused it to be published on PPP’s websites and emailed to subscribers of PPP’s websites.
- (50) During the Relevant Period, PPP published the same testimonials of investors A, B and C in the Lazy Paycheques Promo Letter which contained the following statements:
- (a) (On page 4) “‘MH’ is a 77 year old retired farmer in South Australia. Without enough savings to fund their retirement, he and his wife signed up for Lazy Paycheques. He wrote me a note to say that he has received monthly income amounts like \$1,437.50!”
  - (b) (On page 4) “Jolly is an 87 year old retiree living in sunny Queensland. He and his wife had NO super when they retired 37 years ago. But Jolly wrote to me saying they rake in an average \$6,667 – EVERY MONTH.”
  - (c) (On page 3) “Leon M signed up for Lazy Paycheques, and he told me that he now collects a monthly income of \$540.”

## **E Facts relevant to Sayce’s Liability**

- (51) The idea of the Promo Letter, in particular to refer to the Future Fund’s performance in order to promote the Total Income newsletter service, was Sayce’s. In or about June 2017, Sayce commissioned a copywriter employed by PPP, to prepare the Promo Letter. He directed the copywriter to convert an American promotion published by an American related entity of PPP in the United States entitled “*Americans Now Legally Piggybacking Canadian Social Security ... And Collecting Extra Monthly Checks from \$400 to \$4,700*” into an Australian version.



- (52) At the same time, in approximately June 2017, Sayce commissioned Editor A, to prepare the Guide.
- (53) Sayce knew that the income quoted in the feedback provided by Investor A, Investor B and Investor C related to their investment in shares generally and could not have related to the Investment Strategy, because the Investment Strategy and the portfolio appearing at page 13 of the Guide had not yet been shared with subscribers. The drafts of the Promo Letter that were circulated to Sayce contained testimonials from Investors A, B and C.
- (54) On 6 July 2017, Sayce emailed Editor A and the copywriter, with subject line “Future Fund Portfolio” attaching a spreadsheet, which contained research Sayce said he had conducted using a Bloomberg terminal. In his email, Sayce said that he had *“put [the spreadsheet] together showing historical performance of stocks that could be used to replicate/mimic the Future Fund”* adding *“I think we’ve got a good promotional idea here”*. The spreadsheet provided details about the performance of the stocks which were to be used in the portfolio recommended as part of the Investment Strategy in the Guide.
- (55) On 14 August 2017, the copywriter emailed Sayce, Editor A and another employee at PPP attaching a draft version of the Promo Letter.
- (56) On 17 August 2017, an employee of PPP emailed the copywriter, Editor A and Sayce attaching a revised draft version of the Promo Letter.
- (57) On 18 August 2017, Editor A emailed Sayce, the copywriter and another employee of PPP attaching a further revised draft version of the Promo Letter and a report which formed the substantial basis of the Guide.
- (58) On 18 August 2017, the copywriter sent an email to Sayce, Editor A and another employee of PPP explaining how he derived the figure \$6,667 in the draft Promo Article, purported to be the monthly income of Investor A, as follows *“here’s how I came up with it. Jolly mentioned in his testimonial that his investment income (PA) is around \$80k, So I’ve taken that figure and divided it by 12 for the monthly ‘average’”*.
- (59) On 21 August 2017, Sayce emailed the copywriter requesting the latest version of the Promo Letter.
- (60) On 21 August 2017, the copywriter emailed Sayce, Editor A and another employee of PPP attaching a “full draft version” of the Promo Letter.
- (61) Between 21 and 22 August 2017, Sayce reviewed and edited the Promo Letter which included making comments and marked up amendments to the draft Promo Letter.

- (62) On 22 August 2017, Sayce emailed the copywriter, Editor A and another employee of PPP, stating *“here are my edits ... I think it looks good”* attaching a further draft version of the Promo Letter.
- (63) On 22 August 2017, Sayce reviewed and approved the Promo Letter for publication.
- (64) On 22 August 2017, Editor A asked Sayce, via email, to confirm that the figures in the spreadsheet he had provided to Editor A are correct. There was no written response from Sayce to Editor A’s email.
- (65) On 23 August 2017, the copywriter emailed Sayce, Editor A and another PPP employee stating *“Kris, I’ve made a couple of comments on addressing the Future Fund strategy”* and attached a further draft of the of the Promo Letter.
- (66) On 2 September 2017, the Promo Letter was given final approval by the Compliance Manager of PPP.
- (67) On 5 September 2017, the Compliance Manager at PPP authorised uploading of the Guide to the subscriber only area of the Websites. The Guide remained online and available to paid subscribers, throughout the Relevant Period.
- (68) On or about 5 September 2017, the Promo Letter was published on the Websites and sent out to subscribers of the Websites’ e-letters.
- (69) Sayce was the most senior employee of PPP to review the Promo Letter prior to publication and reviewed it in circumstances where he had authority to make final decisions about what would be published.
- (70) In his role as publisher for PPP, Sayce reviewed, edited and approved the Promo Letter for publication on the Websites and distribution to subscribers.
- (71) During the Relevant Period, Sayce:
  - (a) commissioned, reviewed, amended and approved for publication the Promo Letter and caused it to be published on PPP’s websites and emailed to approximately 200,000 subscribers; and
  - (b) commissioned the Guide, knew it was being completed, did not restrain its publication and in his role as publisher of PPP, permitted and thereby caused, it to be sent to 833 paid subscribers of PPP.
- (72) Sayce engaged in the conduct referred to in paragraphs 70 and 71 above:
  - (a) on his own behalf and on behalf of PPP;
  - (b) in trade or commerce;

- (c) in the case of the Promo Letter and the Guide generally, in relation to financial services, namely the provision of financial product advice by PPP; and
- (d) in the case of the preparation and use of testimonials by Investors A, B and C, in connection with the promotion of the supply or the use of financial services, namely the provision of financial product advice by PPP.

## **F Admissions**

- (73) For the purposes of this proceeding only, PPP admits that, during the Relevant Period, it contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act by making the representations contained in the Promo Letter and the Guide (as set out in paragraphs 20 to 25 and 31 above, respectively), which representations were misleading or deceptive or likely to mislead or deceive in all the circumstances.
- (74) For the purposes of this proceeding only, PPP admits that, during the Relevant Period, it contravened s 12DB(1)(c) and (d) of the ASIC Act by making the representations in relation to the testimonials of Investors A, B and C contained in the Promo Letter (as set out in paragraphs 33 and 34 above, respectively), which representations were false and misleading in all the circumstances.
- (75) For the purposes of this proceeding only, PPP admits that, during the Relevant Period, by engaging in the conduct referred to in paragraphs 73 and 74 above, it failed to:
  - (a) do all things necessary to ensure that it provided financial services honestly, efficiently and fairly in contravention of s 912A(1)(a) of the Corporations Act; and
  - (b) comply with the financial services laws, in contravention of s 912A(1)(c) of the Corporations Act.
- (76) For the purposes of this proceeding only, Sayce admits that, during the Relevant Period, he contravened s 12DA(1) of the ASIC Act by making the representations contained in the Promo Letter and the Guide (as set out in paragraphs 20 to 25 and 31 above, respectively), which representations were misleading or deceptive or likely to mislead or deceive in all the circumstances.
- (77) For the purposes of this proceeding only, Sayce admits that, during the Relevant Period, he contravened s 12DB(1)(c) and (d) of the ASIC Act by making the representations in relation to the testimonials of Investors A, B and C contained in the Promo Letter (as set out in paragraphs

33 and 34 above, respectively), which representations were false and misleading in all the circumstances.

**G Facts relevant to relief, including penalty and disqualification**

***Impact on investors and revenue from the conduct***

(78) The Investment Strategy was directed at retired investors or investors approaching retirement, amongst others, but:

- (a) was unable to generate regular monthly income because it involved investment in the securities of exchange traded funds and listed entities which only paid dividends on a quarterly or half-yearly basis;
- (b) was likely to generate lower returns than the returns promoted by the Promo Letter and the Guide and expose an investor to a greater level of risk than that adopted by the Future Fund in September 2017 because the promoted Investment Strategy was more heavily weighted in favour of growth assets than defensive assets.

(79) There is no evidence that, during the Relevant Period, anyone suffered actual loss due to implementing the Investment Strategy, although the Investment Strategy was likely to have generated lower returns than the returns promoted in the Promo Letter and exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017.

(80) PPP's business model is entirely based on subscription revenue. The revenues come from either selling new subscriptions to publications, or from renewal fees from subscribers who wish to continue receiving those publications and services.

(81) 833 recipients of the Promo Letter were induced to pay (and 823 paid) a subscription fee to receive the Guide and to receive a subscription to Total Income.

(82) PPP's gross revenue from publication of the Promo Letter and Guide was \$74,907. Total Income ceased publication in mid 2018.

***PPP's compliance policies and procedures***

(83) During the Relevant Period, PPP's compliance policies and procedures were ineffective to prevent the contraventions of the ASIC Act and the Corporations Act, for the reasons set out below.

(84) During the Relevant Period, PPP also had a compliance policy dated January 2017 which provided, among other things, that all publications had to be reviewed by the compliance department prior to publication (**Compliance Policy**). The Compliance Policy did not address

the use of testimonials and PPP did not have a separate written policy addressing the use of testimonials during the Relevant Period.

- (85) PPP also employed a full-time compliance manager who was responsible for compliance, including to check that PPP's publications were not misleading or deceptive. However, the compliance manager was not required to check the use of testimonials, other than to check the currency of the testimonials in line with the Compliance Policy.
- (86) For the purposes of this proceeding only, PPP accepts that, during the Relevant Period, there were shortcomings in PPP's compliance policies.
- (87) Since the Relevant Period, PPP has made the following changes to its compliance policies and procedures:
  - (a) on 8 March 2018 and 14 September 2018, PPP's compliance officer emailed the editorial and copywriting teams reminding them, among other things, that promotional documents must be checked for factual accuracy before they are provided to compliance;
  - (b) in April 2019, PPP's compliance manager circulated a compliance note warning staff to avoid misleading or deceptive conduct;
  - (c) in June 2018 and November 2018, PPP revised its policy regarding the use of testimonials;
  - (d) in June 2019, all editorial, copy writing, marketing and compliance teams attended compliance training sessions provided by outside counsel;
  - (e) in June 2019, all editorial, copy writing and compliance teams attended securities training;
  - (f) as of June 2019, PPP has established a new process for checking copy, which requires:
    - (i) use of a Compliance Framework document for all promotions which sets out the responsibilities of editors, copywriters and the compliance office in the copy process, requires the compliance team to verify that the marketing is in all respects compliant with PPP's obligations as a financial services licence holder, and requires final approval to publish from the compliance officer or responsible manager; and
    - (ii) use of a "Campaign Platform Document" to be completed by copywriters before a new promotion is written setting out the material

elements of the promotion and to be circulated to compliance, relevant editors and the publisher for approval by each of them;

- (g) since at least April 2019, PPP directed that a Q&A section be used in all promotions; and
- (h) PPP is in the process of restructuring its compliance team. PPP has recently hired a new compliance manager with over 15 years' experience in the compliance field, including working for a number of banks and insurance companies. The compliance manager is supported by a part-time compliance assistant.

***PPP's size and financial position***

- (88) PPP's is part of the Agora Group of companies, whose ultimate parent company is Agora Holdings (Cyprus) Limited, based in the Republic of Cyprus.
- (89) During the Relevant Period, PPP employed approximately 60 to 70 people. PPP's gross and net revenues for 2017 and 2018, to April 2019 and projections for entire year are as follows:

	2017	2018	YTD 2019 to April	full year forecast 2019
Gross Revenue	36,222,871	18,135,429	2,937,535	9,360,000
Net Revenue	27,298,973	15,386,587	2,219,087	7,248,000
Profit before tax (Cash basis)	14,085,304	2,071,208	(2,168,598)	(6,200,000)

- (90) PPP's net profit after tax for the year ending 31 December 2016 was \$5.8 million. PPP's net profit after tax for the years ending 31 December 2017 and 31 December 2018 were \$10.5 million and \$6.8 million, respectively.
- (91) Agora Holdings (Cyprus) Limited's gross and net revenues (pre-tax) for 2017 and 2018 were USD\$178 million and USD\$21 million, and USD\$169 million and USD\$12 million, respectively.

***Sayce's remuneration and directorships***

- (92) Sayce was a director of:
  - (a) PPP until 6 June 2019;
  - (b) Agora Financial Australia Pty Ltd until 31 December 2018;
  - (c) Agora Holdings Australia Pty Ltd until 6 June 2019;
  - (d) Frankston South Investments Pty Ltd until 31 May 2019; and
  - (e) Money Digest Pty Ltd until 31 May 2019.

- (93) For the financial year ending 30 June 2017, Sayce received a base salary of \$200,000 and a bonus of \$434,194. For the financial year ending 30 June 2018, Sayce received a base salary of \$200,000 and a bonus of \$802,760. Since Total Income was a loss-making publication which was cancelled in FY2018, Sayce did not receive any bonus or make any other gain due to the Promo Letter or Guide.
- (94) A disqualification period of one year will have an impact on the financial position and earning potential of Mr Sayce.

***Prior Infringement Notices***

- (95) On 3 February 2016, ASIC issued two infringement notices to PPP pursuant to s 12GXA of the ASIC Act in respect of representations made by PPP in relation to superannuation during the period from 31 July 2015 to 17 September 2015 and 24 September 2015. At the time the infringements notices were issued by ASIC, Sayce was a director and publisher of PPP.
- (96) Between 31 July 2015 and 17 September 2015, PPP published a video titled “The Genesis 47 Plan” (**Video**) on websites owned and operated by PPP (**PPP Website**) which contained representations that, in the near future, the Australian Government intends to nationalise and take ownership of superannuation, leaving the general working public unable to access their retirement savings (**Superannuation Representations**).
- (97) On 24 September 2015, PPP published an article on the PPP Website which contained the Superannuation Representations.
- (98) The Superannuation Representations were based on the author’s opinion and not evidence as was suggested in the Video and the article on the PPP Website.
- (99) The Video and the PPP Website both contained further representations that subscription to PPP’s “Tactical Wealth” publication would provide consumers with a strategy to “protect their superannuation from being stolen by the Government” (**Subscription Representations**).
- (100) The Subscription Representations were false and misleading and exaggerated the need for the subscription to the general public.
- (101) Infringement notices in respect of the Superannuation and Subscription Representations were issued because ASIC had reasonable grounds to believe that PPP had contravened s12DB(1)(h) of the ASIC Act.
- (102) On 1 March 2016, PPP paid \$10,800 (\$21,600 in total) for each of the penalties specified in the infringement notices.

***No prior contravention of the ASIC Act or the Corporations Act***

- (103) Neither Sayce, nor PPP, has previously been found by a court to have contravened any provision of the ASIC Act or the Corporations Act or engaged in similar conduct to that described in Section D above.

***Co-operation***

- (104) Both PPP and Sayce filed a concise response and resolved the matter at the first and only mediation which was held approximately three months after the first case management conference for this proceeding.
- (105) Although in Mr Sayce's s 19 examination, he did not accept that the use of the testimonials was inappropriate at that time, Mr Sayce now accepts that he has contravened the law and expresses remorse and contrition for his conduct.



## ANNEXURE 2

### MISLEADING STATEMENTS ABOUT THE AUSTRALIAN GOVERNMENT'S FUTURE FUND

We are writing to you about your subscription to Port Phillip Publishing's (ACN 117 765 009) (**PPP**) websites Money Morning and Markets and Money.

- On 29 August 2019, the Federal Court of Australia declared that statements we made in an article entitled "*Everyday Australians Now Legally 'Piggybacking' 'the Future Fund' ... and collecting extra monthly income injections of \$540 right up to \$6,667*" (**Promo Letter**) which:
  - was published on our websites and in emails sent to subscribers to our Websites (defined below); and
  - promoted a document entitled "*Your Quick Start Guide to Piggybacking the Future Fund*" (**Guide**),

were false, misleading and deceptive.

- A copy of the Court's judgment and orders is available here <insert>.
- If you have any questions or concerns about your subscription with us, please contact <insert complaints manager's name>.

### What was the advertisement?

Between September 2017 to January 2018, we published the Promo Letter on our websites:

- <http://www.marketsandmoney.com.au>; and
- <http://www.moneymorning.com.au> (**Websites**); and

emailed it to approximately 200,000 of our subscribers to our Websites.

The Promo Letter and the Guide promoted an investment strategy targeted towards retiree investors and investors approaching retirement, amongst others which involved investing in a portfolio of specific listed investment companies and exchange traded funds which was claimed to mimic the performance of the Future Fund (**Investment Strategy**).

The Guide could only be accessed if a subscriber paid a subscription fee.

### Why was it false, misleading and deceptive?

In a court proceeding brought by ASIC, the Federal Court of Australia found that the Promo Letter published on our Websites and emailed to subscribers to our Websites was false, misleading and deceptive because it:

- purported to provide the views of PPP's retirement income expert, Editor A;
- suggested that the Investment Strategy could generate regular, monthly, income of between \$540 and \$6,667 per month;
- suggested that by adopting the Investment Strategy, investors could mimic the performance of the Future Fund and thereby generate the same or similar annual returns; and
- relied on client testimonials of "Jolly", "Leon M" and "MH" and represented that each of them had adopted the Investment Strategy and had each received monthly returns of \$6,667, \$540 and \$1,437.50 respectively.

In fact, the Promo Letter:

- did not in all respects represent the views of Editor A, who was not the author of the Promo Letter and who was not a retirement income expert;
- did not disclose that the Investment Strategy involved investing in securities which only paid dividends on a quarterly or half yearly basis;
- did not disclose that some returns mentioned could only be achieved by investing approximately \$154,286 and \$1.9m respectively;
- did not disclose that the Future Fund has access to some strategies and markets that are unavailable to an individual investor; and
- did not disclose that "Jolly", "Leon M" and "MH" each had never adopted the full Investment Strategy.

The Federal Court also found that the Guide made representations which were misleading and deceptive in that by adopting the Investment Strategy an investor could mimic the performance of the Future Fund and thereby generate the same or substantially similar annual returns to that of the Future Fund and expose an investor to assets having the same or similar levels of risk as that of the Future Fund.

In fact, the Investment Strategy were likely to have generated lower returns than the returns promoted in the Promo Letter and Guide and was likely to have exposed an investor to a greater level of risk than that adopted by the Future Fund in September 2017.

The Federal Court also found that Kristan Sayce, who was our publisher at the time, engaged in conduct that was false, misleading and deceptive by:

- commissioning, reviewing, amending and approving for publication the Promo Letter and causing it to be published on our Websites and emailed to our subscribers;
- commissioning the Guide and causing it to be sent to 833 paid subscribers; and
- relying on client testimonials of “Jolly”, “Leon M” and “MH” and representing that each of them had adopted the Investment Strategy and had each received monthly returns of \$6,667, \$540 and \$1,437.50 respectively.

**Does this affect me?**

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