FEDERAL COURT OF AUSTRALIA

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

File number:	NSD 1030 of 2018
Judge:	**WIGNEY J**
Date of judgment:	19 December 2019
Catchwords:	**CORPORATIONS** – financial advice – obligation to act in the best interests of the client – where a representative of Westpac Banking Corporation gave deficient and defective advice to clients and failed to act in the best interests of those clients – where representative contravened ss 961B, 961G, 961H and 961J of the *Corporations Act 2001* (Cth) – where Westpac Banking Corporation contravened s 961K and s 912A of the *Corporations Act 2001* (Cth) – obligation of financial services licensee to take reasonable steps to ensure that its representatives comply with best interests obligations – where contraventions admitted – where dispute as to number of civil penalty contraventions – where dispute as to the knowledge of Westpac Banking Corporation concerning risk that representative would not comply with the best interests obligations – appropriate form of declarations – level of detail required in declarations – consideration of appropriate civil penalty to be awarded – consideration of course of conduct and totality principles
Legislation:	*Corporations Act 2001* (Cth) ss 761A, 761G, 761GA, 763A, 764A, 764A(1)(d), 764A(1)(g), 766A, 766B(1), 766B(3), 769B(3), 910A, 910A(a), 912A, 912A(1), 912A(1)(a), 912A(1)(c), 912B(1), 912C, 913B, 916A, 960, 961, 961(1), 961(2), 961B, 961B(1), 961B(2), 961C, 961D, 961E, 961G, 961H, 961H(1), 961H(2), 961H(3), 961J, 961J(1), 961K, 961K(1), 961K(2), 961P, 1317E, 1317E(1), 1317E(2), 1317G(1E), 1317G(1E)(b), 1317G(1F), Ch 7, Pt 7.1 Div 3, Pt 7.1 Div 4, Part 7.6, Pt 7.7A Div 2 *Evidence Act 1995* (Cth) ss 140, 191 *Federal Court of Australia Act 1976* (Cth) s 21 *Insurance Contracts Act 1984* (Cth) s 29(3)
Cases cited:	*Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646 *Australian Competition and Consumer Commission v Coles*

Supermarkets Australia Pty Ltd [2015] FCA 330; 327 ALR 540

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 IMB Group Pty Limited [1999] FCA 313

Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3) [2005] FCA 265; 215 ALR 301

Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2) [2011] FCA 382; 279 ALR 609

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

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

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

Australian Securities and Investment Commission v Westpac Securities Administration Limited [2019] FCAFC 187

Australian Securities and Investments Commission v Adler [2002] NSWSC 483; 42 ACSR 80

Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3) [2012] FCA 43; 213 FCR 380

Australian Securities and Investments Commission v Cassimatis (No 8) [2016] FCA 1023; 336 ALR 209

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

Australian Securities and Investments Commission v GE Capital Finance Australia, in the matter of GE Capital Finance Australia [2014] FCA 701

Australian Securities and Investments Commission v Hellicar (2012) 247 CLR 345

Australian Securities and Investments Commission v Hochtief Aktiengesellschaft [2016] FCA 1489; 117 ACSR 589

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd [2014] FCA 1387; 103 ACSR 453

Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd [2002] NSWSC 310; 41 ACSR 561

Australian Securities and Investments Commission v

Southcorp Ltd (No 2) [2003] FCA 1369; 130 FCR 406

Australian Securities and Investments Commission v Stone Assets Management Pty Ltd [2012] FCA 630; 205 FCR 120

Australian Securities and Investments Commission v Warrenmang Ltd [2007] FCA 973; 63 ACSR 623

Australian Securities and Investments Commission, in the matter of NSG Services Pty Ltd v NSG Services Pty Ltd [2017] FCA 345; 122 ACSR 47

Australian Securities and Investments Commission, in the matter of Chemeq Limited (ACN 009 135 264) v Chemeq Limited (ACN 009 135 264) [2006] FCA 936; 234 ALR 511

Briginshaw v Briginshaw (1938) 60 CLR 336

Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683

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

Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner [2018] FCAFC 97; 264 FCR 155

Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case) [2018] FCAFC 126; 265 FCR 208

Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39; 269 ALR 1

Construction, Forestry, Mining and Energy Union v Williams [2009] FCAFC 171; 262 ALR 417

Environment Protection Authority v Barnes [2006] NSWCCA 246

Forster v Jododex Australia Pty Limited (1972) 127 CLR 421

Jones v Dunkel (1959) 101 CLR 298

Markarian v The Queen [2005] HCA 25; 228 CLR 357

McDonald v AMP Financial Planning Pty Ltd [2018] QSC 195; 129 ACSR 605

Mill v The Queen (1988) 166 CLR 59

Minister for the Environment, Heritage and the Arts v PGP Developments Pty Limited [2010] FCA 58; 183 FCR 10

Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70; 168 FCR 383

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285

R v Bibaoui [1997] 2 VR 600

R v Finnie [2002] NSWCCA 533

Royer v The State of Western Australia [2009] WASCA 139; 197 A Crim R 319

Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited [1921] 2 AC 438

Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; 287 ALR 249

The Attorney-General v Tichy (1982) 30 SASR 84

Thorn v The Queen [2009] NSWCCA 294; 198 A Crim R 135

Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc (No 2) (1993) 41 FCR 89

TPG Internet Pty Ltd v Australian Competition and Consumer Commission (2012) 210 FCR 277

Trade Practices Commission v CSR Limited [1990] FCA 521; (1991) ATPR 41-076

Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd (1978) ATPR 40-091

Veen v The Queen (No 2) (1988) 164 CLR 465

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Category:	Catchwords
Number of paragraphs:	310
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Solicitor for the Plaintiff:	Australian Securities and Investments Commission
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ORDERS

NSD 1030 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**WESTPAC BANKING CORPORATION (ACN 007 457 141)** Defendant

JUDGE:	**WIGNEY J**
DATE OF ORDER:	**19 DECEMBER 2019**

THE COURT DECLARES THAT:

Mr and Mrs AA

1. On 2 July 2013, **Westpac** Banking Corporation contravened subs 961K(2) of the *Corporations **Act** 2001* (Cth) by being the responsible licensee for the contravening conduct of its representative, Mr Sudhir **Sinha**, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs AA when providing them with personal advice.

2. On 2 July 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961G of the Act by providing advice to Mrs AA which included a recommendation that Mrs AA take out term life insurance under a BT Term Life Protection Plan which was not advice appropriate to Mrs AA.

3. On 2 July 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961G of the Act by providing advice to Mr AA which included a recommendation that Mr AA take out income protection insurance under a BT income protection plan which was not advice appropriate to Mr AA.

4. On 2 July 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961J of the Act by providing advice to Mrs AA which included a recommendation that Mrs AA take out term life insurance under a BT Term Life Protection Plan in

circumstances where Mr Sinha failed to give priority to the interests of Mrs AA when giving that advice.

5. On 2 July 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961J of the Act by providing advice to Mr AA which included a recommendation that Mr AA take out income protection insurance under a BT income protection plan in circumstances where Sinha failed to give priority to the interests of Mr AA.

6. On 2 July 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961J of the Act by providing advice to Mrs AA which included a recommendation that Mrs AA consolidate her superannuation by rolling over the funds in accounts held with her existing superannuation funds into a BT Foundation Portfolio SuperWrap superannuation fund in circumstances where Mr Sinha failed to give priority to the interests of Mrs AA.

Mr and Mrs BB

7. On 10 December 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs BB, when providing them with personal advice.

8. On 10 December 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961G of the Act by providing advice to Mr and Mrs BB which included a recommendation that Mr and Mrs BB each take out insurance under a BT Protection Plan with term life cover, total and permanent disability cover and trauma cover which was not advice appropriate to Mr and Mrs BB.

9. On 10 December 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961G of the Act by providing advice to Mr and Mrs BB which included a recommendation that Mr and Mrs BB take out insurance under a BT Protection Plan with income protection cover which was not advice appropriate to Mr and Mrs BB.

10. On 10 December 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961G of the Act by providing advice to Mr and Mrs BB which included

a recommendation that Mr and Mrs BB roll-over their existing superannuation funds into a new self-managed superannuation fund and pursue a gearing strategy which would involve the self-managed superannuation fund borrow money to purchase residential property which was not advice appropriate to Mr and Mrs BB.

11. On 10 December 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961J of the Act by providing advice to Mr and Mrs BB which included a recommendation that Mr and Mrs BB each take out insurance under a BT Protection Plan with term life cover, total and permanent disability cover and trauma cover in circumstances where Mr Sinha failed to give priority to the interests of Mr and Mrs BB when giving that advice.

12. On 10 December 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961J of the Act by providing advice to Mr and Mrs BB which included a recommendation that Mr and Mrs BB each take out insurance under a BT Protection Plan with income protection cover in circumstances where Mr Sinha failed to give priority to Mr and Mrs BB when giving that advice.

13. On 10 December 2013, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Mr Sinha, who contravened s 961J of the Act by providing advice to Mr and Mrs BB which included a recommendation that Mr and Mrs BB roll-over their existing superannuation funds into a new self-managed superannuation fund and pursue a gearing strategy which would involve the self-managed superannuation fund borrow money to purchase residential property in circumstances where Mr Sinha failed to give priority to the interests of Mr and Mrs BB when giving that advice.

Mr and Mrs CC

14. On 2 July 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs CC, when providing them with personal advice.

15. On 2 July 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961G of the

Act by providing advice to Mr and Mrs CC which was not advice appropriate to Mr and Mrs CC.

16. On 2 July 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961H of the Act by providing advice to Mr and Mrs CC which was based on incomplete or inaccurate information relating to their relevant personal circumstances in circumstances where he did not warn Mr and Mrs CC that, because he had incomplete or inaccurate information, they should consider the appropriateness of the advice before acting on it.

17. On 2 July 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961J of the Act by providing advice to Mr CC which included a recommendation that Mr CC roll-over funds from his existing superannuation accounts into a new BT Foundation SuperWrap superannuation fund account in circumstances where Mr Sinha failed to give priority to the interests of Mr CC when giving that advice.

Dr DD and Mr EE

18. On 7 August 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961B of the Act by failing to act in the best interests of his clients, Dr DD and Mr EE, when providing them with personal advice.

19. On 7 August 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961G of the Act by providing advice to Dr DD and Mr EE which included a recommendation that Dr DD and Mr EE each roll over some of the funds from their existing superannuation accounts into new BT SuperWrap Pension Plan+ superannuation accounts which was not advice appropriate to Dr DD and Mr EE.

20. On 7 August 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961G of the Act by providing advice to Dr DD and Mr EE which included a recommendation that Dr DD and Mr EE each draw a pension from the recommended BT SuperWrap Pension Plan+ superannuation account which was not advice appropriate to Dr DD and Mr EE.

21. On 7 August 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961H of the Act by providing advice to Dr DD and Mr EE which was based on incomplete or inaccurate information relating to their relevant personal circumstances in circumstances where he did not warn Dr DD and Mr EE that, because he had incomplete or inaccurate information, they should consider the appropriateness of the advice before acting on it.

22. On 7 August 2014, Westpac contravened subs 961K(2) of the Act by being the responsible licensee for the conduct of its representative, Mr Sinha, who contravened s 961J of the Act by providing advice to Dr DD and Mr EE which included a recommendation that Dr DD and Mr EE each roll over some of the funds from their existing superannuation accounts into new BT SuperWrap Pension Plan+ superannuation accounts in circumstances where Mr Sinha failed to give priority to the interests of Dr DD and Mr EE when giving that advice.

Contraventions of s 912A of the Act

23. Westpac contravened subs 912A(1)(a) of the Act by failing to do all things necessary to ensure that the financial services covered by its AFS licence were provided efficiently, honestly and fairly in that it:

    (a) awarded Mr Sinha high achievement ratings despite the deficiencies identified by Westpac in compliance reviews conducted in relation to Mr Sinha in 2011, 2012 and 2013 and that Mr Sinha was subject to pre-vetting of his advices in the period between May and July 2010; and

    (b) it ought reasonably to have known, from 1 July 2013, that there was a significant risk that Mr Sinha would not comply with the best interests obligations on and from 1 July 2013.

24. Westpac contravened subs 912A(1)(c) of the Act by failing to comply with the financial services laws, including s 961K of the Act.

THE COURT ORDERS THAT:

1. The defendant pay to the Commonwealth a pecuniary penalty of $350,000 in respect of the contravention the subject of declaration 1.
2. The defendant pay to the Commonwealth a pecuniary penalty of $425,000 in respect of the contravention the subject of declaration 2.
3. The defendant pay to the Commonwealth a pecuniary penalty of $425,000 in respect of the contravention the subject of declaration 3.
4. The defendant pay to the Commonwealth a pecuniary penalty of $450,000 in respect of the contravention the subject of declaration 4.
5. The defendant pay to the Commonwealth a pecuniary penalty of $450,000 in respect of the contravention the subject of declaration 5.
6. The defendant pay to the Commonwealth a pecuniary penalty of $450,000 in respect of the contravention the subject of declaration 6.
7. The defendant pay to the Commonwealth a pecuniary penalty of $350,000 in respect of the contravention the subject of declaration 7.
8. The defendant pay to the Commonwealth a pecuniary penalty of $400,000 in respect of the contravention the subject of declaration 8.
9. The defendant pay to the Commonwealth a pecuniary penalty of $400,000 in respect of the contravention the subject of declaration 9.
10. The defendant pay to the Commonwealth a pecuniary penalty of $400,000 in respect of the contravention the subject of declaration 10.
11. The defendant pay to the Commonwealth a pecuniary penalty of $450,000 in respect of the contravention the subject of declaration 11.
12. The defendant pay to the Commonwealth a pecuniary penalty of $450,000 in respect of the contravention the subject of declaration 12.
13. The defendant pay to the Commonwealth a pecuniary penalty of $450,000 in respect of the contravention the subject of declaration 13.
14. The defendant pay to the Commonwealth a pecuniary penalty of $350,000 in respect of the contravention the subject of declaration 14.
15. The defendant pay to the Commonwealth a pecuniary penalty of $450,000 in respect of the contravention the subject of declaration 15.

16. The defendant pay to the Commonwealth a pecuniary penalty of $300,000 in respect of the contravention the subject of declaration 16.

17. The defendant pay to the Commonwealth a pecuniary penalty of $550,000 in respect of the contravention the subject of declaration 17.

18. The defendant pay to the Commonwealth a pecuniary penalty of $350,000 in respect of the contravention the subject of declaration 18.

19. The defendant pay to the Commonwealth a pecuniary penalty of $425,000 in respect of the contravention the subject of declaration 19.

20. The defendant pay to the Commonwealth a pecuniary penalty of $425,000 in respect of the contravention the subject of declaration 20.

21. The defendant pay to the Commonwealth a pecuniary penalty of $300,000 in respect of the contravention the subject of declaration 21.

22. The defendant pay to the Commonwealth a pecuniary penalty of $550,000 in respect of the contravention the subject of declaration 22.

23. The defendant pay the plaintiff's costs.

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

REASONS FOR JUDGMENT

WIGNEY J:

1 This case concerns the liability of one of Australia's big four banks for the failure by one of its representatives to comply with the "best interests obligations" in Div 2 of Pt 7.7A of the *Corporations* ***Act*** *2001* (Cth) when he provided personal advice concerning financial products to certain retail clients.

2 In addition to its banking business, **Westpac** Banking Corporation engaged in a financial services business which included the provision of advice to individuals about financial products, including insurance and superannuation products. Between 2001 and late 2014, Westpac employed the services of Mr Sudhir **Sinha** in its financial services business. The relationship between Westpac and Mr Sinha was structured so that Mr Sinha was able to share in the commissions and fees earned or derived when, as a result of his advice or recommendations, clients signed-up for financial products in which Westpac or associated companies had an interest. As will be seen, that rather cosy arrangement turned out to be fruitful for both Mr Sinha and Westpac, but not always for their clients.

3 The facts of this case focus on advice and recommendations that Mr Sinha, as a representative of Westpac, gave to four domestic couples during 2013 and 2014. As a result of the advice and recommendations given by Mr Sinha, each of the couples altered their existing superannuation or insurance arrangements and acquired interests in or took out superannuation or insurance products or policies with companies or entities associated with Westpac. Both Westpac or its associated companies and, indirectly, Mr Sinha earned not insubstantial fees and commissions from the implementation of Mr Sinha's recommendations.

4 Unfortunately for the four couples, it was subsequently discovered that the recommendations that Mr Sinha made, and the circumstances in which he made them, were deficient and defective, both as a matter of process and in substance. That should not have been a complete surprise to Westpac because Mr Sinha's less than satisfactory conduct as a financial adviser had previously come to the attention of certain senior officers of Westpac as a result of various internal compliance reviews, audits or investigations. In any event, upon investigation and scrutiny of the advice and recommendations that Mr Sinha had provided to the four client couples in question, it was ascertained that Mr Sinha had failed to act in the best interests of those clients, had provided advice which was inappropriate to them and, in circumstances

where there was an obvious conflict between his interests and the interests of the clients, had failed to give priority to the clients' interests. In respect of two of the couples, Mr Sinha had failed to warn them that his advice was, or may have been, based on incomplete or inaccurate information.

5 In 2018, the Australian Securities and Investments **Commission** commenced proceedings in this Court against Westpac. The Commission alleged that Mr Sinha, in providing the advice and recommendations to the four couples in question, had contravened ss 961B, 961G, 961H and 961J of the Act and that Westpac, as the "responsible licensee" in relation to Mr Sinha's contraventions, had contravened subs 961K(2) of the Act. The Commission sought declarations and the imposition of civil penalties in respect of Westpac's contraventions. The Commission also alleged that Westpac had contravened s 912A of the Act because, as the holder of a financial services licence, it had failed to do all things necessary to ensure that the financial services covered by the licence were provided efficiently, honestly and fairly and had failed to comply with the "financial services laws", which include 961K of the Act.

6 Westpac admitted that it had contravened the various provisions of the Act as alleged by the Commission. It did not dispute that declarations should be made in respect of those contraventions. Nor did it dispute that it was liable to pay civil penalties in respect of its contravention of subs 961K(2) of the Act. There was, however, a dispute between the Commission and Westpac concerning the number those contraventions and an issue concerning one of the factual findings that the Commission urged upon the Court in respect of Westpac's knowledge that there was a risk that Mr Sinha would not comply with the relevant provisions of the Act. Those issues will need to be resolved. The main issue for the Court, however, is the size of the civil penalties that should be imposed in respect of Westpac's contraventions of subs 961K(2) of the Act.

7 In order to resolve the outstanding issues it will be necessary in due course to spell out in some more detail the relevant facts in relation to Westpac's contraventions of the Act. Before doing so, however, the relevant statutory provisions should be identified and outlined. That task is not as easy as it should be. The relevant provisions are mainly to be found in Div 2 of Pt 7.7A of the Act, which is entitled "Best Interests Obligations". Like much of Ch 7 of the Act, which deals with financial services and markets, Pt 7.7A contains provisions which are not always easy to comprehend, particularly given the complex and prolix, if not labyrinthine, statutory definitions of many of the key concepts or expressions that are employed in the provisions.

RELEVANT STATUTORY PROVISIONS

8 Pt 7.7A was inserted in the Act in June 2012 and came into effect for most advisers on 1 July 2013. The insertion of Pt 7.7A was part of the so-called "**FoFA**" (Future of Financial Advice) reforms. The following summary of the relevant provisions is based on the provisions of the Act which were in effect from July 2013 to December 2014.

9 Subsection 961(1) of the Act provided that Div 2 of Pt 7.7A "applies in relation to the provision of personal advice (the ***advice***) to a person (the ***client***) as a retail client". Subsection 961(2) of the Act helpfully pointed out that the individual who provides the advice is referred to as the "provider". The balance of s 961 contained other explanations of who may be a "provider". It is unnecessary to consider those provisions. It suffices to note that the provider in this case was Mr Sinha.

10 The definitions of many words, expressions or concepts referred to throughout Ch 7 of the Act are contained in, or are adverted to in, s 761A of the Act. Relevantly, s 761A provided that the expression "personal advice" has the meaning given in subs 766B(3) and that "retail client" has the meaning given by ss 761G and 761GA of the Act. As promised, subs 766B(3) defined "personal advice" in the following terms:

> For the purposes of this Chapter, ***personal advice*** is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:
>
> (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act); or
>
> (b) a reasonable person might expect the provider to have considered one or more of those matters.

11 It is fortunately unnecessary to consider the intricacies and subtleties of this definition. That is because there is no dispute that the advice that was given to the relevant clients in this matter was "personal advice" within the meaning of subs 766B(3) of the Act. Interested readers may nonetheless care to consider what was said about the meaning of "personal advice" in the judgment of the Full Court in *Australian Securities and Investment Commission v Westpac Securities Administration Limited* [2019] FCAFC 187 (***ASIC v Westpac Securities***). It should also be noted that "financial product advice", of which "personal advice" is a subset, is defined in the following terms in subs 766B(1) of the Act:

> For the purposes of this Chapter, ***financial product advice*** means a recommendation

or a statement of opinion, or a report of either of those things, that:

> (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
>
> (b) could reasonably be regarded as being intended to have such an influence.

12 It is perhaps even more fortunate that it is unnecessary to give any detailed consideration to the rather tortuous definition of "retail client" (and the converse expression "wholesale client") in ss 761G and 761GA of the Act. Those provisions extended to over five pages and in turn require one to go to the detailed definitions of various other words or expressions, including "financial product" (see ss 763A and 764A), "financial service" (see s 766A), "general insurance product" (see ss 761A and 764A(1)(d)) and "superannuation product" (see ss 761A and 764A(1)(g)). It suffices to note that it is common ground that each of the clients in this matter was a "retail client". It should also perhaps be noted, in this context, that all of Mr Sinha's recommendations which were in due course taken up by the relevant clients in this matter concerned products which were "financial products" as defined in Div 3 of Pt 7.1 of the Act.

13 Having ascertained that Div 2 of Pt 7.7A applied to the facts of this case, it is necessary to have regard to the various provisions that were contravened by Mr Sinha and Westpac. The first of those provisions is s 961B. Subsections 961B(1) and (2) of the Act provided as follows:

> (1) The provider must act in the best interests of the client in relation to the advice.
>
> (2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:
>
> > (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
> >
> > (b) identified:
> >
> > > (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
> > >
> > > (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the ***client's relevant circumstances***);
> >
> > (c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;
> >
> > (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to

provide the advice;

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

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

(ii) assessed the information gathered in the investigation;

(f) based all judgements in advising the client on the client's relevant circumstances;

(g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

14 It may be observed that the overarching duty imposed on a provider by subs 961B(1) is to act in the best interests of the client in relation to the advice. Subsection 961B(2), which various commentators and other boffins appear to have dubbed the "safe-harbour defence", provided a list of actions which, if proved by a provider to have been "done", would establish that the provider satisfied the duty to act in the best interests of the client in relation to the advice. The fact that a provider may establish that he or she had satisfied the duty to act in the best interests of the client by proving that he or she did the things listed in subs 961B(2), tends to suggest that the duty in subs 961B(1) is more concerned with "process or procedure", or the conduct of the provider, as opposed to the content or substance of the advice given: *Australian Securities and Investments Commission, in the matter of NSG Services Pty Ltd v NSG Services Pty Ltd* [2017] FCA 345; 122 ACSR 47 at [21]; *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644; 131 ACSR 484 at [129]; *ASIC v Westpac Securities* at [404]-[410] (O'Bryan J; cf. Allsop CJ at [151]); cf. *McDonald v AMP Financial Planning Pty Ltd* [2018] QSC 195; 129 ACSR 605 at [48].

15 Even if the list of actions in the so-called safe-harbour defence in subs 961B(2) may suggest that the duty to act in a client's best interests is more about process than the content of the advice, it does not necessarily follow that a failure by a provider to do one or more of the things listed in subs 961B(2) would establish a breach of the duty in subs 961B(1). There is also

nothing definitive in the text or context of s 961B to suggest that the duty imposed by subs 961B(1) should necessarily be approached solely by reference to failures in process or procedure, let alone solely by reference to the procedural check-list in subs 961B(2). As will be seen, however, that is not an issue which is necessary to decide on the facts of this matter. That is because it was common ground that Mr Sinha did not act in the best interests of the clients in relation to the advice he provided to them. It was also common ground that he did not do a number of the things listed in subs 961B(2), so the "safe-harbour" defence was not available to him.

16 It is also unnecessary, in those circumstances, to consider the terms of ss 961C, 961D and 961E of the Act, which respectively helpfully explain (in case that was not otherwise reasonably apparent) the circumstances in which something can be taken to be "reasonably apparent", what constitutes a "reasonable investigation" and what would "reasonably be regarded as in the best interests of the client".

17 The next section to consider is s 961G of the Act, which is plainly about the substance or content of the advice provided to the client. It provided as follows:

> The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client.
>
> Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

18 As can be seen, s 961G assumes that the provider satisfied the duty under s 961B to act in his or her client's best interests. The question, in those circumstances, is whether it would be reasonable to conclude that the advice given to the client was "appropriate to the client". The words "reasonable to conclude" indicate that the question must be approached objectively. It is unnecessary to further explore the circumstances in which it might be concluded that it was not reasonable to conclude that the advice given to a client was not appropriate to the client. As will be seen, in this case there is no dispute that it was not, or would not have been, reasonable to conclude that the advice given by Mr Sinha to the relevant clients was appropriate to those clients.

19 Section 961H of the Act, which is the next provision which was contravened by Mr Sinha, set out what a provider was required to do where the provider had incomplete or inaccurate

information about the objectives, financial situation and needs of the client. Subsection 961H(1) provided as follows:

> If it is reasonably apparent that information relating to the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate, the provider must, in accordance with subsections (2) and (3), warn the client that:
>
> (a) the advice is, or may be, based on incomplete or inaccurate information relating to the client's relevant personal circumstances; and
>
> (b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs.

20 Subsections 961H(2) and (3) of the Act set out the time at which, and the means by which, the warning was required to be given.

21 The final relevant civil penalty provision to consider is s 961J of the Act, which relates to the situation where there is a conflict between the interests of the client and the provider, amongst others. Subsection 961J(1) of the Act provided as follows:

> If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:
>
> (a) the provider; or
>
> (b) an associate of the provider; or
>
> (c) a financial services licensee of whom the provider is a representative; or
>
> (d) an associate of a financial services licensee of whom the provider is a representative; or
>
> (e) an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee; or
>
> (f) an associate of an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee;
>
> the provider must give priority to the client's interests when giving the advice.
>
> Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

22 As adverted to earlier, Westpac's liability in respect of Mr Sinha's contraventions of ss 961B, 961G, 961H and 961J arose by reason of subs 961K(2), which provided as follows:

> A financial services licensee contravenes this section if:
>
> (a) a representative, other than an authorised representative, of the licensee contravenes section 961B, 961G, 961H or 961J; and
>
> (b) the licensee is the, or a, responsible licensee in relation to that contravention.

23 Section 761A of the Act provided that a "financial services licensee" means "a person who holds an Australian financial services licence", that an "Australian financial services licence" means "a licence under section 913B that authorises a person who carries on a financial services business to provide financial services", that (again in case it was not otherwise obvious) a "financial services business" means "a business of providing financial services" and that a "financial service" has the meaning given by Div 4 of Pt 7.1 of the Act. It is unnecessary to go to Div 4 of Pt 7.1 of the Act because it was common ground that Westpac was a financial services licensee because it held an Australian financial services licence.

24 As for whether Westpac was the "responsible licensee" in relation to Mr Sinha's contraventions, s 960 of the Act provided that the expression "responsible licensee" in relation to a contravention of a provision of Pt 7.7A has the meaning given by s 961P. Section 961P of the Act provided as follows:

> For the purposes of this Part, the, or a, ***responsible licensee***, in relation to a contravention of a provision of this Part, is:
>
> (a) if the person who contravenes the provision is a representative of only one financial services licensee—that financial services licensee; or
>
> (b) if the person who contravenes the provision is a representative of more than one financial services licensee:
>
> (i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee; or
>
> (ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees.

25 Section 960 of the Act also provided that, in Pt 7.7A, "representative" of a financial services licensee "has the same meaning as in Part 7.6 (see section 910A)". Subsection 910A(a) of the Act provided that "representative" of a person means, if the person is a financial services licensee, an authorised representative of the licensee, an employee or director of the licensee, or an employee or director of a related body corporate of the licensee, or any other person acting on behalf of the licensee. It was common ground that Mr Sinha was a "representative"

of Westpac within the meaning of subs 910A(a) of the Act and was not a representative of any other financial services licensee.

26 It was also common ground that Mr Sinha was not an "authorised representative" of Westpac as defined in s 761A of the Act. It is accordingly unnecessary to go to s 761A of the Act, which in any event simply directed the reader to s 916A of the Act. Section 916A indicated that a person is an authorised representative of a financial services licensee if the licensee gives the person a written notice authorising the person, for the purposes of Ch 7 of the Act, to provide a specified financial service or financial services on behalf of the licensee. It would seem that Westpac did not give Mr Sinha such a written notice.

27 The final provision that was contravened by Westpac is subs 912A(1)(a) of the Act. Subsection 912A(1) provided as follows:

> 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
>
> (aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and
>
> (b) comply with the conditions on the licence; and
>
> (c) comply with the financial services laws; and
>
> (ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and
>
> (d) unless the licensee is a body regulated by APRA—have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and
>
> (e) maintain the competence to provide those financial services; and
>
> (f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and
>
> (g) if those financial services are provided to persons as retail clients—have a dispute resolution system complying with subsection (2); and
>
> (h) unless the licensee is a body regulated by APRA—have adequate risk management systems; and
>
> (j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

28 The paragraphs of subs 912A(1) relevant to this case are subparagraphs (a) and (c). Section 761A of the Act defined "financial services law" as including a provision of Ch 7 of the Act, which relevantly includes s 961K.

29 As for the orders that the Court must, or may, make if a person has been found to have contravened, relevantly, s 961K, subs 1317E(1) of the Act provided that if a Court is satisfied that a person has contravened one of the provisions listed in the table incorporated in that section, it must make a declaration of contravention. The provisions in the table are defined as civil penalty provisions. Subsections 961K(1) and (2) of the Act are listed in the table at item 18. Subsection 1317E(2) of the Act relevantly provided that a declaration of contravention must specify the Court that made the declaration, the civil penalty provision that was contravened, the person who contravened the provision, the conduct that constituted the contravention and, if the contravention is of a corporation/scheme civil penalty provision – the corporation or registered scheme to which the conduct related.

30 Subsection 1317G(1E) of the Act provided that a Court may order a person to pay the Commonwealth a pecuniary penalty if a declaration of contravention by the person has been made under s 1317E and the contravention was of one of the provisions listed in subs 1317G(1E)(b), which, at paragraph (b)(i), included subss 961K(1) and (2). Subsection 1317G(1F) provided that the maximum amount that the Court may order the person to pay for a contravention of a provision mentioned in subs 1317G(1E)(b), other than two provisions not relevant to this matter, was $200,000 for an individual or $1,000,000 for a body corporate.

SUMMARY OF FACTS RELEVANT TO THE CONTRAVENTIONS

31 Save for one matter, the facts relevant to Westpac's contraventions were not in dispute. The facts were set out in a document entitled "Statement of Agreed Facts and Contraventions", which was signed on behalf of both the Commission and Westpac and was tendered by consent by the Commission. The Commission also tendered a number of the documents referred to in the Agreed Facts.

32 The one factual matter that remained in dispute concerned Westpac's knowledge that there was a significant risk that Mr Sinha would not comply with the "best interests obligations" in Div 2 of Pt 7.7A of the Act from 1 July 2013. Westpac admitted that it ought reasonably to have known of that risk. The Commission, however, contended that it could be inferred from the primary facts in the Agreed Facts and the documents referred to in it that Westpac had actual

knowledge of that risk through two of its senior officers. That issue is addressed later in these reasons.

33 Following is a simplified summary of the material facts relevant to Westpac's contraventions. The summary deliberately does not employ all of the terminology and defined terms that are used in the Agreed Facts. The excessive use of defined terms in the Agreed Facts not only makes the document excruciatingly tedious to read and in parts difficult to comprehend, but was ultimately productive of the ambiguity which was the root cause of the dispute between the parties concerning the number of contraventions. That dispute is addressed later in these reasons.

34 Unless stated otherwise, the summary of facts relates to the state of affairs during the period 1 July 2013 to 17 August 2014, being the period during which the contraventions were committed. It should not be inferred that the omission of any particular fact from the following summary means that the fact was overlooked or ignored, though it may suggest that the fact was not considered to be particularly important.

Westpac's wealth management business and the employment of Mr Sinha

35 Westpac held an Australian financial services licence and carried on a financial services business. That business included a "wealth management" business the trading name of which was, at various times, "Westpac Financial Planning" and "BT Financial Advice". Westpac or related corporate bodies employed advisers to provide financial advice and advice about financial products as part of its wealth management business.

36 Mr Sinha was employed by a subsidiary of Westpac, **Westpac Financial Consultants** Limited, in July 2001. He was seconded to Westpac and, in March 2012, entered into a partnership agreement under a partnership model employed by Westpac for the purposes of its wealth management business. The effect of the partnership agreement was that Mr Sinha was permitted to operate as a semi-autonomous business and supervise a team of Westpac or Westpac Financial Consultants' employees consisting of senior or assistant financial planners and assistants. Mr Sinha and his team were referred to within Westpac as a partnership. Despite being a party to the partnership agreement, Mr Sinha remained an employee of Westpac Financial Consultants seconded to Westpac until that employment was terminated in November 2014.

37 Mr Sinha's remuneration was partly fixed and partly variable. The variable component of his remuneration comprised money payable to Mr Sinha under the terms of the partnership agreement or Westpac's partnership model. It was derived in the following way. The revenue generated by Mr Sinha and his team was paid to Westpac. A portion of that revenue, ranging from 48% to 53%, was allocated to Mr Sinha's partnership. From that amount was deducted the fixed costs of employing Mr Sinha and the members of his team, together with certain other administrative, service and overhead costs incurred by the partnership and an amount referred to as the "partnership reserve". The balance was paid to Mr Sinha as his "partner payout".

38 Mr Sinha was a representative of Westpac, within the meaning of subs 910A(a) of the Act, throughout the period of his employment and partnership with Westpac. He was not, however, an "authorised representative" of Westpac within the meaning of s 761A of the Act. He was not a representative of any other person who held an Australian financial services licence.

Mr Sinha's compliance history prior to the contraventions

39 Westpac conducted periodic reviews of Mr Sinha's client files.

40 Westpac had three compliance ratings: "requires improvement" (rating of 2), "qualified" (rating of 3) and "effective" (rating of 4). Westpac did not have records of Mr Sinha's compliance reviews in 2001 and 2002. A compliance review was undertaken in 2003, though no rating was awarded. The reports for each of Mr Sinha's compliance reviews identified specific compliance issues and in some cases included action plans to rectify issues identified during the particular review. In 2002 and 2007, Mr Sinha was required to complete formal remedial action plans to address identified areas of concern and shortcomings.

41 Mr Sinha was subject to nine compliance audits between 2004 and 2010. He was rated "effective" on four of those occasions (2005, 2007, 2008 and 2010), "qualified" on two occasions (2006 and 2009) and "requires improvement" on three occasions (2004, 2007 and 2009). The issues identified during the audits included failure to identify client circumstances and objectives, failure to address alternative strategies (in 2004), lack of disclosure of fees, poor record keeping, failure to comply with Westpac's policies and procedures and failure to ensure advice and products were appropriate.

42 Westpac conducted an investigation into Mr Sinha in 2010. The investigation involved interviews and a review of 24 of Mr Sinha's files. A memorandum recording the results of the investigation recorded that of the files reviewed, all had the summary of costs table removed,

8% involved inappropriate advice, 42% disclosed no reasonable basis for the advice, 12.5% contained under-disclosure of fees and 28% contained blank forms signed by clients.

43 On 30 March 2010, an email which forwarded the memorandum concerning the 2010 investigation into Mr Sinha was sent to various senior officers, including Mr Mark Spiers, who was Head of Advice, BT Financial Group, and Mr Neville Price, Head of Advice WA, SA and NT, BT Financial Group and Mr Sinha's state manager. The email recommended that Mr Price liaise with other officers "to determine whether the issues identified through the targeted review warrant the provision of a formal warning, suspension or further action" and that if it was intended that Mr Sinha be allowed to continue to provide financial services "a Remedial Action Plan for approval by Mark Spiers and that heightened PM supervision be implemented immediately".

44 Email correspondence which followed the 30 March 2010 email suggested that Mr Spiers' initial reaction to the findings of the investigation was that the termination of Mr Sinha was warranted, but that Mr Price was to meet with Mr Sinha so as to give him the opportunity to respond to the findings. Mr Price and another Westpac officer met with Mr Sinha on 1 April 2010 and shortly thereafter Mr Sinha provided a written response to the issues raised by the investigation. In a subsequent email that Mr Price sent to Mr Spiers, which attached a copy of Mr Sinha's written response, Mr Price advised that, in his view, Westpac did not have "grounds for dismissal", that he did not believe that Mr Sinha intended to deceive clients and that, given his long service, Westpac needed to give Mr Sinha "every chance" to prove that to be the case. The email included Mr Price's recommendations, which included that various remedial steps be taken and a requirement that, for a period of time, Mr Sinha's advice to clients be vetted by others prior to being provided to the clients.

45 It would appear that Mr Price's recommendations were mostly accepted by senior managers at Westpac, including Mr Spiers. The final recommendations included that Mr Sinha be sent a "written warning", that there would be another audit of Mr Sinha in six months, that the "investigations team" undertake a further "targeted file review" within six months and that Mr Sinha be placed on "Pre-vet" for three months, during which time he would be precluded from providing "execution only" services. Mr Sinha was subsequently placed on "pre-vet" in mid-April 2010 for three months. Various other remedial actions and restrictions were also imposed on Mr Sinha. Westpac's "compliance risk rating" for Mr Sinha was increased to "high risk", which had certain consequences for his remuneration.

46 During the period when Mr Sinha's advices were vetted in May to July 2010, only six out of 17 advices were rated "effective", with three rated "qualified" and eight rated "requires improvement". The deficiencies revealed by the vetting process included: failures to meet all the client's needs and goals; failures to explain the recommended strategy; failures to provide adequate reasons for recommendations; failures to link recommendations to the client's needs; no reasonable basis for the advice; failures to include a financial product replacement statement; and failure to document the costs of exiting an existing financial product and acquiring a replacement product. Despite those deficiencies, Mr Sinha was released from pre-vetting in mid-July 2010.

47 Ten of Mr Sinha's files were audited on 8 November 2010. The auditor noted that "[w]hile a number of the files held minimal issues, the remaining files held issues that were quite concerning and require further action". As a result, a further discretionary bonus was withheld from Mr Sinha.

48 Compliance reviews of Mr Sinha were conducted in May 2011, May 2012 and August 2013. Mr Sinha was rated "effective" in each of those reviews, though the reports prepared in respect of each review nonetheless highlighted some not insignificant failures or issues. The August 2013 report, for example: identified missing documentation in relation to a customer; identified oversights in relation to the scope and subject matter of advice in relation to a customer; identified a "paraplanning error" in the disclosure of advice fees; referred to an instance when Mr Sinha did not recommend trauma insurance but did not provide an adequate explanation for why it was not recommended; recounted an instance where Mr Sinha provided advice which was not consistent with the research on file for that customer; identified an advice which appeared to be have been "cut and paste[d]" from a different file; and identified other advices which failed to identify the scope and subject matter of the advice, or failed to consider alternative strategies.

49 Westpac admitted that, by reason of the audits, investigations and compliance reviews conducted in respect of Mr Sinha over the preceding years, from 1 July 2013 it ought reasonably to have known that there was a significant risk that Mr Sinha would not comply with the obligations in ss 961B, 961G, 961H and 961J of the Act. The Commission contended, however, that at the very least Mr Spiers and Mr Price had actual knowledge of that risk and that their knowledge should be imputed to Westpac. That factual contention is addressed in detail later.

50 On 25 September 2014, Westpac completed a compliance review of Mr Sinha. The report of that review recorded a "requires improvement" rating and identified specific deficiencies in each of the four files that had been reviewed. Mr Sinha's employment was suspended on 25 September 2014. His employment was terminated on or about 10 November 2014.

Performance ratings

51 In addition to compliance ratings, Westpac also gave employees in Mr Sinha's position performance review ratings. In September 2010, 2011, 2012 and 2013 Mr Sinha received "high achievement" review ratings by Westpac. That was despite the fact that between May and July 2010 Mr Sinha's advices were subject to pre-vetting and despite the deficiencies identified in his compliance reviews for 2011, 2012 and 2013.

Mr Sinha's advice to four clients

52 Mr Sinha's contraventions of ss 961B, 961G, 961H and 961J of the Act, and the resulting contraventions by Westpac of s 961K of the Act, arose from advice that Mr Sinha gave to four sets of clients between July 2013 and August 2014. The names of those clients have been anonymised. The first two clients are referred to as Mr and Mrs AA; the second are referred to as Mr and Mrs BB; the third are referred to as Mr and Mrs CC; and the fourth are referred to as Dr DD and Mr EE.

Advice given to Mr and Mrs AA

53 Mr Sinha met with Mr and Mrs AA in early June 2013 and agreed to provide them with financial advice.

54 At the time she met Mr Sinha, Mrs AA was 46 years old and worked as a shopkeeper. Her proposed retirement age was 65. Her annual salary was approximately $30,000. She held relatively small amounts in three superannuation funds: AXA Tailored Super roll over ($13,912); BT Business Super 1 fund ($8,985) and BT Business Super 2 fund ($4,864). She had coverage and paid premiums under three life insurance policies: $620,698 term life coverage under Westpac Term Life with annual premiums of $729; $145,000 term life coverage and $145,000 total and permanent disability coverage under BT Super Term Life with annual premiums of $515; and $16,200 life coverage and $16,200 total and permanent disability under BT Business Super Term Life with annual premiums of $68.

55 Mr AA was 42 years old and worked as a plant operator. His proposed retirement age was 65. His annual salary was approximately $150,000. He had superannuation funds of $165,987 in

a BT Portfolio SuperWrap superannuation fund and had the benefit of term life coverage of $1,063,990 under BT Term Life with annual premiums of $900.

56 The advice that Mr Sinha gave to Mr and Mrs AA included three recommendations.

57 The first recommendation was that Mrs AA consolidate her superannuation by rolling over the funds in her existing accounts into a BT Foundation Portfolio SuperWrap superannuation fund.

58 The second recommendation was that Mrs AA cancel her existing life insurance policies and take out, within the new superannuation fund, term life cover of $750,000 under a BT Term Life Protection Plan.

59 The third recommendation was that Mr AA take out income protection insurance, with a monthly benefit of $9,380 and a five-year benefit period, under a BT income protection plan to be held within his existing superannuation account.

60 Each of the three recommendations to Mr and Mrs AA comprised or constituted "financial product advice" within the meaning of subs 766B(1) of the Act and "personal advice" within the meaning of subs 766B(3) of the Act. The advice given to Mr and Mrs AA was a "financial service" provided to them as retail clients for the purposes of s 761G of the Act. Division 2 of Pt 7.7A of the Act accordingly applied to the advice.

61 The process by which the advice was given to Mr and Mrs AA, and the advice itself, was defective or deficient in a number of respects.

62 First, Mr Sinha did not adequately ascertain and record in the customer profile booklet the objectives, financial situation and needs for Mr and Mrs AA. Large sections of the booklet were incomplete or lacking analysis and there was no record that Mr Sinha explored various relevant topics with Mr and Mrs AA.

63 Second, the life insurance recommendation to Mrs AA and the income protection recommendation to Mr AA were made without conducting an analysis of the insurance needs of Mr and Mrs AA. Mr Sinha did not meaningfully or adequately consider any alternative strategies to the courses of action recommended, or adequately set out the advantages and disadvantages of each.

64 Mrs AA's existing life insurance policies contained total and permanent disability coverage, whereas the recommended life insurance policy did not. Mr Sinha did not consider whether Mrs AA needed total and permanent disability coverage. The recommended life insurance

policies had a higher annual premium than the combined premiums of the existing policies and provided less cover than the existing policies combined. Mr Sinha did not advise Mrs AA that there was an intrinsic benefit in retaining her existing policies, and a risk in replacing them with the recommended policy, by reason of s 29(3) of the ***Insurance Contracts Act*** *1984* (Cth). Nor did he adequately advise Mrs AA in respect of funding the recommended life insurance policies through superannuation, including that doing so would erode her superannuation savings.

65 In relation to the recommendations to Mr AA concerning income protection insurance, Mr Sinha failed to consider the alternative strategy of holding income protection outside superannuation. Mr AA had sufficient cash flow to fund income protection insurance premiums outside superannuation and would have obtained a greater tax advantage by holding that insurance outside superannuation because the premiums would have been deductable at his highest marginal tax rate rather than the lower concessional tax rate applicable to income within superannuation.

66 Third, in respect of the recommendation to Mrs AA concerning the consolidation of her superannuation funds, Mr Sinha's advice did not meaningfully or adequately consider any alternative strategies to the recommended courses of action, or adequately set out the advantages and disadvantages of each. There was, for example, no consideration of the possible strategy of rolling the balance of the two BT funds into the AXA fund. Mr Sinha appears not to have conducted a proper review of the existing superannuation funds or a proper comparison between those funds and the recommended one.

67 As a result of the implementation of the recommendations, Mr Sinha was eligible to receive up to $3,018 arising from the commission payable in respect of the recommended financial products. Total commissions payable were up to $5,694.

68 The advice Mr Sinha gave to Mr and Mrs AA was given other than in good faith and with a view to providing the most appropriate financial advice. He was influenced in making the recommendation by the prospect of receiving variable remuneration based on the commission and implementation fees payable by Mr and Mrs AA.

Contravention of s 961B(1) of the Act

69 Mr Sinha failed to act in the best interests of Mr and Mrs AA in relation to the advice he gave them.

70 Mr Sinha did not do a number of the things referred to in subs 961B(2) of the Act. He did not identify the subject matter of the advice that had been sought by Mr and Mrs AA, or identify the objectives, financial situation and needs of Mr and Mrs AA that would reasonably be considered to be relevant to the advice. He did not make reasonable inquiries to obtain complete and accurate information where it was reasonably apparent that information relating to Mr and Mrs AA's circumstance was incomplete and inaccurate. He did not conduct a reasonable investigation into the financial products that might achieve the objectives and needs of Mr and Mrs AA, or assess the information gathered in respect of any such investigation. He did not base all judgments on Mr and Mrs AA's relevant circumstances.

71 It was common ground that there was only one relevant contravention of s 961B(1) by Mr Sinha arising from the advice given to Mr and Mrs AA.

Contravention of s 961G of the Act

72 It would not have been reasonable in all the circumstances to conclude that the advice given to Mrs AA in relation to life insurance, and the advice given to Mr AA in relation to income protection, was appropriate to Mrs AA and Mr AA respectively, had Mr Sinha satisfied the duty under s 961B to act in the best interests of Mr and Mrs AA.

73 The Commission contended that there were two contraventions of s 961G by Mr Sinha: one in respect of the life insurance recommendation given to Mrs AA and one in relation to the income protection insurance recommendation given to Mr AA. Westpac maintained that there was only one contravention arising from the overall advice given to Mr and Mrs AA. That issue will be addressed later.

Contravention of s 961J of the Act

74 There was a conflict between the interests of Mr and Mrs AA, on the one hand, and Westpac, or one of its associates, and Mr Sinha, on the other. Mr Sinha knew, or ought reasonably to have known, of that conflict of interest.

75 Mr and Mrs AA had an interest in Mr Sinha acting in their best interests in relation to the advice that he was to provide to them, and an interest in that advice being appropriate to them in their circumstances.

76 Westpac, or one of its associates, and Mr Sinha had a pecuniary interest in the implementation of the recommendations Mr Sinha made to Mr and Mrs AA.

77 Westpac, or one of its associates, had a pecuniary interest in the implementation of the recommendation to Mrs AA to consolidate her superannuation funds because an implementation fee of $833 and product fees and charges would be payable by Mrs AA. Mr Sinha had a pecuniary interest in the implementation of this recommendation because he would earn variable remuneration under his partnership agreement with Westpac arising from the payment of the implementation fee.

78 Westpac, or one of its associates, had a pecuniary interest in the implementation of the recommendation to Mrs AA concerning her life insurance policies because, if implemented, an initial commission of about $1,441 and ongoing commission of about $131 per annum would have been payable by Mrs AA. Mr Sinha had a pecuniary interest in the implementation of this recommendation because he would earn variable remuneration under his partnership agreement with Westpac arising from the payment of that commission.

79 Westpac, or one of its associates, had a pecuniary interest in the implementation of the recommendation to Mr AA concerning his income protection policy because, if implemented, an initial commission of about $4,253 and ongoing commission of $387 per annum would have been payable by Mr AA. Mr Sinha had a pecuniary interest in the implementation of this recommendation because he would earn variable remuneration under his partnership agreement with Westpac arising from the payment of that commission.

80 Mr Sinha failed to give priority to the interests of Mr and Mrs AA over his and Westpac's interests.

81 The Commission contended that there were three contraventions of s 961J by Mr Sinha: one in respect of the superannuation consolidation advice given to Mrs AA, one in respect of the life insurance recommendation given to Mrs AA and one in relation to the income protection insurance recommendation given to Mr AA. Westpac maintained that there was only one contravention arising from the overall advice given to Mr and Mrs AA. That issue will be addressed later.

Advice given to Mr and Mrs BB

82 Mr Sinha met with Mr and Mrs BB in early November 2013 and agreed to provide them with financial advice.

83 At the time he met Mr Sinha, Mr BB was 50 years old and worked as a mining supervisor. His proposed retirement age was 65. His annual salary was approximately $116,000. He had

superannuation funds of $204,122 in a Rest superannuation fund and had the benefit of term life coverage of $327,000 within that fund.

84 Mrs BB was 48 years old and worked as a bus driver. Her proposed retirement age was 65. Her annual salary was $40,000. She held $10,562 in a TWU superannuation fund and had the benefit of term life and total and permanent disability coverage of $107,025 under that fund. She paid annual premiums of $484.

85 The advice that Mr Sinha gave to Mr and Mrs BB included three main recommendations.

86 The first main recommendation was that they establish a self-managed superannuation fund and, once that fund was established, roll over the money in their existing superannuation funds into the self-managed superannuation fund and redirect their superannuation guarantee contributions into the self-managed superannuation fund.

87 The second main recommendation was that Mr and Mrs BB both take out insurance under a BT protection plan with term life cover of $445,000, total and permanent disability cover of $445,000 and trauma cover in the amount of $195,000 for each of them. Once those recommended policies were established, Mr and Mrs BB were to cancel their existing life insurance policies.

88 The third main recommendation was that Mr and Mrs BB take out insurance under a BT protection plan with income protection cover of $8,450 per month for Mr BB and $2,920 per month for Mrs BB.

89 Each of those three main recommendations to Mr and Mrs BB comprised or constituted "financial product advice" within the meaning of subs 766B(1) of the Act and "personal advice" within the meaning of subs 766B(3) of the Act. The advice given to Mr and Mrs BB was a "financial service" provided to them as retail clients for the purposes of s 761G of the Act. Division 2 of Pt 7.7A of the Act accordingly applied to the advice.

90 Mr Sinha made two other recommendations to Mr and Mrs BB which did not directly or separately relate to separate financial products. Those recommendations were that both Mr and Mrs BB salary sacrifice certain amounts per year into the self-managed superannuation fund and that they pursue a 'gearing strategy' which involved them having their self-managed superannuation fund borrow $250,000 and purchase residential property worth $400,000.

91 The process by which the advice was given to Mr and Mrs BB, and the advice itself, was defective or deficient in a number of respects.

92 First, Mr Sinha did not adequately ascertain and record in the customer profile booklet the objectives, financial situation and needs for Mr and Mrs BB. In particular, the customer profile booklet contained little, if any, information about Mr and Mrs BB's circumstances, including their objectives, financial situation and needs, of the kind that each section of the booklet was designed to elucidate.

93 Second, the recommendation that Mr Sinha made concerning life insurance to Mr and Mrs BB was made without considering or having regard to whether life insurance and total and permanent disability coverage could be increased under Mr and Mrs BB's respective existing life insurance policies and whether that would be more cost-effective or preferable given that Mr and Mrs BB would not have been exposed to the risk of losing cover by operation of s 29(3) of the Insurance Contracts Act.

94 Mr Sinha made that recommendation without conducting a proper review of Mr and Mrs BB's existing life insurance policies or a proper comparison between them and the policies that Mr Sinha recommended they take up. The recommended life insurance policies were more expensive per dollar of cover than the existing life insurance policies. Mr Sinha did not tell Mr and Mrs BB that there was an intrinsic benefit in retaining their existing life insurance policies or adequately advise them that there was a risk of replacing the existing policies with the recommended policies having regard to the potential application of s 29(3) of the Insurance Contracts Act. Mr Sinha also did not properly advise Mr and Mrs BB on the appropriateness of the levels of term life, total and permanent disability and trauma cover that he recommended they take out.

95 Third, Mr Sinha did not properly consider whether Mr and Mrs BB's objective to establish a self-managed superannuation fund was appropriate for their circumstances. Nor did he consider whether Mr and Mrs BB had an adequate understanding of the responsibilities and risks of an investment strategy involving the establishment of a self-managed superannuation fund and investment into direct property.

96 The recommendations concerning the self-managed superannuation fund and the gearing strategy were made without conducting a proper review of Mr and Mrs BB's existing superannuation funds, or a proper comparison between, on the one hand, remaining invested

in the existing funds and, on the other, the strategy of setting up a self-managed superannuation fund and pursuing the attendant recommended rollover, loan and property purchase. Mr Sinha also did not properly advise Mr and Mrs BB of the advantages and disadvantages of implementing the recommendations and did not meaningfully or adequately consider any alternative strategies or set out the advantages and disadvantages of those strategies. Finally, Mr Sinha did not consider or warn Mr BB that there was a risk that the rollover of the funds in his existing superannuation fund into the self-managed superannuation fund may incur a potential tax liability in the United Kingdom.

97 Fourth, in relation to the recommendation concerning salary sacrifice, Mr Sinha did not properly consider whether that recommendation was appropriate for Mr and Mrs BB's circumstances.

98 Fifth, in relation to the recommendation that Mr and Mrs BB take out insurance with income protection cover, Mr Sinha did not properly advise Mr and Mrs BB on the appropriateness of the levels of income protection insurance that he recommended they take out.

99 Mr Sinha proposed to charge a fee of $3,000 for implementing the self-managed superannuation fund recommendation and the gearing strategy. Mr Sinha was eligible to receive variable remuneration based upon up to 53% of those fees.

100 As a result of the implementation of the recommendations, Mr Sinha was also eligible to receive additional variable remuneration arising from the commissions payable to Westpac or its associates in respect of the recommended financial products. The total commissions payable are detailed later.

101 The advice Mr Sinha gave to Mr and Mrs BB was given other than in good faith and with a view to providing the most appropriate financial advice. He was influenced in making the recommendation by the prospect of receiving variable remuneration based on initial and ongoing commissions and the implementation fees payable by Mr and Mrs BB.

Contravention of s 961B(1) of the Act

102 Mr Sinha failed to act in the best interests of Mr and Mrs BB in relation to the advice he gave them.

103 Mr Sinha did not do a number of the things referred to in subs 961B(2) of the Act. He did not identify the subject matter of the advice that had been sought by Mr and Mrs BB, or identify

the objectives, financial situation and needs of Mr and Mrs BB that would reasonably be considered to be relevant to the advice. He did not make reasonable inquiries to obtain complete and accurate information where it was reasonably apparent that the information he had obtained relating to Mr and Mrs BB's circumstance was incomplete and inaccurate. He did not conduct a reasonable investigation into the financial products that might achieve the objectives and needs of Mr and Mrs BB, or assess the information gathered in respect of any such investigation. He did not base all judgments on Mr and Mrs BB's relevant circumstances.

104 It was common ground that there was only one relevant contravention of s 961B(1) by Mr Sinha arising from the advice given to Mr and Mrs BB.

Contravention of s 961G of the Act

105 It would not have been reasonable in all the circumstances to conclude that the advice given to Mr and Mrs BB in relation to life insurance, income protection insurance, the establishment of a self-managed superannuation fund and the "gearing" strategy, was appropriate to Mr and Mrs BB, had Mr Sinha satisfied the duty under s 961B to act in the best interests of Mr and Mrs BB.

106 The Commission contended that there were three contraventions of s 961G of the Act by Mr Sinha: one in respect of each of the separate recommendations relating to financial products which were given to Mr and Mrs BB. Westpac maintained that there was only one contravention arising from the overall advice given to Mr and Mrs BB. That issue will be addressed later.

Contravention of s 961J of the Act

107 There was a conflict between the interests of Mr and Mrs BB, on the one hand, and Westpac, or one of its associates, and Mr Sinha, on the other. Mr Sinha knew, or ought reasonably to have known, of that conflict of interest.

108 Mr and Mrs BB had an interest in the advice that was given to them by Mr Sinha being appropriate to them and its content of not being affected, or potentially affected, by any pecuniary interest of Westpac, Mr Sinha or their associates.

109 Westpac, or one of its associates, and Mr Sinha had a pecuniary interest in the implementation of the recommendations that Mr Sinha made to Mr and Mrs BB.

110 If the recommendation concerning the self-managed superannuation fund was implemented, Westpac or one of its associates would receive an implementation fee of $3,000. Mr Sinha would also receive a portion of the implementation fee as part of his variable remuneration.

111 Westpac, or one of its associates, had a pecuniary interest in the implementation of the recommendation to Mr and Mrs BB concerning their life insurance policies because, if implemented, initial commissions totalling about $7,317 and ongoing commissions totalling about $665 per annum would have been payable by Mr and Mrs BB. Mr Sinha had a pecuniary interest in the implementation of this recommendation because he would earn variable remuneration under his partnership agreement with Westpac arising from the payment of that commission.

112 Westpac, or one of its associates, had a pecuniary interest in the implementation of the recommendation to Mr and Mrs BB concerning their income protection policies because, if implemented, initial commissions totalling about $6,445 and ongoing commission totalling $586 per annum would have been payable by Mr and Mrs BB. Mr Sinha had a pecuniary interest in the implementation of this recommendation because he would earn variable remuneration under his partnership agreement with Westpac arising from the payment of that commission.

113 Mr Sinha failed to give priority to the interests of Mr and Mrs AA over Westpac and his interests.

114 The Commission contended that there were three contraventions of s 961J of the Act by Mr Sinha: one in respect of the life insurance recommendation given to Mr and Mrs BB; one in relation to the income protection insurance recommendation given to Mr and Mrs BB; and one in relation to both the self-managed superannuation fund and gearing recommendations. Westpac maintained that there was only one contravention arising from the overall advice given to Mr and Mrs BB. That issue will be addressed later.

Advice given to Mr and Mrs CC

115 Mr Sinha met with Mr and Mrs CC in late June 2014 and agreed to provide them with financial advice.

116 At the time he met Mr Sinha, Mr CC was 62 years old, employed and planned to retire at the age of 68. His annual salary was $85,000. He also earned investment income of $18,453. He had superannuation funds in three accounts: $10,000 in an AMP superannuation account;

$70,000 in an LGSP WA super accumulation account and $250,000 in a LGSP WA super transition-to-retirement account.

117 Mrs CC was 61 years old and was retired. She was earning $19,209 in investment income per annum. She had shares valued at $18,000 but otherwise had no financial assets and was not making any superannuation contributions.

118 Mr and Mrs CC had annual expenses of $50,000 and were paying $48,750 per annum in investment property loan repayments. They jointly had $20,000 in cash as well as non-financial assets including a principal place of residence valued at $500,000 and two investment properties valued at just over $1 million against which they owed $975,000. They also had a joint cash account.

119 The advice that Mr Sinha gave to Mr and Mrs CC included four recommendations.

120 The first recommendation was that Mr CC roll over most of the funds from his existing superannuation accounts into a new BT Foundation SuperWrap super fund account and then roll over the combined funds into a BT Foundation SuperWrap pension account.

121 The second recommendation was that Mr CC draw the maximum pension of $32,800 per year from the newly established pension account.

122 The third recommendation was that Mr CC leave his existing LGSP WA super accumulation account open for future contributions and salary sacrifice $18,000 per year into that account.

123 The fourth recommendation was that Mr CC direct any surplus into his joint cash account with Mrs CC.

124 Each of the three recommendations to Mr and Mrs CC comprised or constituted "financial product advice" within the meaning of subs 766B(1) of the Act and "personal advice" within the meaning of subs 766B(3) of the Act. The advice given to Mr and Mrs CC was a "financial service" provided to them as retail clients for the purposes of s 761G of the Act. Division 2 of Pt 7.7A of the Act accordingly applied to the advice.

125 The process by which the advice was given to Mr and Mrs CC, and the advice itself, was defective or deficient in a number of respects.

126 First, Mr Sinha did not adequately ascertain and record in the customer profile booklet the objectives, financial situation and needs for Mr and Mrs CC. In particular, the customer profile

booklet contained little if any information about Mr and Mrs CC's circumstances of the kind that each section of the booklet was designed to elucidate.

127 Second, Mr Sinha failed to identify the voluntary concessional superannuation contributions totalling approximately $25,000 that Mr CC paid into his LGSP WA super accumulation account, or the amount of the pension income being drawn by Mr CC from his existing LGSP WA transition-to-retirement account, or the terms and conditions of Mr CC's employment relevant to the subject matter of the advice and Mr and Mrs CC's retirement objectives and needs. Mr Sinha failed to make reasonable enquiries to obtain that information in circumstances where it ought to have been reasonably apparent to him that such information that he did receive from Mr and Mrs CC was incomplete.

128 Third, while Mr Sinha undertook an analysis of Mr CC's existing superannuation accounts and did a comparison between those accounts and the recommended superannuation accounts, that analysis was inadequate. The effect of Mr Sinha's recommendations concerning Mr CC's superannuation was that Mr CC's contributions would reduce to $31,200, which was below the maximum concessional cap of $35,000 which was applicable at that time. Mr Sinha did not give any explanation for the reduction of Mr CC's superannuation contributions to below the maximum concessional cap. The effect of the reduction, if implemented, would have been that Mr CC would have to pay additional tax each year of approximately $800. It would also have reduced the rate at which Mr and Mrs CC were accumulating savings for retirement, in circumstances where Mr and Mrs CC had inadequate savings for retirement.

129 Fourth, Mr Sinha did not take into account that Mr CC had the benefit of a superannuation contribution matching arrangement with his employer whereby his employer matched Mr CC's voluntary superannuation contributions up to $5,100 per annum. Mr Sinha also did not take into account that Mr CC was drawing a pension from an existing LGSP pension account which totalled approximately $11,700.

130 Fifth, the recommendations, if implemented, would have produced an income surplus of approximately $21,000 per annum for Mr and Mrs CC. Mr Sinha did not explain how that surplus should be used to increase Mr and Mrs CC's assets for the purposes of their retirement. Nor did Mr Sinha address how the major liabilities of $975,000 on Mr and Mrs CC's investment loans were to be serviced. Mr Sinha recommended that any surplus be directed to cash, which offset Mr and Mrs CC's home loan.

131 Sixth, while Mr Sinha did address some alternative strategies in his advice, he did not meaningfully or adequately consider those alternative strategies, or set out their advantages and disadvantages.

132 Mr Sinha proposed to charge Mr and Mrs CC an advice preparation fee of $600 and an implementation fee of $9,840. Having regard to the subject matter of the advice given by Mr Sinha, the implementation fee was likely to outweigh the apparent financial benefit to Mr and Mrs CC to be derived from the implementation of the advice. Mr Sinha did not advise Mr and Mrs CC of that fact, despite the fact that he knew that Mr and Mrs CC were not sophisticated consumers of financial products and advice. Mr Sinha was eligible to receive variable remuneration of up to 53% of the fees he proposed to charge Mr and Mrs CC.

133 The advice Mr Sinha gave to Mr and Mrs CC was given other than in good faith and other than with a view to providing the most appropriate financial advice. He was influenced in making the recommendation by the prospect of receiving variable remuneration based on the implementation fee payable by Mr and Mrs CC.

Contravention of s 961B(1) of the Act

134 Mr Sinha failed to act in the best interests of Mr and Mrs CC in relation to the advice he gave them.

135 Mr Sinha did not do a number of the things referred to in subs 961B(2) of the Act. He did not identify the subject matter of the advice that had been sought by Mr and Mrs CC, or identify the objectives, financial situation and needs of Mr and Mrs CC that would reasonably be considered to be relevant to the advice. He did not make reasonable inquiries to obtain complete and accurate information where it was reasonably apparent that information he had obtained relating to Mr and Mrs CC's circumstance was incomplete and inaccurate. He did not conduct a reasonable investigation into the financial products that might achieve the objectives and needs of Mr and Mrs CC, or assess the information gathered in respect of any such investigation. He did not base all judgments on Mr and Mrs CC's relevant circumstances.

136 It was common ground that there was only one relevant contravention of subs 961B(1) by Mr Sinha arising from the advice given to Mr and Mrs CC.

Contravention of s 961G of the Act

137 It would not have been reasonable in all the circumstances to conclude that the advice given to Mr and Mrs CC was appropriate to Mr and Mrs CC, had Mr Sinha satisfied the duty under s 961B to act in the best interests of Mr and Mrs CC.

138 It was common ground that there was only one relevant contravention of s 961G by Mr Sinha arising from the advice given to Mr and Mrs CC.

Contravention of s 961H of the Act

139 Mr Sinha obtained statements and other documents in relation to Mr CC's existing AMP superannuation account and existing LGSP accounts. While the statement in relation to the LGSP WA super accumulation account showed that it held total permanent disability and death benefit insurances, the documents in relation to the LGSP WA super transition-to-retirement account did not show that any amounts had been deducted for insurance premiums and made no mention of any insurance being held in that account. It was also unclear from the statement in relation to the AMP superannuation account whether it held any insurance and the statement was incomplete: it referred to Mr CC as the "life insured" and noted that the premiums were "fully paid up", but did not record any amounts being deducted for premiums in the "detailed account activity" section of the statement.

140 In the circumstances, it was reasonably apparent that information relating to the objectives, financial situation and needs of Mr and Mrs CC on which Mr Sinha's advice was based was incomplete. Despite that, Mr Sinha did not warn Mr and Mrs CC that the advice he had provided was, or may have been, based on incomplete or inaccurate information relating to their, or Mr CC's, relevant personal circumstances and that, for that reason, Mr and Mrs CC, or Mr CC, should, before acting on the advice, consider the appropriateness of the advice having regard to their, or Mr CC's, objectives, financial situation and needs.

141 It was common ground that there was only one relevant contravention of s 961H by Mr Sinha arising from the advice given to Mr and Mrs CC.

Contravention of s 961J of the Act

142 There was a conflict between the interests of Mr and Mrs CC, on the one hand, and Westpac, or one of its associates, and Mr Sinha, on the other. Mr Sinha knew, or ought reasonably to have known, of that conflict of interest.

143 Mr and Mrs CC had an interest in Mr Sinha acting in their best interests in giving them advice and an interest in the advice being appropriate to them in their circumstances.

144 Westpac, or one of its associates, and Mr Sinha had a pecuniary interest in the implementation of the recommendations that Mr Sinha made to Mr and Mrs CC in relation to the roll-over of Mr CC's superannuation funds. If those recommendations were implemented, Westpac or one of its associates would receive the implementation fee referred to earlier. As events transpired, an implementation fee of $9,355.99 was charged to Mr and Mrs CC. Product fees were also payable to Westpac or one of its associates.

145 Mr Sinha had a pecuniary interest in the implementation of the superannuation roll-over recommendations because he would receive a portion of the implementation fee as part of his variable remuneration.

146 Mr Sinha failed to give priority to the interests of Mr and Mrs AA over his and Westpac's interests.

147 It was common ground that there was only one relevant contravention of s 961J by Mr Sinha arising from the advice given to Mr and Mrs CC.

Advice given to Dr DD and Mr EE

148 Mr Sinha met with Dr DD and Mr EE in early August 2014 and agreed to provide them with financial advice.

149 At the time he met Mr Sinha, Dr DD was 55 years old and planned to retire at the age of 65. He had $274,745 in a BT SuperWrap superannuation account and $10,000 in a UniSuper superannuation account.

150 Mr EE was 61 years old and proposed to retire at the age of 63. He had $151,773 in a BT SuperWrap superannuation account which was in its pension phase and $83,630 in another BT SuperWrap account.

151 Dr DD and Mr EE had a joint cash account and jointly owned a principal residence valued at $1,800,000 against which they owed $32,000. They also jointly owned cash of $20,000 and investment properties valued at $3,000,000 on which they owed $1,800,000. They were each contributing $35,000 per annum to their superannuation accounts.

152 The advice that Mr Sinha gave to Dr DD and Mr EE included three main recommendations.

153 The first recommendation was that both Dr DD and Mr EE roll-over some of the funds from their existing superannuation accounts into new BT SuperWrap pension plan accounts.

154 The second recommendation was that Dr DD draw a pension from her new superannuation account of $20,000 per year and Mr EE draw a pension from his new superannuation account of $4,000 per year.

155 The third recommendation was that Dr DD and Mr EE direct any surplus funds into their joint cash account.

156 The recommendations to Dr DD and Mr EE comprised or constituted "financial product advice" within the meaning of subs 766B(1) of the Act and "personal advice" within the meaning of subs 766B(3) of the Act. The advice given to Dr DD and Mr EE was a "financial service" provided to them as retail clients for the purposes of s 761G of the Act. Division 2 of Pt 7.7A of the Act accordingly applied to the advice.

157 Mr Sinha proposed to charge Dr DD $5,934 and Mr EE $1,760 for implementing his recommendations. Mr Sinha was eligible to receive variable remuneration based on up to 53% of the implementation fees.

158 The process by which the advice was given to Dr DD and Mr EE, and the advice itself, was defective or deficient in a number of respects.

159 First, Mr Sinha did not adequately ascertain and record in the customer profile booklet the objectives, financial situation and needs of Dr DD and Mr EE. In particular, the customer profile booklet contained little, if any, information about Dr DD and Mr EE's circumstances, including their objectives, financial situation and needs, of the kind that each section of the booklet was designed to elucidate. Large sections of the booklet were simply crossed out, or were incomplete or lacking in any analysis.

160 Second, the recommendations that Mr Sinha made were essentially directed at resolving only one financial problem that Dr DD and Mr EE faced at the time. That problem was a temporary cash flow deficit of $24,000 per annum which related to the cost of proposed renovations to an investment property. At the time Mr Sinha made the recommendations to Dr DD and Mr EE, however, they had other objectives, financial circumstances and needs that should have been, but were not, addressed. They included the achievement of an acceptable level of post-retirement income. Mr Sinha knew or ought to have known about Dr DD and Mr EE's other objectives, financial circumstances and needs.

161 Third, there were alternative strategies available to address Dr DD and Mr EE's temporary cash flow problem. The possible alternative strategies included taking out a loan, reducing concessional superannuation contributions, delaying the renovations, re-letting the investment property, or a combination of one or more of those strategies. Those alternative strategies would, on analysis, have been more appropriate than the recommendations made by Mr Sinha having regard to Dr DD and Mr EE's respective ages, their proximity to retirement, their assets and liabilities, the size of the implementation fees and the fact that, if implemented, Dr DD would have been required to pay additional tax. They would also most likely have resulted in higher post-retirement income, better accumulation of assets and reduced taxation liabilities compared to the strategies recommended by Mr Sinha. Mr Sinha either did not consider those alternative strategies, or considered them but dismissed them without any apparent basis.

162 Mr Sinha did give some consideration to other strategies that might have been available to Dr DD and Mr EE. Those strategies included paying living expenses from savings, decreasing salary sacrifice contributions and drawing more pension income from Mr EE's account and less from Dr DD's account. Mr Sinha ultimately recommended against taking those strategies, though his reasons for doing so reveal that his consideration of them was inadequate, or that the advice he gave in relation to them was defective or deficient.

163 Fourth, other BT superannuation products would have been more suitable as replacement superannuation plans and would have been more suitable than the recommended superannuation funds.

164 Fifth, while Mr EE was assessed as being a "balanced" investor, the investment recommendations made in respect of Mr EE, if implemented, would have resulted in him being overweight in higher-risk investments for a balanced investor, particularly having regard to his proximity to retirement and exposure to real estate.

Contravention of s 961B(1) of the Act

165 Mr Sinha failed to act in the best interests of Dr DD and Mr EE in relation to the advice he gave them.

166 Mr Sinha did not do a number of the things referred to in subs 961B(2) of the Act. He did not identify the subject matter of the advice that had been sought by Dr DD and Mr EE, or identify the objectives, financial situation and needs of Dr DD and Mr EE that would reasonably be considered to be relevant to the advice. He did not make reasonable inquiries to obtain

complete and accurate information where it was reasonably apparent that the information he had received in relation to Dr DD and Mr EE's circumstances was incomplete and inaccurate. He did not conduct a reasonable investigation into the financial products that might achieve the objectives and needs of Dr DD and Mr EE, or assess the information gathered in respect of any such investigation. He did not base all judgments on Dr DD and Mr EE's relevant circumstances.

167 It was common ground that there was only one relevant contravention of subs 961B(1) by Mr Sinha arising from the advice given to Dr DD and Mr EE.

Contravention of s 961G of the Act

168 It would not have been reasonable in all the circumstances to conclude that the advice given to Dr DD and Mr EE was appropriate to Dr DD and Mr EE, had Mr Sinha satisfied the duty under s 961B to act in the best interests of Dr DD and Mr EE.

169 The Commission contended that there were two contraventions of s 961G by Mr Sinha: one in respect of the recommendations given to both Dr DD and Mr EE in relation to superannuation rollover and one in relation to the recommendation given to both Dr DD and Mr EE in relation to drawing a pension from their new superannuation accounts. Westpac maintained that there was only one contravention arising from the overall advice given to Dr DD and Mr EE. That issue will be addressed later.

Contravention of s 961H of the Act

170 It was reasonably apparent that information relating to the objectives, financial situation and needs of Dr DD and Mr EE, on which Mr Sinha's advice was based, was incomplete. Dr DD and Mr EE had objectives, financial circumstances and needs that extended beyond the need to address their temporary cash flow problem, including the achievement of an acceptable level of post-retirement income. Mr Sinha knew, or ought to have known, that that was the case. Despite that, Mr Sinha did not warn Dr DD and Mr EE that the advice he had provided was, or may have been, based on incomplete or inaccurate information relating to their personal circumstances and that, for that reason, Dr DD and Mr EE should, before acting on the advice, consider the appropriateness of the advice having regard to their objectives, financial situation and needs.

171 It was common ground that there was only one relevant contravention of s 961H by Mr Sinha arising from the advice given to Dr DD and Mr EE.

Contravention of s 961J of the Act

172 There was a conflict between the interests of Dr DD and Mr EE, on the one hand, and Westpac, or one of its associates, and Mr Sinha, on the other. Mr Sinha knew, or ought reasonably to have known, of that conflict of interest.

173 Dr DD and Mr EE had an interest in Mr Sinha acting in their best interests in giving them advice and an interest in the advice being appropriate to them in their circumstances.

174 Westpac, or one of its associates, and Mr Sinha had a pecuniary interest in the implementation of the recommendations that Mr Sinha made to Dr DD and Mr EE in relation to the roll-over of their superannuation funds. If those recommendations were implemented, Westpac or one of its associates, would receive the implementation fees referred to earlier, as well as product fees or charges estimated at $4,411 for Dr DD and $1,679 for Mr EE.

175 Mr Sinha had a pecuniary interest in the implementation of the roll-over recommendations because he would receive a portion of the implementation fee as part of his variable remuneration.

176 Mr Sinha failed to give priority to the interests of Dr DD and Mr EE over his and Westpac's interests.

177 It was common ground that there was only one relevant contravention of s 961J by Mr Sinha arising from the advice given to Dr DD and Mr EE.

Westpac the "responsible licensee"

178 Westpac was the "responsible licensee" in relation to all of Mr Sinha's contraventions of ss 961B, 961G, 961H and 961J of the Act, within the meaning of s 961P of the Act. Westpac accordingly contravened s 961K of the Act.

Westpac's contravention of s 912A of the Act

179 As a financial services licensee, Westpac was, by reason of subs 912A(1)(a) of the Act, obliged to do all things necessary to ensure that the financial services covered by the licence were provided "efficiently, honestly and fairly".

180 The Commission alleged, and Westpac admitted, that it failed to meet its obligation under subs 912A(1)(a) of the Act for two reasons: first, because it awarded Mr Sinha "high achievement" performance ratings in 2010, 2011, 2012 and 2013 despite the fact that, between

May and July 2010, Mr Sinha's advices were subject to pre-vetting and despite the deficiencies identified in his compliance reviews for 2011, 2012 and 2013; and second, because Westpac at least ought reasonably to have known, from 1 July 2013, that there was a significant risk that Mr Sinha would not comply with his obligations under ss 961B, 961G, 961H and 961J of the Act. The Commission went further and alleged that it could be inferred from the agreed facts that Westpac had actual knowledge of that risk. Westpac disputed that such an inference could or should be drawn from the agreed facts. That issue is addressed later.

181 Westpac was also obliged, by reason of subs 912A(1)(c), to comply with the "financial services laws", which included s 961K of the Act. Westpac failed to meet its obligation under subs 912A(1)(c) because, as the responsible licensee for Mr Sinha's contraventions of ss 961B, 961G, 961H and 961J of the Act, it contravened s 961K.

OTHER RELEVANT FACTS

182 Westpac developed training materials for and delivered training to its advisers in preparation for, and following the introduction of, the FoFA reforms, including in relation to the best interests obligations in Div 2 of Pt 7.7A of the Act. Mr Sinha attended training in respect of the best interests obligations in May, June and August 2013.

183 Westpac identified Mr Sinha for detailed review in May 2014 through a data analytics tool that it had introduced following the commencement of the FoFA reforms. Upon conducting that review, certain concerns in respect of Mr Sinha's conduct were identified and investigated. Following that investigation, Mr Sinha's employment was suspended on 25 September 2014 and his employment was terminated on 10 November 2014.

184 On 31 May 2017, a delegate of the Commission decided to ban Mr Sinha from providing financial services for a period of five years in relation to conduct referred to in a "breach notification" that Westpac sent to the Commission in March 2015. That breach notification advised that the conduct that Westpac had identified at that point included charging ongoing advice fees without providing the relevant services and "issues" with the quality of advice that Mr Sinha had provided to clients.

185 Westpac has undertaken a remediation process in respect of Mr Sinha's clients. As at 22 October 2018, Westpac had paid approximately $12.7 million in compensation to clients impacted by Mr Sinha's poor advice and his failure to provide ongoing services where he had

agreed to do so. The compensation that was paid was not limited to instances where contraventions of the law had been established.

186 In relation to the four sets of clients relevant to this matter: Mrs AA received a refund of $428.42 and Mr AA received refunds totalling $16,106.22; Mr and Mrs BB received refunds totalling $6,045.47; Mr CC received a refund of $9,355.99; Dr DD received refunds totalling $57,305.03 and Mr EE received a refund of $70,154.38. Westpac also offered to indemnify Mr BB in respect of any demand from the United Kingdom revenue authority relating to any tax liability arising from any finding by that authority that the transfer of funds from Mr BB's existing superannuation policy to the self-managed superannuation fund was an unauthorised payment. The potential liability the subject of that indemnity was approximately $75,830.59.

187 A Regulation Impact Statement published by the Commission in December 2012 in relation to the FoFA reforms included the following statements:

> ASIC will take a facilitative approach to compliance with the FOFA reforms until 1 July 2014. We will work with industry participants to help them comply with the law.
>
> We will continue to liaise with industry associations and firms to ensure that we understand where the most significant implementation challenges arise. We will adapt our regulatory approach during the introduction of the FOFA reforms to take into account these issues.
>
> Where inadvertent breaches arise or systems changes are underway, we will adopt a measure approach provided industry participants are making reasonable efforts to comply. However, where we find deliberate and systematic breaches, we will take stronger regulatory action.

188 None of the statements in the Regulation Impact Statement, nor any other position taken by the Commission, exempted persons subject to the Act from compliance with s 912A of the Act or excused noncompliance with that provision. It is nevertheless to be noted, in this context, that the contraventions arising from the advice given to Mr and Mrs AA and the advice given to Mr and Mrs BB involved conduct that occurred prior to 1 July 2014 and the contraventions arising from the advice given to Mr and Mrs CC occurred partly before and partly after 1 July 2014, but no later than 2 July 2014. The contraventions arising from the advice given to Dr DD and Mr EE involved conduct that occurred after 1 July 2014 but no later than 7 August 2014.

NUMBER OF CONTRAVENTIONS

189 The dispute between the parties concerning the number of contraventions arising from the agreed facts did not so much involve competing submissions about the operation or construction of the relevant provisions of the Act. Rather, the dispute was largely the product

of unfortunate and ambiguous drafting and inadequate communication between the parties in relation to exactly what contraventions Westpac was admitting to.

190 What essentially divided the parties, in simple terms, was whether the agreed facts gave rise to a single contravention of s 961G and a single contravention of s 961J of the Act by Mr Sinha in respect of each statement of advice that Mr Sinha gave to each of the relevant clients, or whether there was a separate contravention of each of those provisions by Mr Sinha arising from each separate recommendation concerning a financial product contained in each statement of advice. The number of contraventions of s 961K by Westpac depended on the number of contraventions of the relevant provisions by Mr Sinha.

191 Taking the case of Mr and Mrs AA by way of example, as has already been explained, the statement of advice that Mr Sinha furnished to Mr and Mrs AA contained a recommendation to Mrs AA concerning a superannuation product, a recommendation to Mrs AA concerning a life insurance product and a recommendation to Mr AA concerning an income protection insurance product. The Commission initially contended that there was a separate contravention of s 961G in respect of each of those three product recommendations in the statement of advice, though ultimately it did not press its contention that there was a contravention of s 961G arising from the recommendation concerning the superannuation product. The Commission maintained that there was a separate contravention of s 961J in respect of each of the three product recommendations. For its part, Westpac contended that it had admitted only that there was a single contravention of both ss 961G and 961J in respect of the statement of advice.

192 While there is a regrettable degree of complexity and ambiguity in the relevant statutory provisions, it is nevertheless tolerably clear that a person who provides personal advice to a client may be found to have engaged in multiple contraventions of both s 961G and s 961J of the Act in circumstances where the advice, even though contained in a single statement of advice, nonetheless relates to more than one financial product. That flows from the respective definitions of "advice", "personal advice" and "financial product advice".

193 Subsection 961(1) of the Act provides, in effect, that the "advice" for the purposes of, *inter alia*, s 961G and s 961J, is "personal advice". Subsection 766B(3) of the Act provides that "personal advice" is "financial product advice" that is given or directed to a person in particular defined circumstances. Subsection 766B(1) defines "financial product advice" as being a "recommendation or a statement of opinion, or a report of either of those things" that is "intended to influence a person or persons in making a decision in relation to *a particular*

financial product or class of financial products, or an interest in *a particular financial product or class of financial products*" or "could reasonably be regarded as being intended to have such an influence" (emphasis added). The critical point to emphasise is that the definition of "financial product advice" essentially fixes on a recommendation or a statement of opinion in relation to a "particular financial product or class of financial products". It follows that a person who provides advice to a client about multiple financial products (or classes of financial products) thereby provides multiple instances of financial product advice.

194 The reference in subs 766B(1) to a "report" containing a recommendation or statement of opinion is somewhat ambiguous. It would appear to be intended to capture a document or other record of a recommendation or statement of opinion. In that context, it might, at first blush at least, be thought that a single document or other record that contains recommendations or opinions concerning more than one financial product might comprise a single instance of "financial product advice". On closer analysis, however, it can be seen that subs 766B(1) is relevantly expressed in the singular. A report, for the purposes of subs 766B(1), is something that records a single recommendation or single statement of opinion. The better view, therefore, is that a document or other record which contains recommendations or opinions concerning, for example, three separate financial products, in fact contains three separate reports of recommendations or opinions for the purposes of subs 766B(1); a separate report in respect of each separate financial product. A single document or other record containing recommendations or statements of opinion concerning three different financial products therefore comprises or constitutes three separate instances of financial product advice.

195 It follows that, taking the case of Mr and Mrs AA by way of example again, while Mr Sinha may well have provided only one statement of advice to Mr and Mrs AA, because that statement of advice contained recommendations or statements of opinion concerning three different financial products, it relevantly comprised three separate instances of the provision of financial product advice. The fact that the advice concerning the three different financial products was contained in a single document, or was provided at the same time or as part of the one act, is essentially immaterial in determining the number of potential contraventions of, relevantly, ss 961G and 961J of the Act.

196 Westpac in effect conceded that, in an appropriate case, the Commission would be able to allege that a person who provided recommendations to a client concerning multiple financial products, albeit in a single letter or statement of advice, had contravened ss 961G and 961J in

respect of each separate recommendation. It submitted, however, that this was not an appropriate case. That was said to be the case for a number of reasons, though most of those reasons related in one way or another to the wording of the Agreed Facts and, to a lesser extent, the pleadings.

197 First, Westpac pointed out that there was no clear and unambiguous statement in the Agreed Facts concerning the number of contraventions by either Mr Sinha or Westpac. Nowhere in the Agreed Facts is there an unambiguous admission by Westpac that Mr Sinha engaged in multiple contraventions of ss 961G and 961J in respect of some of the sets of clients, and it therefore engaged in corresponding multiple contraventions of s 961K.

198 Second, Westpac relied on the fact that those parts of the Agreed Facts which contain statements concerning the contraventions by Mr Sinha of ss 961G and 961J of the Act are either expressed in the singular, or appear under subheadings that are expressed in the singular.

199 Third, Westpac submitted that the contraventions referred to in the Agreed Facts are expressed by reference to what was effectively the entirety of the advice given to each of the clients. That included each of the recommendations in relation to different financial products. In Westpac's submission, that reflected the reality of the matter, which was that while the advice that Mr Sinha provided to each of the relevant clients included recommendations concerning different financial products, it essentially involved a single integrated financial plan or strategy.

200 Fourth, Westpac contended that the various deficiencies which gave rise to the contraventions of ss 961G and 961J are often analysed or addressed in the Agreed Facts by reference to the overall advice given to the clients, rather than strictly by reference to the separate recommendations. In Westpac's submission, the Agreed Facts proceed in part on the basis that at least some of the agreed deficiencies can be "treated together as part of the same financial plan or strategy".

201 Fifth, Westpac noted that there was a tension between the Commission's acceptance that the facts gave rise to only one breach of ss 961B and 961H in respect of each of the clients and the Commission's contention that there were separate contraventions arising from the separate recommendations given to each of the clients. Westpac submitted that there was "little to distinguish the analysis in respect of s 961B and 961H on the one hand, and 961G and 961J on the other".

202 Westpac's criticisms of the Agreed Facts have some considerable merit. There is certainly no clear and unambiguous statement in the Agreed Facts concerning the number of contraventions. There is also a degree of ambiguity and a lack of clarity in the way the critical facts concerning the contraventions, and the statements concerning the contraventions themselves, have been dealt with in the Agreed Facts. It does not necessarily follow, however, that the Agreed Facts do not support the number of contraventions of ss 961G and 961J that the Commission contended had been committed by Westpac, or that for some other reason the Court should not proceed on the basis of those multiple contraventions.

203 The main problem with the Agreed Facts, in terms of identifying the precise number of contraventions, arises from the fact that the relevant contraventions are expressed by reference to a series of defined terms or expressions.

204 In the case of Mr and Mrs AA, for example, the contraventions of ss 961G and 961J are expressed or particularised by reference to what is referred to as the "AA Advice". The s 961G contravention is said, in short, to be that "it would not have been reasonable to conclude that the AA Advice was appropriate to each of Mr and Mrs AA". Similarly, the s 961J contravention is said, in short, to be that Mr Sinha "gave the AA Advice other than in good faith".

205 It is perhaps not difficult to see how, in those circumstances, one could interpret the Agreed Facts as stating that there was a single contravention of ss 961G and 961J arising from the "AA Advice". It is, however, necessary to consider the definition of the "AA Advice". That in turn requires one to have regard to a series of other defined terms used in the Agreed Facts.

206 The "AA Advice" is defined in the Agreed Facts as being the "advice constituted by each of the AA Recommendations and, further or alternatively, the AA SOA". The expression "AA Recommendations" is the composite expression which is defined as encompassing each of what are referred to as the "AA Super Rollover Recommendation", the "AA Life Insurance Recommendation" and the "AA IP Insurance Recommendation". Each of those defined recommendations also incorporates various defined terms, though fortunately it is unnecessary, for present purposes, to consider those additional defined terms. The "AA SOA" is defined as the written statement of advice dated 2 June 2013 that Mr Sinha provided to Mr and Mrs AA. The "AA SOA" is said to have included each of the "AA Super Rollover Recommendation", the "AA Life Insurance Recommendation" and the "AA IP Insurance Recommendation".

207 The Commission contended that it was effectively agreed in the Agreed Facts that each of the "AA Super Rollover Recommendation", the "AA Life Insurance Recommendation" and the "AA IP Insurance Recommendation" constituted both "financial product advice" and "personal advice" as those terms or expressions are defined in the Act. Accordingly the making of each of those recommendations could give rise to separate contraventions of both ss 961G and 961J of the Act. So much so may be accepted.

208 The difficulty, however, is that the "AA Advice", as defined in the Agreed Facts, is not defined as simply comprising the three defined financial product recommendations. It is also said "further, or alternatively", to include the "AA SOA". The Agreed Facts also state that the AA Advice was financial product advice. If that is accepted, the "AA SOA", given the other agreed facts, was agreed or admitted to be personal advice and therefore advice for the purposes of both ss 961G and 961J.

209 The Commission did not submit that Mr Sinha contravened either s 961G or s 961J by furnishing the AA SOA. It is also somewhat questionable, having regard to the proper construction of the definition of "financial product advice" in subs 766B(1) of the Act, as discussed earlier, how it could be said that a report which contained separate recommendations concerning three separate financial products could be said to constitute a single incident of the provision of financial product advice. Nevertheless, given the ambiguity of the Agreed Facts concerning the "AA Advice" and "AA SOA", it is not difficult to see why there appears to have been confusion between the parties about the number of contraventions of s 961G and s 961J.

210 Nor is it difficult to see how Westpac may have considered that, by agreeing to the facts in the Agreed Facts, it was admitting to the commission of only a single contravention of each of s 961G and s 961J in respect of Mr and Mrs AA: single contraventions relating to the "AA SOA", which was included in the definition of the "AA Advice" and which was agreed to be financial product advice. That is particularly so given that, as Westpac submitted, the statements in the Agreed Facts concerning the contraventions of those provisions by Mr Sinha are generally either expressed in the singular, or appear under subheadings that are expressed in the singular. It equally may be accepted that the Agreed Facts tend to address the deficiencies in Mr Sinha's conduct which underlie the contraventions by reference to the overall advice given by him, rather than by reference to the specific defined financial product recommendations.

211 It should also be noted, in this context, that the pleadings do not assist in precisely defining the number of contraventions of ss 961G and 961J alleged by the Commission. Indeed, the Commission's statement of claim appears to have effectively been the template for the Agreed Facts. It too employs the same drafting device of utilising multitudinous defined terms or expressions. Relevantly, and again using the case concerning Mr and Mrs AA as an example, it defines the alleged contraventions of ss 961G and 961J by reference to the "AA Advice" and thus has the same inherent ambiguity as the Agreed Facts. It also expresses the contraventions of ss 961G and 961J in the singular, or refers to the contraventions under subheadings which are expressed in the singular.

212 Given the ambiguity and lack of clarity in the Agreed Facts concerning the number of contraventions and the considerable scope for confusion in that regard, one would reasonably have expected the parties to confer with each other so as to clarify exactly how many contraventions the Commission alleged and how many Westpac admitted. That apparently did not happen. The parties chose, instead, to advance lengthy and detailed written and oral submissions on that issue and to leave it up to the Court to decide it on the basis of the ambiguous document that they both signed up to. Westpac did, however, make it clear that if the Commission's contentions concerning the number of contraventions were accepted by the Court, it would not "seek leave to controvert any of the additional contraventions" or lead any further evidence.

213 In all the circumstances, and despite the ambiguity of the Agreed Facts, the Commission's contentions concerning the number of contraventions of ss 961G and 961J, and therefore its contentions concerning the number of contraventions by Westpac of s 961K flowing from those contraventions, should be accepted. The facts recited in the Agreed Facts are sufficient to support findings of contravention of ss 961G and 961J in respect of each separate instance of personal advice and financial product advice comprising recommendations in respect of different financial products. While those recommendations may have been made or given to the respective clients in a single written advice which provided an overall or integrated financial plan or strategy, the statutory scheme in Pt 7.7A relevantly fixes on recommendations or statements of opinion concerning particular financial products. It is both available and appropriate, in those circumstances, for the Commission to allege separate contraventions in respect of each recommendation or statement of opinion concerning a particular financial product.

214 Despite the ambiguity of the pleadings and the Agreed Facts, Westpac ultimately did not, and did not seek to, traverse or controvert what effectively amounted to admissions by it that Mr Sinha contravened s 961G and s 961J in respect of each separate recommendation concerning a particular financial product.

215 The number of contraventions of s 961G by Mr Sinha are: two in respect of Mr and Mrs AA; three in respect of Mr and Mrs BB; one in respect of Mr and Mrs CC; and two in respect of Dr DD and Mr EE. Westpac contravened s 961K in respect of each of those contraventions. The number of contraventions of s 961J by Mr Sinha are: three in respect of Mr and Mrs AA; three in respect of Mr and Mrs BB; one in respect of Mr and Mrs CC; and one in respect of Dr DD and Mr EE. Westpac contravened s 961K in respect of each of those contraventions.

216 It should finally be noted that Westpac submitted that, even if the Court accepted the Commission's contentions concerning the number of contraventions, that may not ultimately have a significant impact on the total of the pecuniary penalties imposed on Westpac arising from the contraventions. That was said to be because the operation of the "course of conduct" principle would require the Court, when imposing penalties for multiple contraventions, to take into account, where appropriate, the fact that the contraventions occurred during or as part of a course of conduct.

217 The nature of the so-called course of conduct principle and its application to the facts of this case are addressed in detail later. It suffices, at this point, to note that there is considerable merit in the proposition that, where penalties are to be imposed on Westpac in respect of multiple contraventions of s 961K arising from contraventions by Mr Sinha of, relevantly, s 961G and s 961J, it is important to have regard to the fact that those multiple contraventions arose out of a series of occasions where Mr Sinha provided advice to each of the respective clients concerning an overall or integrated financial plan or strategy. In imposing penalties on Westpac for six contraventions of s 961K arising from Mr Sinha's dealings with Mr and Mrs AA, for example, it is important to have regard to the fact that those six contraventions all relate to or arise from a single letter of advice that Mr Sinha gave to Mr and Mrs AA concerning an overall financial plan or strategy. As will be seen, however, it does not follow that only one penalty should be imposed, or that the fixing of the penalties should be approached on the basis that there was only one contravention.

WESTPAC'S KNOWLEDGE OF THE RISK POSED BY MR SINHA

218 The issue concerning the state of Westpac's knowledge of the risk that Mr Sinha would not comply with the obligations in ss 961B, 961G, 961H and 961J of the Act is relevant only to the form of the declaration concerning Westpac's contravention of subs 912A(1)(c) of the Act. Subsection 912A(1) is not a civil penalty provision.

219 Westpac admitted that it ought reasonably to have known, from 1 July 2013, that there was a significant risk that Mr Sinha would not comply with those obligations. The significance of 1 July 2013 is that, as noted at the outset, that was the date that Pt 7.7A of the Act came into compulsory effect for most advisers. Westpac did not oppose the making of a declaration concerning its contravention of subs 912A(1)(c) which recorded that it ought reasonably to have known that Mr Sinha posed a significant compliance risk.

220 The Commission contended, however, that it can and should be inferred from the Agreed Facts and documentary evidence that Westpac had actual knowledge that there was a significant risk that on and from 1 July 2013, Mr Sinha would not comply with the obligations in ss 961B, 961G, 961H and 961J of the Act. It sought a declaration which recorded that fact. Westpac contended that the evidence did not support the drawing of any such inference. It was common ground that there was no direct evidence that Westpac had actual knowledge that from 1 July 2013 Mr Sinha posed a significant risk of failing to comply with the best interest obligations.

221 The Commission's case was that the inference that Westpac had actual knowledge of the significant risk posed by Mr Sinha could be drawn from the agreed facts and evidence concerning the knowledge and involvement of certain senior Westpac officers in the compliance reviews, audits and investigations of Mr Sinha between 2004 and 2013. The key facts relating to those reviews, audits and investigations were summarised earlier.

222 The Commission placed particular reliance on the involvement of two senior Westpac officers, Mr Spiers and Mr Price, in considering the findings of the 2010 investigation of Mr Sinha's compliance and the steps that were taken as a consequence of those findings. It contended, in effect, that as a result of their knowledge and involvement in the 2010 investigation and its aftermath, Mr Spiers and Mr Price had actual knowledge of the significant risk that Mr Sinha posed in respect of his compliance obligations. That knowledge, so it was submitted, was to be imputed to Westpac by virtue of subs 769B(3) of the Act. That section provides, in substance, that where, in a proceeding under Ch 7 of the Act in respect of the conduct of a body corporate, it is necessary to establish the state of mind of the body corporate, it is sufficient to

show that a director, employee or agent of the body corporate who engaged in the relevant conduct had that state of mind. The Commission also relied on the fact that Westpac did not adduce any evidence from Mr Spiers and Mr Price and appeared to suggest that it should, in those circumstances, be inferred that their evidence would not have assisted Westpac's case in relation to knowledge.

223 It is unnecessary to rehearse the facts relating to Mr Sinha's compliance history. It is sufficient to observe that the facts reveal that Mr Sinha's compliance with his general obligations as a representative of Westpac in the conduct of its financial services business was, at best, patchy and, at worst, at times significantly deficient. The most significant deficiencies were exposed by the 2010 investigation. Mr Spiers and Mr Price were no doubt aware of the final findings of the 2010 investigation, though those findings cannot necessarily be equated with a finding that Mr Sinha presented a significant ongoing compliance risk. Mr Spiers and Mr Price were also no doubt aware of the remedial and protective actions that were taken with a view to improving Mr Sinha's compliance. Mr Price was also most likely aware of the not entirely satisfactory results of Mr Sinha's compliance reviews in 2011, 2012 and 2013.

224 While the facts and documentary evidence concerning Mr Sinha's compliance history clearly supports a finding that, through its senior employees or officers, Westpac ought reasonably to have known from 1 July 2013 that there was a significant risk that Mr Sinha would not comply with his obligations under ss 961B, 961G, 961H and 961J, it cannot be inferred that any senior employee or officer of Westpac whose knowledge could be imputed to Westpac had actual knowledge of that risk. That is so for a number of reasons.

225 First, the allegation that Westpac, through one or more senior officers, had actual knowledge that Mr Sinha posed a significant compliance risk and yet nevertheless allowed him to continue as a representative in its financial services business is a grave and serious allegation. While the civil balance of probabilities standard applies, the Court, in determining whether it is satisfied that the Commission has proved that allegation to that standard must take into account, amongst other things, the gravity of the allegation: s 140 of the ***Evidence Act** 1995* (Cth). That reflects the general principle that the "seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved": *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (Dixon J); see too *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at

449-450; *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023; 336 ALR 209 at [38]-[39].

226 Second, the final report concerning the 2010 investigation did not conclude, or support the conclusion, that there was a significant ongoing risk that Mr Sinha would not comply with the obligations in ss 961B, 961G, 961H and 961J of the Act. Nor was it recommended that Mr Sinha's services be terminated. Rather, it was recommended by the authors of the report that Mr Sinha should be sanctioned and, more significantly, that certain remedial and protective steps should be taken to minimise any ongoing risk that Mr Sinha might pose. It was apparently thought that those steps would pull Mr Sinha back into line and make him compliant. The Commission did not contend that the final findings and recommendations of the 2010 investigation were in any way disingenuous or made in bad faith, let alone that Mr Spiers knew or had reason to believe that they were anything other than genuine and reasonable. The fact that, with the benefit of hindsight, it might now be thought that the actions taken by Westpac in respect of Mr Sinha were inadequate is beside the point.

227 It is, in those circumstances, somewhat difficult to see how Mr Spiers and Mr Price's knowledge of the findings and outcome of the 2010 investigation could provide any reasonable foundation for an inference of actual knowledge on their behalf that from 1 July 2013 there was a significant risk that Mr Sinha would not comply with the obligations in ss 961B, 961G, 961H and 961J of the Act. It should also be noted, in this context, that those obligations did not even exist at the time of the 2010 investigation. They were not inserted into the Act until June 2012. While some broadly similar obligations were in the Act prior to the FoFA reforms, it nonetheless cannot be inferred that, at the time of the final report relating to the 2010 investigation, Mr Spiers and Mr Price were aware of the specific obligations which are the subject of the Commission's contention of actual knowledge.

228 Third, insofar as Mr Spiers was concerned, there is no evidence to suggest that he had any direct involvement with or knowledge of any investigations, audits or compliance reviews of Mr Sinha following the final report of the 2010 investigation. It is somewhat unrealistic to suppose that an officer of Mr Spiers' seniority, to whom many hundreds of people reported directly or indirectly, would by July 2013 have retained any actual knowledge acquired by him about one Westpac employee as a result of his involvement in an investigation in relation to that employee which, so far as he was concerned, had concluded over three years earlier.

229 That is not to say that Mr Spiers would or may have forgotten about the 2010 investigation by 1 July 2013. There is, however, no evidence to suggest that he had, or was required to, turn his mind to Mr Sinha and the compliance risk he posed on and from 1 July 2013. It is, in those circumstances, difficult to infer that he had actual knowledge of that risk on or from that date, whatever he may have known or believed three years earlier. Indeed, it might equally be inferred that, had he turned his mind to it, Mr Spiers might have believed that the actions taken as a result of the 2010 investigation had substantially reduced or eliminated any risk that Mr Sinha had previously posed. That belief may have been reinforced by virtue of the fact that no issue concerning Mr Sinha's compliance appears to have been brought to his attention following the 2010 investigation report. It should also be noted in this context that there was evidence that Mr Sinha attended training sessions in respect of the FoFA reforms in May, June and August 2013.

230 Fourth, insofar as Mr Price was concerned, it may be accepted that he was most likely aware of the results of Mr Sinha's compliance reviews in 2011, 2012 and 2013, in particular the results of the 2012 and 2013 reviews, the reports of which had been sent to him. The results of those reviews, or the contents of the reports, do not, however, provide any real support for an inference that Mr Price had actual knowledge that Mr Sinha posed a significant risk of failing to comply with his statutory best interests obligations. While the reports of those reviews continued to reveal certain compliance failures by Mr Sinha, some of them fairly significant, the authors of the reports nonetheless rated him as "effective". The reports did not, in terms, state that Mr Sinha was a significant compliance risk. While a close analysis of the findings in the reports, considered in light of the findings of the 2010 investigation, might support a finding that Mr Price ought reasonably to have known from 1 July 2013 that Mr Sinha posed a significant risk, such an analysis does not provide a basis for inferring that Mr Price had actual knowledge that Mr Sinha in fact posed such a risk. It should also be noted that the documentary evidence tended to suggest that Mr Sinha did not directly report to Mr Price.

231 Fifth, the fact that neither Mr Spiers nor Mr Price gave evidence for Westpac did not materially assist the Commission's case concerning actual knowledge. By the time of the hearing neither Mr Price nor Mr Spiers worked for Westpac. Mr Price's employment with Westpac was terminated in October 2018 and Mr Spiers' employment was terminated in December 2018. There was evidence that Westpac had endeavoured without success to contact Mr Price concerning the proceedings. In those circumstances, it is at best questionable whether it could be said that Westpac might have been expected to call them in its case. Neither could really be

said to have been in Westpac's "camp" by the time of the hearing: cf. *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* [2012] FCA 43; 213 FCR 380 at [153] (***ASIC v Australian Lending Centre***).

232 Given the somewhat nebulous nature of the Commission's case concerning actual knowledge, it is also somewhat questionable whether it could be said that Westpac was required to call Mr Spiers or Mr Price to "explain or contradict something": ***Jones v Dunkel*** (1959) 101 CLR 298 at 321. In any event, any inference that may be available from the fact that Westpac did not call either Mr Spiers or Mr Price cannot be employed to make up a deficiency of evidence, or convert conjecture or suspicion into inference: *Jones v Dunkel* at 312-313. Nor can it be inferred that any evidence that Mr Spiers and Mr Price could have given would have been damaging to Westpac's case: *Australian Securities and Investments Commission v* ***Hellicar*** (2012) 247 CLR 345 at [232]. Disputed questions of fact must be decided according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led: *Hellicar* at [165].

233 It might perhaps reasonably be thought that at some point prior to 1 July 2013 Westpac should have done more to ensure that Mr Sinha was not in a position to engage in the sort of conduct that ultimately gave rise to the contraventions which are the subject of this proceeding. Indeed, one might reasonably conclude that Westpac should have terminated Mr Sinha's services following the 2010 investigation, particularly given his poor compliance history. Certainly Mr Spiers initially considered that the compliance breaches which were exposed by that investigation justified Mr Sinha's dismissal. It seems, however, that Mr Spiers was ultimately persuaded by others that such action was not warranted.

234 Mr Sinha's actions following the 2010 investigation also did not inspire confidence. His compliance breaches continued effectively unabated, despite the sanctions and remedial actions that were taken following the 2010 investigation. The fact that Mr Sinha was nonetheless rated as "effective" from a compliance perspective in those years is somewhat baffling. One might reasonably speculate that the answer to that puzzle might well be that the fact that Mr Sinha continued to generate significant revenue for Westpac's financial services business made it difficult to let him go. The fact that Mr Sinha generated significant revenue for Westpac is no doubt why he received "high achievement" performance review ratings by Westpac in 2010, 2011, 2012 and 2013. The fact that Mr Sinha received that award despite his poor compliance

record might suggest that Westpac was more interested in the returns it received as a result of Mr Sinha's activities than it was about ensuring that Mr Sinha met his compliance obligations.

235 Westpac's admission that it ought reasonably to have known, from 1 July 2013, that there was a significant risk that Mr Sinha would not comply with the "best interests obligations" in the Act amounts, in effect, to a concession that, following the introduction of the FoFA reforms, it should not have permitted Mr Sinha to continue to operate as part of Westpac's financial services business as he had before. It should have seen that the signs were well and truly on the wall, as it were, as far as Mr Sinha's likely compliance with the new best interests obligations was concerned. It is readily apparent, however, that Westpac did not see or fully appreciate those signs, at least until it terminated Mr Sinha's employment in late 2014.

236 The reasons for Westpac's failure to fully appreciate the risk and act before it did in respect of Mr Sinha is, in some respects at least, not fully explained by the evidence. The most likely explanation, however, is that those employees or officers who were ultimately responsible for overseeing Mr Sinha's compliance with the best interests obligations from July 2013 were not as diligent or rigorous as they should have been in appreciating and acting on the available information concerning Mr Sinha's compliance record.

237 That is not to say, however, that those employees or officers, or any employee or officer of Westpac, had actual knowledge that there was a significant risk that Mr Sinha would not comply with the best interests obligations. The evidence, considered as a whole, does not support the drawing of that inference or conclusion.

DECLARATORY RELIEF

238 The Commission sought declarations that Westpac had contravened subs 961K(2) and subss 912A(1)(a) and (c) of the Act.

239 The position in relation to the making of declarations concerning the contraventions of subs 961K(2) is fairly straightforward. That is because, as already noted, subs 961K(2) is a civil penalty provision. Section 1317E of the Act provided that, if a Court is satisfied that a person has contravened one of the civil penalty provisions listed in that section, it must make a declaration of contravention. Section 961K is included in that list. The making of a declaration of contravention in such circumstances is mandatory: *Australian Securities and Investments Commission v Warrenmang Ltd* [2007] FCA 973; 63 ACSR 623 at [31].

240 It will accordingly be necessary to make declarations of contravention in respect of Westpac's contraventions of subs 961K(2) of the Act. A separate declaration must be made in respect of each contravention. As discussed in detail earlier, there were 22 contraventions of subs 961K(2) by Westpac. A declaration of contravention must specify, relevantly, the name of the Court that made the declaration, the provision that was contravened, the person who contravened the provision, and the conduct that constituted the contravention.

241 The parties provided the Court with competing draft orders which included their proposed wording of the declarations of contraventions of subs 961K(2). The wording of the declarations proposed by each of the parties did not, however, satisfactorily specify the conduct that constituted the contraventions.

242 The wording proposed by the Commission simply described the contravening conduct as involving Mr Sinha providing the various recommendations to the clients and utilised the defined terms used in the Agreed Facts. For example, one of the contraventions that related to a contravention of s 961G by Mr Sinha in respect of Mr and Mrs AA simply described the conduct that constituted the contravention as "providing the AA Life Insurance Recommendation to Mr and Mrs AA". The wording proposed by Westpac was similar, but utilised the defined term "AA Advice": the conduct constituting the contravention was simply described as "providing the AA Advice to Mr and Mrs AA".

243 There are at least two problems with the wording proposed by the parties. The first problem is that the proposed wording omits what is perhaps the key element of the contravening conduct. The key element of the contraventions that involve Mr Sinha's contravention of s 961G, for example, is that the recommendation given by Mr Sinha was not appropriate to Mr and Mrs AA. The key element of the contraventions that involve Mr Sinha's contravention of s 961J, to give another example, is that Mr Sinha failed to give priority to Mr and Mrs AA's interests over his own and Westpac's interests when giving the recommendations. The declarations that will be made will describe the conduct in more detail and will refer to the key elements of each of the contraventions.

244 The second problem is that, if possible, declarations of contravention should avoid using defined terms which are essentially meaningless to anyone who has not read the document in which the term is defined. One of the purposes that declarations of contravention serve is to provide a form of general deterrence; to warn others of the danger of engaging in similar conduct. That purpose will not be achieved if the declarations use defined terms which are

effectively meaningless to anyone other than the parties to the litigation. The declarations proposed by the parties would be essentially meaningless to anyone who did not have access to the Agreed Facts because they use expressions such as the "AA Advice" or the "AA Life Insurance Recommendation". The declarations that will be made will avoid the use of opaque expressions or terms.

245 As for the contraventions of subss 912A(1)(a) and (c), the Court has jurisdiction to make declarations pursuant to s 21 of the ***Federal Court of Australia Act*** *1976* (Cth). Westpac agreed that declarations of contravention in respect of its contraventions of subss 912A(1)(a) and (c) of the Act should be made. It is nevertheless necessary to give some brief consideration to the principles that apply in relation to the making of declarations in such circumstances. Those principles are well-established. The following summary of those principles is taken largely from the decision of the Court in *Australian Securities and Investments Commission v Hochtief Aktiengesellschaft* [2016] FCA 1489; 117 ACSR 589 at [74]-[79].

246 The Court's power to make declarations under s 21 of the Federal Court of Australia Act is a wide discretionary power: ***Forster*** *v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437-438 (per Gibbs J, citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited* [1921] 2 AC 438 at 448); *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 99 (per Sheppard J).

247 The fact that the parties have agreed that a declaration of contravention should be made does not relieve the Court of the obligation to satisfy itself that the making of the declaration is appropriate: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [59] (***Commonwealth v Director, FWBII***); *Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2)* [2011] FCA 382; 279 ALR 609 at [7]. It is not the role of the Court to merely rubber stamp orders that are agreed as between a regulator and a person who has admitted contravening a public statute: *Australian Securities and Investments Commission, in the matter of Chemeq Limited (ACN 009 135 264) v* ***Chemeq*** *Limited (ACN 009 135 264)* [2006] FCA 936; 234 ALR 511 at [100].

248 The facts necessary to support the declaration may be established by facts which are agreed pursuant to s 191 of the Evidence Act and admissions: *Minister for the Environment, Heritage and the Arts v PGP Developments Pty Limited* [2010] FCA 58; 183 FCR 10.

249 Before making a declaration, the Court should be satisfied that the question is real, not hypothetical or theoretical, that the applicant has a real interest in raising the issue, and that there is a proper contradictor: *Forster* at 437-438.

250 Considerations relevant to the exercise of the discretion include whether the declaration will have any utility, whether the proceeding involves a matter of public interest, whether the circumstances call for the marking of the Court's disapproval of the contravening conduct, whether the declarations may assist in clarifying the law and whether the declarations will serve to warn others of the danger of engaging in similar conduct: see generally *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310; 41 ACSR 561 at [38]; *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* [2014] FCA 1387; 103 ACSR 453 at [63]; *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; 205 FCR 120 at [42]; *ASIC v Australian Lending Centre* at [272]; *Australian Competition and Consumer Commission v IMB Group Pty Limited* [1999] FCA 313 at [21].

251 Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, assist in clarifying the law, inform individuals of the dangers arising from the respondent's contravening conduct, and deter other persons from contravening the provisions: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; (2007) ATPR 42-140 at [6], and the cases there cited.

252 The facts and admissions in the Agreed Facts provide a proper factual basis for the declarations of contravention by Westpac of s 912A of the Act which are sought by the Commission. There could also be little doubt that the making of the declarations is otherwise appropriate. That is because the proceeding, involving as it does contraventions by a major bank of its statutory obligations under its financial services licence, involves a matter of significant public interest. The circumstances also call for the marking of the Court's disapproval of the contravening conduct and the declarations will serve to warn other holders of financial services licences of the danger of engaging in similar conduct and thereby contravening the same provisions.

PECUNIARY PENALTIES

253 As set out earlier, subs 1317G(1E) of the Act provides that the Court may order a person to pay the Commonwealth a pecuniary penalty if a declaration of contravention by the person has

been made under s 1317E and the contravention is of, relevantly, subs 961K(2). The maximum penalty that the Court may order a corporation to pay for a single contravention of subs 961K(2) is $1,000,000. The issue for the Court is to determine the appropriate penalty for each contravention.

Fixing the appropriate penalty or penalties – Relevant principles

254 Beyond providing the relevant maximum amount, the Act does not provide any express guidance in relation to the fixing of an appropriate pecuniary penalty in respect of a contravention of a civil penalty provision, including a contravention of subs 961K(2). It is, in those circumstances, necessary to apply the general principles in relation to the fixing of appropriate penalties for contraventions of civil or pecuniary penalty. Those principles are fairly well-settled. Following is a short summary of those principles.

The importance of deterrence

255 Whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is primarily, if not wholly, protective in promoting the public interest in compliance: *Trade Practices Commission v CSR Limited* [1990] FCA 521; (1991) ATPR 41-076 at 52,152 [42]; *Commonwealth v Director, FWBII* at [55] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2018] FCAFC 97; 264 FCR 155 at [20]-[22] (***CFMMEU v ABCC***). The principal object of a pecuniary penalty is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene. Both specific and general deterrence are important: *Chemeq* at [90]. A civil penalty for a contravention of the law must accordingly be fixed with a view to ensuring that the penalty is not to be regarded by the contravenor or others as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 at [66] (per French CJ, Crennan, Bell and Keane JJ); *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [62]-[63]. The penalty imposed should make it clear that contraventions of the sort under consideration are serious and not acceptable: *Australian Securities and Investments Commission v Southcorp Ltd (No 2)* [2003] FCA 1369; 130 FCR 406 at [32] (per Lindgren J).

Relevant factors

256 In fixing the amount of a civil penalty, reference is frequently made to the lists of factors or considerations identified by Santow J in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 at [126] and French J in *Chemeq* at [99]. Those lists of relevant considerations, which have been approved and elaborated on by many subsequent decisions of this Court, were not, and were not intended to be, exhaustive. Nor was it suggested that each of the factors referred to in the respective lists was necessarily relevant or important in every case. These lists of factors should not be treated as a rigid catalogue or checklist of matters to be applied in each case: the overriding principle is that the Court should weigh all the relevant circumstances: *Australian Securities and Investments Commission v GE Capital Finance Australia, in the matter of GE Capital Finance Australia* [2014] FCA 701 at [72].

257 In general terms, the factors that may be relevant when fixing a pecuniary penalty may conveniently be categorised according to whether they relate to the objective nature and seriousness of the offending conduct, or concern the particular circumstances of the contravenor in question – what sentencing judges commonly refer to as the offender's "subjectives" or the "subjective circumstances".

258 The factors relating to the objective seriousness of the offence include: the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness; whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time; if the contravenor is a corporation, the seniority of the officers responsible for the contravention; the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation; the impact or consequences of the contravention on the market or innocent third parties; and the extent of any profit or benefit derived as a result of the contravention.

259 The factors that concern the particular circumstances of the contravenor, where the contravenor is a corporation, generally include: the size and financial position of the contravening company; whether the company has been found to have engaged in similar conduct in the past; whether the company has improved or modified its compliance systems since the contravention; whether the company (through its senior officers) has demonstrated contrition and remorse; whether the company had disgorged any profit or benefit received as a result of the contravention, or made reparation; whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and

whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law.

260 The size of the contravening corporation does not of itself justify a higher penalty than might otherwise be imposed: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 at [89]-[92]. The size of the corporation may, however, be particularly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent. The sum required to achieve this object will be larger where the company has vast resources: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265; 215 ALR 301 at [39]; *Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646 at [38].

Balancing the relevant factors – An instinctive synthesis

261 The fixing of a pecuniary penalty in respect of a contravention of a civil penalty provision in the Act involves the identification and balancing of all the factors relevant to the contravention and the contravenor, and the making of a value judgment as to what is the appropriate penalty in light of the protective and deterrent purpose of a pecuniary penalty. While there are undoubtedly differences between the criminal sentencing process and the process of fixing a pecuniary penalty (cf. *Commonwealth v Director, FWBII* at [56]-[57]), the fixing of a pecuniary penalty may, to an extent, be likened to the "instinctive synthesis" involved in criminal sentencing: *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* (2012) 210 FCR 277 at 294; *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [44]. Instinctive synthesis is the "method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case": ***Markarian*** *v The Queen* [2005] HCA 25; 228 CLR 357 at [51] (per McHugh J). Or, as the plurality put it in *Markarian* (at [37], per Gleeson CJ, Gummow, Hayne and Callinan JJ) "the sentencer is called on to reach a single sentence which … balances many different and conflicting features."

The maximum penalty

262 Careful attention must also be given to the maximum penalty for the contravention. That is so for at least three reasons: first, because the legislature has legislated for the maximum penalty and it is therefore an expression of the legislature's policy concerning the seriousness of the proscribed conduct; second, because it permits comparison between the worst possible case

and the case that the Court is being asked to address; and third, because the maximum penalty provides a "yardstick" which should be taken and balanced with all of the other relevant factors: *Markarian* at [31] (per Gleeson CJ, Gummow, Hayne and Callinan JJ). The maximum penalty is generally reserved for the worst category of cases: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 478; applied in the civil penalty context in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case)* [2018] FCAFC 126; 265 FCR 208 at [108]-[110].

263 Even where the maximum penalty for the contravention is high, and the amount necessary to provide effective deterrence is large, the amount of the penalty cannot be so high as to be oppressive: *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR 40-091 at 17,896; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 293 (per Burchett and Kiefel JJ). The pecuniary penalty imposed must be proportionate to the contravening conduct: *CFMMEU v ABCC* at [22].

Course of conduct

264 When fixing penalties for multiple contraventions, it may be necessary to consider what is now conventionally referred to as the "course of conduct principle". Like many of the principles that apply to the fixing of pecuniary penalties, the course of conduct, or one-transaction, principle is derived from criminal law sentencing principles. The principle, as applied in sentencing for criminal offences, is that "where there is an interrelationship between the legal and factual elements of two or more offences with which an offender has been charged, care needs to be taken so that the offender is not punished twice (or more often) for what is essentially the same criminality": *Royer v The State of Western Australia* [2009] WASCA 139; 197 A Crim R 319 at [22]; see also *The Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93.

265 Where, for example, the conduct engaged in by an offender may technically constitute or comprise a number of separate offences, but can nevertheless fairly be characterised as a single act or course of criminal conduct, the sentences imposed for the separate offences should ordinarily be moulded or adjusted to reflect that fact and to avoid double punishment. Where custodial sentences are to be imposed, that can generally be achieved by making the separate sentences wholly or partly concurrent. The principle is, however, equally applicable where monetary penalties are to be imposed.

266 It is important to emphasise, however, that the course of conduct principle, in the criminal context at least, does not operate to permit a sentencing judge to impose a single sentence in respect of multiple offences on the basis that the offences formed part of a course of conduct. Absent a statutory provision that provides otherwise, a sentencing judge is required to impose a separate sentence for each offence, albeit with the option of concurrency.

267 The single course of conduct principle has been applied in the civil pecuniary penalty context: see for example *Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; 262 ALR 417; *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1. That is despite the fact that it is largely based on the need to avoid double punishment, whereas, as discussed earlier, the primary, if not sole, purpose of imposing pecuniary penalties is said to be to deter, not to punish.

268 There would also appear to be cases where the court has, purportedly pursuant to the course of conduct principle, grouped together separate contraventions which were considered to be part of a single course of conduct and imposed a single penalty for that course of conduct. Ordinarily, however, other than where there is a specific statutory provision which permits the imposition of a single penalty in respect of multiple contraventions, or perhaps in cases where the parties agree to the imposition of a single penalty for practical or pragmatic reasons, separate penalties should be imposed for each contravention: *Director, FWBII v CFMEU; Australian Competition and Consumer Commission v* ***Yazaki*** *Corporation* [2018] FCAFC 73; 262 FCR 243 at [227]. The application of the course of conduct principle, which is really just a tool to assist the Court in arriving at the appropriate penalty for the contraventions, involves the adjustment of the individual penalties to take into account the single course of conduct and to avoid double punishment, not the imposition of a single penalty: *Yazaki* at [226]-[227] and [236].

The totality principle

269 The totality principle, like the course of conduct principle, has its origins in criminal sentencing. In simple terms, the principle is that when a court is imposing sentences for multiple offences, the court should, after imposing separate sentences for each offence and applying the principles concerning cumulative and consecutive sentences, review the aggregate sentence and consider whether it is just and appropriate. In doing so, the court must "look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences": *Mill v The Queen* (1988) 166 CLR 59 at 62-63, referring to Thomas, *Principles of*

Sentencing, 2nd ed. (1979), pp. 56-57. Where the sentences involve periods of imprisonment, the appropriate aggregate sentence may again be achieved either by making sentences wholly or partially concurrent, though in some circumstances it may be appropriate to lower the individual sentences to below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed.

270 While, in the criminal sentencing context, the totality principle is generally applied in cases involving sentences of imprisonment, it has been held to apply to the fixing of fines: *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 704; *Environment Protection Authority v* ***Barnes*** [2006] NSWCCA 246 at [43]-[50]. In the case of fines, the court must fix a fine for each offence and then review the aggregate to ensure that it is just and appropriate as a reflection of the overall criminality. If the result of the aggregation of multiple fines is that the penalty is excessive, that may lead to the moderation of the fine imposed in respect of each offence: *Barnes* at [49].

271 Once again, the important point to emphasise is that, in the criminal sentencing context, application of the totality principle does not authorise or permit the sentencing court to impose a single sentence for multiple offences: see *R v Bibaoui* [1997] 2 VR 600 at 603-604; *R v Finni*e [2002] NSWCCA 533 at [54]-[57]; *Thorn v The Queen* [2009] NSWCCA 294; 198 A Crim R 135 at [39]-[47].

272 The totality principle has been picked up and applied in the context of civil pecuniary penalty proceedings: see for example *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; 168 FCR 383 at [5]-[7] (Gyles J) and [41]-[43] (Stone and Buchanan JJ). Unfortunately, however, it is sometimes confused or conflated with the course of conduct principle. It has also, on occasion, erroneously been relied on to support the imposition of a single pecuniary penalty for multiple contraventions. The correct approach, however, is to first consider the course of conduct principle. If considered appropriate, the individual penalties should be adjusted to reflect that the contraventions occurred as part of a course or courses of conduct. The court should then review the aggregate sentence to ensure that it is just and appropriate. That may require a further adjustment of the sentences if the aggregate sentence is considered to be excessive or out of proportion to the contravening conduct considered as a whole.

Consideration of appropriate penalties

273 What, then, are the appropriate penalties to impose in respect of each of Westpac's contraventions of subs 961K(2) of the Act? As has just been discussed, the answer to that

question is arrived at by considering, weighing and balancing the relevant objective and subjective factors and, if considered appropriate in all the circumstances, applying the course of conduct and totality principles.

Objective seriousness of the contraventions

274 Westpac's contraventions of subs 961K(2) are somewhat unusual because the contravening conduct was essentially engaged in entirely by Mr Sinha. Westpac is liable because Mr Sinha was its representative and it was the responsible licensee in connection with Mr Sinha's contraventions. It is, in the circumstances, necessary to approach the objective seriousness of the contraventions by considering not only the objective seriousness of Mr Sinha's contravening conduct, but also considering Westpac's conduct as the responsible licensee for Mr Sinha.

275 There could be little doubt that Mr Sinha's contravening conduct was objectively very serious. It occurred over a twelve month period and involved four separate sets of clients. The period over which the contravening conduct occurred was far from fleeting and the scale or scope of offending was far from confined or narrow. Mr Sinha's conduct during the twelve month period in respect of those four sets of clients also should not be considered in isolation. It occurred against the backdrop of previous compliance breaches which resulted in the imposition of sanctions and remedial action against Mr Sinha by Westpac. It could scarcely be suggested that Mr Sinha was not aware of his obligations. Nor could it be suggested that Mr Sinha's contraventions were isolated or out of character.

276 Mr Sinha had also received training in respect of the best interests obligations introduced by the FoFA reforms. The fact that Mr Sinha had received that training, coupled with the fact that Mr Sinha had previously faced sanctions and remedial action as a result of compliance breaches, suggests that Mr Sinha's contraventions were not the product of ignorance or mere carelessness. Rather, the available inference is that Mr Sinha was apparently prepared to ignore or disregard his obligations.

277 Why? The obvious, if not inescapable, inference is that Mr Sinha was prepared to ignore or disregard his best interests obligations because he stood to gain personally from most of the recommendations he made to the four sets of clients. The variable remuneration which he received by virtue of his partnership arrangement with Westpac provided him with an incentive to make recommendations to clients which involved them switching to financial products provided by Westpac or its associates, or rolling-over existing funds or policies into new funds

or policies provided by Westpac or its associates. It is readily apparent that the financial incentive to make such recommendations was such that Mr Sinha was prepared to make them even if they were not in his clients' best interests, or even if they were not appropriate to the clients' objectives, financial situations and needs, or even if he had incomplete or inaccurate information concerning those matters. He was plainly prepared to give priority to his interests rather than the clients' interests when giving advice.

278 Westpac also stood to gain from Mr Sinha's actions. That perhaps explains why Mr Sinha was permitted to continue as Westpac's representative and partner despite the serious compliance breaches which were exposed by the 2010 investigation. It is tolerably clear that, at least prior to the commencement of the FoFA reforms, some officers or employees at Westpac were either unable or unwilling to terminate the services of a representative who achieved high achievement ratings and was plainly proficient and successful at promoting the financial products of Westpac and its associates. It may readily be inferred that Westpac's compliance systems and practices were less than rigorously applied, at least in Mr Sinha's case.

279 To be fair, as discussed later, systems introduced by Westpac in conjunction with the FoFA reforms ultimately led to the exposure of Mr Sinha's contravening conduct and his termination. Most of Mr Sinha's contravening conduct also occurred during the first twelve months after the relevant commencement date of the FoFA reforms. The Commission had advised that it would take a "facilitative" approach to compliance during that period, no doubt recognising that the reforms were fairly major reforms and that it would take some time for many in the industry to come to terms with the changes and adjust their conduct and practices accordingly. It appears that some, like Mr Sinha, were unwilling to adjust their conduct and practices despite being well aware of the changes.

280 The contraventions were also undoubtedly serious because they caused real detriment to the four sets of clients. The contraventions were by no means simply technical or process related breaches. As discussed later, however, Westpac has since acted to compensate the clients in respect of the loss or detriment they suffered as a result of Mr Sinha's contravening conduct.

Mitigating and other subjective considerations

281 Westpac spent approximately $43.7 million on regulatory change projects associated with the FoFA reforms. As part of that program, representatives, including Mr Sinha, were required to attend training sessions, including training in respect of the best interests obligations.

282 The Commission submitted that Westpac's expenditure associated with the FoFA reforms had not been deployed effectively. That submission is not, however, supported by the evidence. Given the scale of Westpac's financial services business, the fact that one representative has been found to have engaged in contravening conduct within the first twelve months of the commencement of the FoFA reforms does not support the proposition advanced by the Commission. It should also be reiterated, in this context, that it was one of the systems introduced by Westpac following the FoFA reforms which identified Mr Sinha for review and investigation in mid-2014 and ultimately led to his termination some months later.

283 It was also Westpac which first notified the Commission of conduct by Mr Sinha which may have contravened the Act, albeit as part of Westpac's notification obligations under s 912C of the Act. It was this notification which led to the investigation which ultimately exposed the contravening conduct the subject of this proceeding. Westpac also fully cooperated with the Commission's investigation. Westpac should also be given credit for the fact that it ultimately did not defend or oppose the relief sought by the Commission in this proceeding and made appropriate admissions in the Agreed Facts. Westpac's approach to the proceeding meant that it was heard efficiently and expeditiously and the administration of justice was facilitated.

284 Westpac has undertaken a remediation process in respect of Mr Sinha's clients. That remediation process extended beyond the four sets of clients the subject of this proceeding and was not limited to compensation for losses arising from conduct that amounted to contraventions of the Act. It has paid approximately $12.7 million in compensation to clients of Mr Sinha. Mrs AA received a refund of just over $400; Mr AA received refunds totalling over $16,000; Mr and Mrs BB received refunds totalling over $6,000 and Mr BB received an indemnity in respect of potential taxation liabilities in the United Kingdom arising from the implementation of one of Mr Sinha's recommendations; Mr CC received a refund of over $9,000; Dr DD received refunds totalling over $57,000 and Mr EE received a refund of just over $70,000.

285 Subsection 912B(1) of the Act provides that a financial services licensee, such as Westpac, who provides financial services to retail clients must have arrangements for compensating clients for loss or damage suffered because of breaches of the relevant obligations by its representatives. Westpac's willingness to pay compensation to the clients involved in this proceeding must be considered in that context. It is nonetheless to Westpac's credit that it appears to have acted relatively swiftly to compensate Mr Sinha's clients, including those the

subject of this proceeding. Those actions, considered together with Westpac's cooperative approach to both the Commission's investigation and this proceeding, demonstrate appropriate contrition.

286 Westpac is undoubtedly a very large company. Its profits in the years preceding the contravening conduct exceeded $6 billion. Westpac's size and financial position suggests that the objective of deterrence may require the imposition of higher penalties than would be required for smaller and less well-resourced companies. Westpac has, however, in recent times announced that it will cease to provide personal financial advice through its salaried financial advisers and authorised representatives. That is a relevant consideration to the issue of specific deterrence.

Course of conduct

287 The Commission contended that the course of conduct principle had little if any role to play in the determination of the appropriate penalties in this matter. It submitted, in relation to the multiple contraventions of s 961G arising from separate financial product recommendations, that the inclusion of separate recommendations in the one statement of advice "does not convert separate recommendations into a single 'course of conduct'". In the Commission's submission, "[a]pplying the course of conduct across distinct recommendations made in breach of s 961G would generalise the contraventions improperly, and fail to treat each distinct act constituting the contravening conduct in the contest of the legislative prohibitions". The Commission also suggested that it had already "accommodated" the course of conduct principle because it had only proposed single contraventions of s 961B and s 961H of the Act in respect of each set of clients.

288 The Commission's submissions concerning the course of conduct principle have little merit and largely misconceive the nature and operation of the principle.

289 There could be no doubt that the contraventions arising from Mr Sinha's conduct all arose in the course of him giving advice to four sets of clients. As discussed earlier in the context of the issue concerning the number of contraventions, Mr Sinha met separately with each of the sets of clients and subsequently gave them a single statement of advice which contained an integrated financial plan or strategy. In the case of all the client groups other than Mr and Mrs CC, the financial plan that Mr Sinha proposed undoubtedly contained recommendations concerning more than one financial product. It is for that reason that the single financial plan for those client groups gave rise to multiple contraventions of s 961G and, except in the case

of Dr DD and Mr EE, multiple contraventions of s 961J. There were also separate and distinct deficiencies and defects in Mr Sinha's dealings with each of the sets of clients and the advice he gave them. It is for that reason that the advice he gave to each of the separate client groups gave rise to contraventions of different provisions of the Act.

290 The fact that the advice that Mr Sinha gave to each of the four sets of clients gave rise to multiple and separate and distinct contraventions does not, however, mean that the matter should not be approached on the basis that the multiple contraventions are interrelated and arose out of courses of conduct related to each of the sets of clients. All of the contraventions arising out of Mr Sinha's dealings with, for example, Mr and Mrs AA, should properly be viewed as arising out of a course of action involving Mr Sinha meeting, obtaining information from and giving advice to Mr and Mrs AA. The same can be said of the other sets of clients.

291 That is not to say that the fixing of the appropriate penalties should be approached as if there were only four contraventions, one in respect of each of the sets of clients. As discussed earlier, separate penalties should be imposed in respect of each of the separate contraventions. Those penalties, however, should be adjusted to take into account that they arose out of courses of conduct in respect of each of the sets of clients and that there is accordingly some degree of overlap or interrelationship between the contraventions. That consideration must be taken into account to avoid doubly punishing Westpac in respect of what may have been essentially the same conduct.

292 The penalties should, however, still reflect the fact that the separate contraventions each involve some separate and distinct elements of wrongdoing. For example, an advice that involves three or four recommendations concerning different financial products involves a greater degree of wrongdoing than an advice that includes a recommendation about one financial product. Contraventions of different statutory provisions arising out of the one advice also involve some separate and distinct elements and different types of wrongdoing. A failure to act in the clients' best interests is one thing; the provision of advice in circumstances where it would not be reasonable to conclude that the advice was appropriate to the client is another. The failure to give priority to the clients' interests in circumstances where there is a conflict also involves different elements and a different type of wrongdoing. The penalties imposed should take that into account, even where the different contraventions arose out of the one course of conduct.

293 If this were a criminal matter involving custodial sentences, the course of conduct principle would require the Court to consider whether the separate custodial sentences should be served partly, or perhaps in some instances, wholly concurrently. That would be the appropriate way to take into account that the offending conduct occurred as part of a course or courses of action. As this is a civil penalty proceeding involving the imposition of monetary penalties, however, the appropriate way to reflect the fact that the contraventions arose from courses of conduct is to reduce the amount of the separate pecuniary penalties. It is important to emphasise, in that context, that the process of adjusting the penalties to take into account the course of conduct principle should not be approached as if the fixing of the appropriate penalties was simply a mathematical exercise. Sometimes it may be appropriate to quantify the appropriate reduction of the penalties, in either percentage or dollar terms, though that is not always necessary or appropriate.

294 The penalties for each contravention in this case have been adjusted downwards to reflect the fact that the contraventions arose out of courses of action involving the provision of advice to four sets of clients. Where there are multiple contraventions of ss 961G and 961J for particular sets of clients, the penalties for those contraventions have also been further adjusted downwards to reflect the fact that those multiple contraventions all arose out of the one advice.

The appropriate penalties

295 Westpac submitted that its contraventions which arose from Mr Sinha's contraventions of s 961J were objectively the most serious contraventions. In Westpac's submission, the facts showed that Mr Sinha's contraventions of ss 961B and 961G followed from his contraventions of s 961J: that he was "influenced by receipt of fees and commissions" and that it was that influence or motivation which led him to fail to act in his clients' best interests and to provide advice which was not appropriate to them. Westpac submitted that the appropriate penalty range for the s 961J contraventions was $600,000 to $800,000 and $300,000 to $400,000 for any further contravention of that section, when multiple contraventions of that provision were involved. Westpac's proposed penalty range for the s 961G contraventions was $200,000 to $300,000 and $100,000 for any further contravention of that section, when multiple contraventions of that provision were involved. Its proposed penalty range for the s 961B contraventions was $100,000 to $200,000 and the penalty range for the s 961H contraventions was $100,000 to $200,000.

296 The Commission submitted that there was no statutory basis for treating a contravention of any of ss 961B, 961G, 961H or 961J of the Act as more serious than a contravention of any other of those provisions given that the maximum penalty is the same for each contravention. As for Westpac's submission concerning the contraventions of s 961J, the Commission contended that it was not clear that there was any factual basis for Westpac's assertion that its contraventions of s 961J were objectively the most serious contraventions because they led to the contraventions of s 961B. In the Commission's submission, the contraventions of s 961B were "independent" contraventions and were not dependent on the contraventions of s 961J. Finally, ASIC submitted that Westpac's suggested penalty range of $100,000 to $200,000 for s 961B offences was "completely inadequate" given that Westpac had acknowledged that those contraventions were serious.

297 The Commission proposed a penalty range of $400,000 to $600,000 for all of the contraventions.

298 There would appear to be some merit in Westpac's submissions concerning the objective seriousness of the s 961J contraventions. As has already been discussed at some length, the particular facts and circumstances of this case revealed that the deficient and defective approach that Mr Sinha took to advising his clients was to a large extent a product of the fact that he was motivated by the prospect of increasing his own financial interests. He knew that he would receive a share of the commissions and implementation fees that Westpac or its associates would earn if he caused his clients to shift to Westpac associated financial products, or roll-over existing financial products into Westpac associated products. He put his own interests before the interests of his clients. That was the root cause of Mr Sinha's resulting failure to act in the best interests of his clients and his failure to provide advice that was appropriate to his clients. It would also be fair to say that Westpac ought to have appreciated the conflict of interest that it placed representatives like Mr Sinha in when they entered into partnerships with them that involved variable remuneration based on a portion of the fees or commissions earnt by them.

299 That is not to say that the s 961B contraventions were not independent, or that the s 961B contraventions were somehow dependent on the s 961J contraventions. Nor does it mean that s 961J contraventions are, or always will be, more serious than s 961B contraventions. It is simply a recognition that, having regard to the particular facts of this case, Mr Sinha's contraventions of s 961J were objectively more serious than his s 961B contraventions. That

conclusion is reinforced when one considers the basis upon which it has been found that Mr Sinha failed to act in the best interests of his clients, most of which relate to his failure to follow correct or appropriate processes or procedures.

300 The Commission's proposed penalty range, which involves the same range for each contravention, appears also to be somewhat mechanistic and to not fully reflect the particular facts and circumstances of this case. It appears to be based largely on the fact that each of the contraventions carried a maximum penalty of $1,000,000 and an implicit assertion that all of the contraventions were of the same slightly higher than mid-range objective seriousness. It also appears to take no account whatsoever of the course of conduct principle.

301 Having regard to the relevant principles, including the course of conduct principle, and all of the objective and subjective considerations to which reference has already been made, the appropriate penalties for each of Westpac's contraventions of subs 961K(2) are as follows.

302 In relation to the contraventions that arose from the advice Mr Sinha, as Westpac's representative, provided to Mr and Mrs AA:

- A penalty of $350,000 in respect of the contravention of s 961B of the Act
- A penalty of $425,000 in respect of each of the two contraventions of s 961G of the Act
- A penalty of $450,000 in respect of each of the three contraventions of s 961J of the Act

303 In relation to the contraventions that arose from the advice Mr Sinha, as Westpac's representative, provided to Mr and Mrs BB:

- A penalty of $350,000 in respect of the contravention of s 961B of the Act
- A penalty of $400,000 in respect of each of the three contraventions of s 961G of the Act
- A penalty of $450,000 in respect of each of the three contraventions of s 961J of the Act

304 In relation to the contraventions that arose from the advice Mr Sinha, as Westpac's representative, provided to Mr and Mrs CC:

- A penalty of $350,000 in respect of the contravention of s 961B of the Act

- A penalty of $450,000 in respect of the contravention of s 961G of the Act
- A penalty of $300,000 in respect of the contravention of s 961H of the Act
- A penalty of $550,000 in respect of the contravention of s 961J of the Act

305 In relation to the contraventions that arose from the advice Mr Sinha, as Westpac's representative, provided to Dr DD and Mr EE:

- A penalty of $350,000 in respect of the contravention of s 961B of the Act
- A penalty of $425,000 in respect of each of the two contraventions of s 961G of the Act
- A penalty of $300,000 in respect of the contravention of s 961H of the Act
- A penalty of $550,000 in respect of the contravention of s 961J of the Act

306 It can be seen that these penalties reflect the view that the s 961J contraventions were objectively the most serious offences, followed by the s 961G, s 961B and s 961H contraventions in that order. These penalties also take into account the course of conduct principle as earlier explained.

Totality

307 It remains to address the so-called totality principle.

308 The total penalty to be imposed on Westpac, following the accumulation of the separate penalties imposed for each of its contraventions of subs 961K(2) of the Act, is $9,150,000. The question is whether that total penalty is just and appropriate and not excessive having regard to the totality of the relevant contravening conduct.

309 The short answer to that question is that the total penalty is not excessive and is a just and appropriate penalty in all the circumstances. While the total penalty is high, and that is to a certain extent the product of the large number of contraventions, it fairly reflects and is proportionate to the overall seriousness of the contravening conduct. It must also be recalled that Westpac is a very large corporation and the aggregate penalty must have an appropriate deterrent effect. Any significantly lesser aggregate penalty would be unlikely to achieve the appropriate deterrent effect.

OTHER ORDERS

310 The Commission's originating application sought costs. The parties did not make any submissions in relation to costs. There does not appear to be any reason why costs should not follow the event.

I certify that the preceding three hundred and ten (310) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate: 

Dated: 19 December 2019