

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (No 2) [2019] FCA 2151

File number: VID 1141 of 2018

Judge: **O'BRYAN J**

Date of judgment: 20 December 2019

Catchwords: **CORPORATIONS** – false, misleading or deceptive conduct – contraventions of s 1041H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and ss 12DA(1) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) – consideration of the appropriate form of declarations – consideration of exercise of power of the Court to declare that an individual is involved in a contravention by another person where involvement is not itself a contravention

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA(1), 12DB(1)(i), 12GBA(1)(a), 12GBA(1)(e)  
*Corporations Act 2001* (Cth) ss 79, 1041H(1), 1041I, 1101B(1)(a), 1324  
*Federal Court of Australia Act 1976* (Cth) s 21

Cases cited: *ACCC v Danoz Direct Pty Ltd* [2003] FCA 881; 60 IPR 296  
*ACCC v Dataline.Net.Au Pty Ltd* [2006] FCA 1427; 236 ALR 665  
*ACCC v EnergyAustralia Pty Ltd* [2015] FCA 274; ATPR 42-491  
*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564  
*Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135  
*ASIC v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181  
*ASIC v Dover Financial Advisers Pty Ltd* [2019] FCA 1932  
*ASIC v Gallop International Group Pty Ltd* [2019] FCA 1514; 138 ACSR 395  
*ASIC v Maxwell* [2006] NSWSC 1052; 59 ACSR 373  
*ASIC v Wealth and Risk Management Pty Ltd (No 2)* [2018] FCA 59; 124 ACSR 351  
*ASIC v Westpac Banking Corporation (No 3)* [2018] FCA

1701; 131 ACSR 585

*Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136

*Rural Press Ltd v ACCC* (2003) 216 CLR 53

Date of hearing: Determined on the papers

Date of last submissions: 6 December 2019

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Category: Catchwords

Number of paragraphs: 27

Counsel for the Plaintiff: Mr B F Quinn QC and Ms E Levine

Solicitor for the Plaintiff: Australian Securities and Investments Commission

Counsel for the Defendants: Mr J J Gleeson QC, Ms G Crafti and Mr K Raghavan

Solicitor for the Defendants: Robert James Lawyers

# ORDERS

VID 1141 of 2018

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

**AND:**                            **DOVER FINANCIAL ADVISERS PTY LTD**  
First Defendant

**TERRENCE PAUL MCMASTER**  
Second Defendant

**JUDGE:**                        **O'BRYAN J**

**DATE OF ORDER:**    **20 DECEMBER 2019**

## **THE COURT DECLARES THAT:**

1.        Between around 25 September 2015 and around 30 March 2018 (the **relevant period**), and on each occasion that its authorised representatives provided clients a “Client Protection Policy” in conjunction with, or incorporated into, statements of advice, the first defendant (**Dover**):
  - (a)        engaged in conduct, in trade or commerce, in connection with the supply of financial services, that was misleading or deceptive or likely to mislead or deceive in contravention of s 1041H(1) of the *Corporations Act 2001* (Cth) and s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
  - (b)        made, in connection with the supply or possible supply of financial services, false or misleading representations concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in contravention of s 12DB(1)(i) of the ASIC Act,by reason that:
  - (c)        the Client Protection Policy included a statement to the effect that it set out a number of important consumer protections designed to ensure that every Dover client got the maximum protection available under the law; and

- (d) the Client Protection Policy did not ensure that clients received the maximum protection available under the law and, to the contrary, sought to limit and exclude Dover's liability to clients.
2. During the relevant period, the second defendant was knowingly concerned in each of Dover's contraventions of s 12DB(1)(i) of the ASIC Act by reason of the fact that he was responsible for:
- (a) determining the content of the Client Protection Policy;
  - (b) approving the content of the Client Protection Policy; and
  - (c) requiring Dover's authorised representatives to incorporate the Client Protection Policy into, or provide the Client Protection Policy with, statements of advice provided to clients.

**AND THE COURT ORDERS THAT:**

**Discovery**

- 3. The defendants be granted leave to reinstate their application for discovery filed on 21 December 2018.
- 4. By 4.00pm on 24 December 2019, the defendants file and serve:
  - (a) a supplementary affidavit in support of their application for discovery; and
  - (b) an outline of submissions.
- 5. By 4.00pm on 31 January 2020, the plaintiff file and serve:
  - (a) any affidavits in opposition to the defendants' application for discovery; and
  - (b) an outline of submissions.
- 6. The defendants' application be heard at 10.15am on 3 February 2020.

**Evidence**

- 7. By 4.00pm on 7 February 2020, the plaintiff file and serve any evidence on which it intends to rely on the question of penalty.
- 8. By 4.00pm on 6 March 2020, the defendants file and serve any evidence on which they intend to rely on the question of penalty.
- 9. By 4.00pm on 27 March 2020, the plaintiff file and serve any evidence in reply on which it intends to rely on the question of penalty.

### **Submissions**

10. By 4.00pm on 9 April 2020, the plaintiff file and serve:
  - (a) a proposed form of final order;
  - (b) a written outline of submissions in support of its proposed form of order; and
  - (c) a list of authorities.
11. By 4.00pm on 24 April 2020, the defendants file and serve:
  - (a) a proposed form of final order;
  - (b) a written outline of submissions in support of their proposed form of final order;  
and
  - (c) a list of authorities.

### **Objections to evidence**

12. By 4.00pm on 24 April 2020, each party is to serve on the other a list of any objections to evidence (and brief reasons for the objections).
13. The parties confer with a view to resolving any evidentiary objections and, on or before 15 May 2020, file a joint list of any evidentiary objections which remain unresolved.

### **Court book**

14. By 4.00pm on 1 May 2020, the plaintiff serve on the defendants:
  - (a) a draft court book index; and
  - (b) a draft index for the joint book of authorities.
15. By 4.00pm on 8 May 2020, the defendants notify the plaintiff of any additions to the draft court book index and the draft index for the joint book of authorities.
16. By 4.00pm on 15 May 2020, the applicant file and serve:
  - (a) a copy of the court book in electronic form, which:
    - (i) is produced in a text-recognised PDF format;
    - (ii) is paginated sequentially throughout;
    - (iii) is divided into volumes such that each volume is contained within a single PDF file and the file name of each PDF file is the volume number;  
and
    - (iv) each PDF file contains electronic bookmarks to each document in that file; and

- (b) a copy of the joint book of authorities in electronic form, which:
  - (i) is produced in a text-recognised PDF format; and
  - (ii) contains electronic bookmarks to each authority.
- 17. Subject to further order of the Court, a document included in the court book:
  - (a) shall not form part of the evidence at the trial unless specifically tendered and admitted into evidence; and
  - (b) shall be treated as tendered and admitted if referred to at the trial (including in written or oral submissions) and no objection is taken.

**Hearing**

- 18. The matter be fixed for hearing as to penalty and other relief at 10.15am on 1 June 2020 on an estimate of one to two days.
- 19. Liberty to apply.
- 20. Costs reserved.

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

## REASONS FOR JUDGMENT

**O'BRYAN J:**

### Introduction

1 On 22 November 2019, I upheld the Australian Securities and Investments Commission's (ASIC's) claim that Dover Financial Advisers Pty Ltd (**Dover**) had contravened s 1041H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) and ss 12DA(1) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) on each occasion that its authorised representatives provided clients a "Client Protection Policy" in conjunction with, or incorporated into, a statement of advice: *ASIC v Dover Financial Advisers Pty Ltd* [2019] FCA 1932. I found that the introductory clause contained in the Client Protection Policy was misleading or deceptive or likely to mislead or deceive within the meaning of s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act and a false or misleading representation within the meaning of s 12DB(1)(i) of the ASIC Act. The relevant parts of the introductory clause stated:

Dover's Client Protection Policy sets out a number of important consumer protections designed to ensure every Dover client gets ... the maximum protection available under the law...;

2 I found that the introductory clause was false, misleading or deceptive because the Client Protection Policy did not ensure that clients received the maximum protection available under the law. Rather, various other clauses in the Client Protection Policy purported to remove or dilute the protections that clients would otherwise have under the law. The contraventions occurred between around 25 September 2015 and around 30 March 2018 (the **relevant period**).

3 I directed the parties to file draft short minutes containing an agreed form of declarations reflecting my reasons for decision and orders proposed by the parties for timetabling a hearing as to pecuniary penalties or, in the absence of agreement, each party was to file competing draft short minutes containing the declarations and timetabling orders proposed by each party and accompanying submissions in support.

4 The parties were unable to agree the form of declarations to be made or a timetable to hearing. The substantive difference between the parties concerns the form of declarations to be made and whether a declaration should be made that the second defendant, Mr McMaster, was involved or knowingly concerned in Dover's contraventions of s 1041H or s 12DA. There were minor differences between the parties with respect to the proposed timetabling orders.

5 These reasons address those matters and the form of orders I now make.

### **Form of declarations**

6 The form of declarations proposed by ASIC were lengthy and elaborate. Amongst other things, ASIC's proposed declarations incorporated a lengthy definitional annexure that attempted to identify every clause in the Client Protection Policy that was inconsistent with the introductory clause and rendered the Client Protection Policy misleading (albeit consistently with my factual findings). In support of its proposed declarations, ASIC referred to the observations of Gordon J in *ACCC v EnergyAustralia Pty Ltd* [2015] FCA 274 (at [83]); ATPR 42-491 (*EnergyAustralia*) that declarations must be "informative as to the basis on which the Court declares that a contravention has occurred" and "should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act". ASIC submitted that its proposed declarations set out appropriate and adequate particulars of how and why Dover's impugned conduct contravened the relevant legislative prohibitions.

7 In contrast, Dover's proposed declarations contained a shorter statement of the contraventions found by the Court and the basis of those contraventions. Dover relied on the following observations of Dowsett J in *ACCC v Danoz Direct Pty Ltd* [2003] FCA 881; 60 IPR 296 (*Danoz Direct*) (at [260]):

...It is important that any declaration be framed so as to convey a limited and accurate message to those who have an interest in its subject matter. It is unlikely that any good purpose will be served by numerous declarations which merely repeat the various misrepresentations and the various occasions on which they were made. The most effective form of declaration will accurately reflect the impugned conduct in a concise way.

8 Dowsett J's observations have been referred to in many decisions, including *ACCC v Dataline.Net.Au Pty Ltd* [2006] FCA 1427; 236 ALR 665 at [63] per Kiefel J and *ASIC v Westpac Banking Corporation (No 3)* [2018] FCA 1701; 131 ACSR 585 at [38] per Beach J.

9 In my view, the declarations proposed by ASIC are inappropriate. The detail proposed to be included is excessive and detracts from the purpose of the declarations, which is to declare the Court's determination of a right, duty or liability that was the subject of controversy between the parties: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (*Ainsworth*) at 582. As observed by the High Court in *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at [89] in a similar context, a declaration that a person has contravened a statutory prohibition should indicate the gist of the findings that identify the contravention. Certainly, as observed by



Gordon J in *EnergyAustralia*, a declaration has no utility if it does not indicate the basis for the contravention of the law that is declared. However, as observed by Dowsett J in *Danoz Direct*, the declaration should accurately reflect the contravening conduct in a concise way.

10 The aspect of the Client Protection Policy found to be misleading was the introductory clause: the statement that Dover's Client Protection Policy sets out a number of important consumer protections designed to ensure every Dover client gets the maximum protection available under the law. That statement was misleading because various other clauses in the Client Protection Policy purported to remove or dilute the protections that clients would otherwise have under the law. A declaration of Dover's contravention of the law should be properly focused on the offending statement, not the detail of the numerous ways in which the Client Protection Policy was inconsistent with the offending statement. In the circumstances of the present case, the declaration should convey in a concise manner:

- (a) a description of the contravening conduct;
- (b) identification of the statutory prohibitions that were contravened; and
- (c) the reason that the conduct contravened those statutory prohibitions.

#### **Declarations concerning Mr McMaster**

11 The second area of disagreement between the parties concerns the question whether there is a basis for the Court to make declarations that Mr McMaster was knowingly concerned in Dover's contraventions of ss 1041H(1) or 12DA(1).

12 In my liability reasons, I expressed a preliminary view that there is no proper basis for the Court to make those declarations. Having considered the parties' submissions on that issue, I now confirm my preliminary view.

13 In its originating process, ASIC sought the following relief:

- (a) declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) or s 1101B(1)(a) of the Corporations Act that Dover has contravened s 1041H(1) of the Corporations Act and ss 12DA(1) and 12DB(1)(i) of the ASIC Act;
- (b) declarations pursuant to s 21 of the FCA Act that Mr McMaster was knowingly concerned in Dover's contraventions of s 1041H(1) of the Corporations Act and ss 12DA(1) and 12DB(1)(i) of the ASIC Act;

- (c) orders pursuant to s 12GBA(1)(a) of the ASIC Act that Dover pay pecuniary penalties in respect of its contraventions of s 12DB(1)(i) of the ASIC Act; and
- (d) orders pursuant to s 12GBA(1)(e) of the ASIC Act that Mr McMaster pay pecuniary penalties in respect of being knowingly concerned in Dover's contraventions of s 12DB(1)(i) of the ASIC Act.

14 In *Ainsworth*, the plurality summarised the principles concerning the power to grant declaratory relief in the following terms (at 581-2, references omitted):

It is a discretionary power which "[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise." However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have "a real interest" and relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen" or if "the Court's declaration will produce no foreseeable consequences for the parties".

15 In the present case, there is no doubt that the Court has power to make a declaration that Mr McMaster was knowingly concerned in Dover's contraventions of s 12DB(1)(i) of the ASIC Act. That is because ASIC is seeking an order under s 12GBA(1)(e) (in the form it took during the relevant period) that Mr McMaster pay a pecuniary penalty by reason of being knowingly concerned in Dover's contraventions of s 12DB(1)(i). During the relevant period, s 12GBA(1) provided as follows:

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

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.

16 ASIC alleged and proved that Mr McMaster was knowingly concerned in Dover's contraventions of s 12DB(1)(i) of the ASIC Act, which enlivens the Court's power to impose

a pecuniary penalty on Mr McMaster under s 12GBA(1)(e). A declaration in those terms determines a legal controversy. Accordingly, s 21 of the FCA Act empowers the Court to declare that Mr McMaster is a person who has been knowingly concerned in Dover's contraventions of s 12DB(1)(i) of the ASIC Act as a precursor to the imposition of a pecuniary penalty under s 12GBA(1)(e).

17 In contrast, a declaration that Mr McMaster is a person who has been knowingly concerned in Dover's contraventions of s 1041H(1) of the Corporations Act or s 12DA(1) of the ASIC Act does not involve the determination of a legal right, duty or liability that was properly the subject of controversy between the parties. It is convenient to explain that conclusion by reference to s 1041H of the Corporations Act, but the same reasoning applies to s 12DA of the ASIC Act.

18 Section 1041H(1) provides that a person must not engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive. Unlike many other provisions of the Corporations Act (for example, s 181), it is not a contravention of s 1041H(1) to be "involved" in a contravention of another person within the meaning of s 79 of the Corporations Act or more generally to be knowingly concerned in a contravention of another person. I respectfully agree with the observation of Brereton J in *ASIC v Maxwell* [2006] NSWSC 1052; 59 ACSR 373 at [57] that the availability of s 79 to impose accessorial liability has been carefully and deliberately marked out through the Corporations Act. While s 21 of the FCA Act empowers the Court to make binding declarations of right whether or not any consequential relief is or could be claimed, in my view that power does not extend to a declaration of a state of affairs that is divorced from the existence of any right, duty or liability. The declaration sought by ASIC faces that difficulty: ASIC seeks a declaration that Mr McMaster was involved in contraventions of s 1041H(1) by Dover within the meaning of s 79, or was otherwise knowingly concerned in such a contravention, when being involved or knowingly concerned in such a contravention is not itself a wrong under the Corporations Act.

19 The position would be different if ASIC were seeking other relief in the proceeding which depended on a finding that Mr McMaster was involved in a contravention of s 1041H(1) by Dover within the meaning of s 79, or was otherwise knowingly concerned in such a contravention (as is the case in respect of pecuniary penalties under s 12GBA(1)(e), referred to above). Most relevantly, s 1324 of the Corporations Act empowers the Court, on the application of ASIC, to grant injunctive relief against a person who is knowingly concerned in

a contravention of the Corporations Act by another person. If ASIC were seeking an injunction against Mr McMaster under s 1324, the Court may have considered it appropriate to make a declaration that Mr McMaster was knowingly concerned in Dover's contraventions of s 1041H(1) as a precursor to the grant of injunctive relief. But ASIC is not seeking such relief in these proceedings.

20 ASIC also relied on s 1041I of the Corporations Act. That section provides that a person who suffers loss or damage by conduct of another person that contravenes, amongst other provisions, s 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention (within the meaning of s 79 of the Corporations Act). ASIC is not empowered to bring proceedings under s 1041I and, accordingly, there is no legal controversy in these proceedings as to whether any person has suffered loss or damage by reason of Dover's contraventions of s 1041H(1). It follows that there is no right, duty or liability that arises in these proceedings from a determination of whether Mr McMaster was a person involved in Dover's contraventions within the meaning of s 1041I.

21 As mentioned above, the same analysis applies to Dover's contraventions of s 12DA(1) of the ASIC Act. It is not a contravention of s 12DA(1) to be involved in a contravention of another person (within the meaning of s 79 of the Corporations Act, which is incorporated into the ASIC Act by s 5(3) of the ASIC Act), or more generally to be knowingly concerned in a contravention of another person. However, under s 12GD, ASIC may seek injunctive relief against a person who is knowingly concerned in a contravention of, amongst other provisions, s 12DA(1) by another person.

22 In support of its application for a declaration that Mr McMaster was knowingly concerned in Dover's contraventions of s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act, ASIC relies on *ASIC v Wealth and Risk Management Pty Ltd (No 2)* [2018] FCA 59; 124 ACSR 351 (*Wealth and Risk Management*) at [134] – [138] per Moshinsky J and *ASIC v Gallop International Group Pty Ltd* [2019] FCA 1514 at [266] per Charlesworth J; 138 ACSR 395 (*Gallop International*). The cases are distinguishable. In *Wealth and Risk Management*, Moshinsky J made a declaration that an individual defendant was knowingly concerned in a corporate defendant's contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act. However, his Honour also granted an injunction against the individual defendant under s 1324 of the Corporations Act on the basis that the individual defendant was knowingly

concerned in the corporate defendant's contraventions. Thus, the declaration determined a legal controversy that arose under s 1324. The same circumstances arose in *Gallop International* and therefore the declaration made by the Court in that case also determined a legal controversy that arose under s 1324. ASIC drew attention to the statement of Charlesworth J in *Gallop International* (at [266]) that a declaration may be made that an individual was "involved" in a contravention of the Corporations Act by a company notwithstanding that the involvement did not itself amount to a contravention by the individual, relying on observations of White J in *ASIC v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 (*ActiveSuper*) at [421]. With respect to her Honour, that statement, taken in an unqualified form, is too broad and the observations of White J in *ActiveSuper* do not support the breadth of the statement. The issue that was considered by White J in *ActiveSuper* was again whether it was open to the Court to issue injunctions against individuals pursuant to s 1324 of the Corporations Act on the basis that they were knowingly concerned in contraventions by the primary defendants. In circumstances where ASIC was seeking an injunction under that section, White J concluded that the Court may make a declaration that a person was knowingly concerned in, or party to, a contravention of the Corporations Act by another person as a precursor to the grant of the injunction (at [421]). I respectfully agree with his Honour's conclusion. But his Honour's reasons do not support a broader proposition that a declaration may be made that an individual was involved in a contravention of a statutory provision by a another person notwithstanding that the involvement did not itself amount to a contravention by the individual or otherwise give rise to a legal right, duty or liability.

23 As observed by Tracey and McKerracher JJ in *Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135 at [78], in the context of declaratory relief the distinction between the boundaries of judicial power and the exercise of discretion are often blurred. Nevertheless, *Ainsworth* confirms that the grant of declaratory relief is marked by the boundaries to the exercise of judicial power. A declaration in respect of an abstract or hypothetical question might be refused on the basis of power or discretion, depending on the nature of the question and the features that make it abstract or hypothetical. In *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136, Lord Diplock noted that (at 1158):

All questions involved in *quia timet* proceedings are hypothetical and future. To exclude the jurisdiction of the court to inquire into them in order to decide whether to exercise its discretion to grant relief, the defendants would have to show that the questions were purely abstract questions the answers to which were incapable of affecting any existing or future rights.

24 Whether the present question is approached as a matter of power or discretion, in my view the Court ought not make a declaration under s 21 of the FCA Act that Mr McMaster is a person who was knowingly concerned in Dover's contraventions of s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act because there is no right, duty or liability in the proceeding that is dependent upon that determination. Any such declaration would be entirely abstract and would not determine a legal controversy that arises in the proceeding. For those reasons, the declarations I will make are confined, in the case of Mr McMaster, to a declaration that Mr McMaster was knowingly concerned in Dover's contraventions of s 12DB(1)(i) of the ASIC Act.

### **Timetabling orders**

25 The parties' competing orders with respect to timetabling differed in relatively minor respects. ASIC sought slightly earlier dates for the timetabling steps with a view to progressing the proceeding as expeditiously and efficiently as possible. I have considered the orders proposed by each party and, in the main, adopted the slightly expedited timetable proposed by ASIC.

26 On 18 December 2019, Dover emailed the Court requesting an additional order permitting it to file an amended concise response on the question of penalties. The email indicated that ASIC opposed that order being made. In the circumstances, I do not consider it appropriate to make that order. However, that does not prevent Dover from serving a draft amended concise response on ASIC and then seeking leave to file that document.

### **Costs**

27 At the time of delivering my decision on liability on 22 November 2019, I indicated to the parties that I did not propose to make separate costs orders for the liability and penalty phases of the hearing, but would deal with costs at the conclusion of the whole proceeding. The parties have not sought to revisit costs and, accordingly, I will reserve the costs of the liability phase, including this determination of the form of declarations to be made.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Bryan.

Associate:



Dated: 20 December 2019