FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v MLC Nominees Pty Ltd

[2020] FCA 1306

File number:	NSD 1654 of 2018
Judge:	**YATES J**
Date of judgment:	11 September 2020
Catchwords:	**CORPORATIONS** – admitted contraventions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) related to the charging and deductions of fees and representations about the right to charge fees from members of superannuation funds – imposition of penalties pursuant to s 12GBA of the ASIC Act – where quantum of penalties is contested
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BA(1), 12BAB, 12BAA(7)(f), 12DA, 12DB(1)(g), 12DB(1)(i), 12GBA *Competition and Consumer Act 2010* (Cth) Sch 2 *(Australian Consumer Law)* *Corporations Act 2001* (Cth) ss 761E, 912A(1)(a), 912A(1)(c), 1012B(3), 1013C, 1022A, 1022B(2), 1041H(1), 1041H(2) *Corporations Regulations 2001* (Cth) regs 7.9.11N, 7.9.11O *Crimes Act 1914* (Cth) s 4AA *Evidence Act 1995* (Cth) s 191 *Federal Court of Australia Act 1976* (Cth) s 21 *Superannuation Industry (Supervision) Act 1993* (Cth) ss 10, 52(2) *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth)
Cases cited:	*Attorney-General v Tichy* (1982) 30 SASR 84 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540

Australian Competition and Consumer Commission v Pental Limited [2018] FCA 491

Australian Competition and Consumer Commission v Dukemaster Pty Ltd [2009] FCA 682

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 634; 317 ALR 73

Australian Securities and Investments Commission v Westpac Banking Corporation [2018] FCA 751; 266 FCR 147

Australian Competition and Consumer Commission v Optus Mobile Pty Limited [2019] FCA 106

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

Australian Competition and Consumer Commission v BAJV Pty Ltd [2014] FCAFC 52

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

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3; 262 CLR 157

Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (in Liquidation); In the matter of Camelot Derivatives Pty Limited (in Liquidation) [2012] FCA 414; 88 ACSR 206

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd [2018] FCA 155

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

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 at [39]-[41]; *ABCC v CFMEU*

Director of Consumer Affairs, Victoria v Alpha Flight Services Pty Ltd [2015] FCAFC 118

Finch v Telstra Super Pty Ltd [2010] HCA 36; 242 CLR 254

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

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

McDonald v Australian Building and Construction Commissioner [2011] FCAFC 29; 202 IR 467

Mill v The Queen (1988) 166 CLR 59

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

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

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

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

Setka v Gregor (No 2) [2011] FCAFC 90; 195 FCR 203

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

Schneider Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission [2003] FCAFC 2; 127 FCR 170

Trade Practices Commission v CSR Ltd [1991] ATPR 41-076

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	315
Date of hearing:	16 March 2020 and 19 June 2020
Counsel for the Plaintiff:	Mr T Faulkner SC, Ms J Shepard and Ms A Garsia
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendants:	Mr D Thomas SC, Ms M Ellicott and Mr M Forgacs
Solicitor for the Defendants:	Herbert Smith Freehills

ORDERS

NSD 1654 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**MLC NOMINEES PTY LTD (ACN 002 814 959)** First Defendant
	NULIS NOMINEES (AUSTRALIA) LIMITED (ACN 008 515 633) Second Defendant
JUDGE:	**YATES J**
DATE OF ORDER:	**11 SEPTEMBER 2020**

THE COURT:

First Defendant (MLC Nominees Pty Ltd): no-adviser members

1. Declares that during the period 8 September 2012 to 30 June 2016, while MLC Nominees Pty Ltd (**MLC Nominees**) was trustee of The Universal Super Scheme, MLC Nominees failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 230702 were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the *Corporations Act 2001* (Cth) (the **Corporations Act**), in that:

   (a) during that period, the administrator retained by MLC Nominees to administer The Universal Super Scheme on behalf of MLC Nominees, being MLC Limited, made monthly deductions from the account balances of approximately 220,000 members' accounts in the MasterKey Product totalling over $33,620,000 (gross of any tax credits the member would have received) in respect of **Plan Service Fees** in circumstances where those members (**no-adviser members**) had no linked financial adviser (**Plan Adviser**);

   (b) the administrator retained those deductions;

   (c) it was a term of the MasterKey Product that Plan Service Fees:

(i) could only be deducted and paid to a Plan Adviser; and

(ii) could not be deducted from account balances of no-adviser members; and

(d) MLC Nominees failed to ensure deductions of Plan Service Fees were made consistently with the terms of the MasterKey Product referred to in sub-paragraph (c).

2. Declares that during the period 4 July 2012 to 12 April 2013, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**), in that MLC Nominees sent a letter to each existing no-adviser member of the MasterKey Product which:

(a) under the heading "Your new fees", listed the Plan Service Fee as a fee that would apply to the no-adviser member's account on and from the date specified;

(b) did not state that the Trustee was not entitled to deduct the Plan Service Fee from the no-adviser member's account or that the no-adviser member was not obliged to pay the Plan Service Fee; and

(c) in the circumstances, represented that the Trustee was entitled to deduct the Plan Service Fee and the no-adviser member was obliged to pay it whereas there was no such entitlement or obligation.

3. Declares that during the period 8 September 2012 to 29 November 2013, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that MLC Nominees issued to each new no-adviser member a "welcome kit" which:

(a) listed "current fees" by type and amount/percentage including the Plan Service Fee;

(b) did not state that the Trustee was not entitled to deduct the Plan Service Fee from the no-adviser member's account or that the no-adviser member was not obliged to pay the Plan Service Fee; and

(c) in the circumstances, represented that the Trustee was entitled to deduct the Plan Service Fee and the no-adviser member was obliged to pay it whereas there was no such entitlement or obligation.

4. Declares that during the period 8 September 2012 to 30 June 2016, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that MLC Nominees issued to each no-adviser member of the MasterKey Product annual statements which:

(a) listed "current fees" by type and amount/percentage including the Plan Service Fee;

(b) did not state that the Trustee was not entitled to deduct the Plan Service Fee from the no-adviser member's account or that the no-adviser member was not obliged to pay the Plan Service Fee; and

(c) in the circumstances represented that the Trustee was entitled to deduct the Plan Service Fee and the no-adviser member was obliged to pay it whereas there was no such entitlement or obligation.

5. Declares that, by reason of the matters set out in Declarations 2, 3 and 4 above, MLC Nominees in connection with the supply of financial services made a false or misleading representation to each no-adviser member for each of no fewer than approximately 220,000 accounts with respect to the fees to be paid by the no-adviser member of the MasterKey Product, and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

6. Declares that, by reason of the matters set out in Declarations 2, 3 and 4 above, MLC Nominees in connection with the supply of financial services made a false or misleading representation to each no-adviser member for each of no fewer than approximately 220,000 accounts concerning the existence of a right of MLC Nominees, namely the right to deduct the Plan Service Fee and, further, a condition imposed on no-adviser members, namely the obligation to pay the Plan Service Fee, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

7. Declares that, during the period 8 September 2012 to 30 June 2016 MLC Nominees failed to comply with the financial services laws and thereby contravened s 912A(1)(c) of the Corporations Act, in that MLC Nominees:

(a) contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act as referred to in Declarations 2 to 4 above;

(b) contravened s 12DB(1)(g) of the ASIC Act as referred to in Declaration 5 above; and

(c) contravened s 12DB(1)(i) of the ASIC Act as referred to in Declaration 6 above.

8. Declares that during the period 8 September 2012 to 30 June 2016 MLC Nominees failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 230702 were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act, in that MLC Nominees engaged in the misleading or deceptive conduct referred to in Declarations 2 to 6 above.

9. Orders pursuant to s 12GBA of the ASIC Act that MLC Nominees pay to the Commonwealth a pecuniary penalty in respect of each declared civil penalty contravention, in the sum of $22.5 million.

First Defendant (MLC Nominees Pty Ltd): linked members

10. Declares that during the period 8 September 2012 to 30 June 2016 whilst MLC Nominees was trustee of The Universal Super Scheme, MLC Nominees failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 230702 were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act, in that MLC Nominees:

(a) was party to standard Licensee Remuneration Agreements with Plan Advisers in respect of distribution of the MasterKey Product, which standard agreements imposed an obligation on MLC Nominees to pay to the Plan Advisers a fee called the Plan Service Fee in respect of members of a division of the MasterKey Product called MasterKey Personal Super who had a Plan Adviser linked to their account (**linked members**), but did not impose any obligation on Plan Advisers to provide any services to linked members in MasterKey Personal Super;

(b) did not obtain information about any agreement between a Standard Employer Sponsor and its Plan Adviser in addition to that contained in the MLC Application Form, namely information about whether there was any agreement

by the Plan Adviser to provide services to linked members after they ceased employment and, if so, what services;

(c) did not have in place an adequate system to enable it to form a reasonable belief, for the purposes of cl 4.4(a)(i) of the Licensee Remuneration Agreements, about whether Plan Advisers were providing services to linked members in MasterKey Personal Super to which the Plan Service Fee related;

(d) did not form a reasonable belief, for the purposes of cl 4.4(a)(i) of the Licensee Remuneration Agreements, upon each linked member of the MasterKey Product ceasing employment and being transferred to MasterKey Personal Super from another division of the MasterKey Product called MasterKey Business Super, that the Plan Adviser was no longer providing that member with the financial services to which the Plan Service Fee related;

(e) did not terminate payment of the Plan Service Fee for each linked member upon that member ceasing employment and being transferred to MasterKey Personal Super;

(f) made or authorised the making of monthly deductions from the account balances of 313,078 linked members' accounts in MasterKey Personal Super for payment to Plan Advisers of Plan Service Fees totalling $59,073,846;

(g) did not inform linked members in MasterKey Personal Super at any time, including when they were transferred from MasterKey Business Super to MasterKey Personal Super, that they had the right to elect to turn off the Plan Service Fee;

(h) did not inform linked members in MasterKey Business Super at any time that they would have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super; and

(i) did not inform any linked members that they could exercise the right to elect to turn off the Plan Service Fee simply by notifying the Trustee.

11. Declares that from 10 September 2012 to 19 November 2012, MLC Nominees gave to people who became a member of the MasterKey Product a product disclosure statement dated 10 September 2012 which was defective within the meaning of s 1022A of the Corporations Act in that:

(a) the product disclosure statement contained a statement that was misleading or deceptive, namely:

"Your Plan service fee will continue under MLC MasterKey Personal Super and will be capped at 0.44%."

whereas upon a linked member being transferred to MasterKey Personal Super the member had the right to elect to turn off the Plan Service Fee;

(b) there was an omission from the product disclosure statement of material required to be included by s 1013C(1)(a) of the Corporations Act as modified by reg 7.9.11N of the *Corporations Regulations 2001* (Cth) (the **Corporations Regulations**) and cl 5B.2 of Schedule 10A to those regulations, namely the material specified in reg 7.9.11O and cl 8(9)(c) of Schedule 10D which required the product disclosure statement to explain how fees which may be paid to the employer's Plan Adviser were determined, in that the product disclosure statement did not explain that:

(i) linked members in MasterKey Personal Super had the right to elect to turn off the Plan Service Fee; and

(ii) linked members in MasterKey Business Super would have the right to elect to turn off the Plan Service Fee upon ceasing employment and being transferred to MasterKey Personal Super; and

(c) there was an omission from the product disclosure statement of material required to be included by s 1013C(1)(a) of the Corporations Act as modified by reg 7.9.11N of the Corporations Regulations and cl 5B.2 of Schedule 10A to those regulations, namely the material specified in reg 7.9.11O, cl 8(5) of Schedule 10D and para 209(k)(iv) of Schedule 10 which required the product disclosure statement to set out information about all the changes in the structure of the Plan Service Fee that were dependent on a member's change in employment, in that the product disclosure statement did not set out the following information:

(i) linked members who had ceased to be employed and were now members in MasterKey Personal Super had the right to elect to turn off the Plan Service Fee; and

(ii) linked members in MasterKey Business Super would have the right to elect to turn off the Plan Service Fee upon ceasing employment and being transferred to MasterKey Personal Super.

12. Declares that from 19 November 2012 until 1 July 2013, MLC Nominees gave to people who became a member of the MasterKey Product a product disclosure statement dated 19 November 2012 which was defective within the meaning of s 1022A of the Corporations Act for the same reasons as for the product disclosure statement dated 10 September 2012 as referred to in Declaration 11 above.

13. Declares that from 1 July 2013 until 29 November 2013, MLC Nominees gave to people who became a member of the MasterKey Product a product disclosure statement dated 1 July 2013 which was defective within the meaning of s 1022A of the Corporations Act for the same reasons as for the product disclosure statement dated 10 September 2012 as referred to in Declaration 11 above.

14. Declares that prior to 8 September 2012, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that MLC Nominees:

(a) sent a letter to each linked member of MasterKey Personal Super which:

(i) informed linked members of the introduction of the Plan Service Fee;

(ii) listed "your new fees" by type and amount/percentage;

(iii) provided information under the heading "How you can reduce your fees"

(iv) but did not state that the linked member had the right to elect to turn off the Plan Service Fee;

(v) in the circumstances, represented that the linked member did not have the right to elect to turn off the Plan Service Fee, whereas the linked member did;

(b) enclosed with the letter a reference guide which:

(i) stated:

"**Plan service fee**

Up to 1.5% pa of your account balance. It may be a dollar amount, as long as it doesn't exceed this limit.

It is deducted monthly from your account and is paid to your adviser.

You can negotiate a lower fee with your adviser."

(ii) by stating without qualification, expansion or explanation that "You can negotiate a lower fee with your adviser", the reference guide represented that:

A. a linked member could not remove the Plan Service Fee unless the Plan Adviser agreed, whereas the linked member had the right to elect to turn off the Plan Service Fee simply by notifying the trustee;

B. a linked member could lower the amount he or she had to pay but would still have to pay some amount for the Plan Service Fee, whereas the linked member had the right to elect to turn off the fee altogether;

(iii) the reference guide provided information about reducing fees under the heading "How you can reduce your fees";

(iv) but did not state that the linked member had the right to elect to turn off the Plan Service Fee;

(v) in the circumstances, represented that the linked member did not have the right to elect to turn off the Plan Service Fee, whereas the linked member did;

(c) sent a letter to each linked member of MasterKey Business Super which:

(i) informed linked members of the introduction of the Plan Service Fee;

(ii) listed "your new fees" by type and amount/percentage;

(iii) provided information under the heading "How you can further reduce your fees";

(iv) but did not state that the linked member would have the right to elect to turn off the Plan Service Fee upon the linked member being transferred to MasterKey Personal Super;

(v) in the circumstances, represented that the linked member would not have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super, whereas the linked member would; and

(d) enclosed with the letter a reference guide which:

(i) provided information about reducing fees under the heading "How you can reduce your fees";

(ii) stated:

"**Plan service fee**

This fee is up to 1.5% pa of your account balance. It may be a dollar amount, as long as it doesn't exceed this limit.

It is deducted monthly from your account and paid to your Plan adviser. The fee is for providing financial services that are tailored to the needs of the employees in your company.

The Plan service fee is the Asset based commission plus the Employer service fee."

(iii) further stated:

"**Changes when you leave your employer**

If you leave your employer, we'll automatically transfer your super account to MLC MasterKey Personal Super.

The overall changes to your fees and costs will be:

- your Administration fee may increase as you will no longer be part of an employer Plan
- any Adviser contribution fee will cease
- any Plan service fee will be capped at 0.44%, and
- your Insurance commission will be 23.65%.

Other fees and costs will remain the same at the time of the transfer."

(iv) but did not at any place state that the linked member would have the right to elect to turn off the Plan Service Fee upon the linked member being transferred to MasterKey Personal Super; and

(v) in the circumstances, represented that the linked member would not have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super, whereas the linked member would.

15. Declares that by reason of the matters referred to in Declaration 14 above, prior to 8 September 2012 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member

in MasterKey Personal Super for each of no fewer than approximately 219,000 accounts with respect to the fees to be paid by the linked member in the MasterKey Product and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

16. Declares that by reason of the matters referred to in Declaration 14 above, prior to 8 September 2012 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member in MasterKey Personal Super for each of no fewer than approximately 219,000 accounts concerning the existence of a right of linked members of the MasterKey Product, namely the right to elect to turn off the Plan Service Fee once the linked member was transferred to MasterKey Personal Super, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

17. Declares that during the period 17 September 2012 to 12 October 2012, MLC Nominees in trade or commerce, engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that MLC Nominees:

    (a) sent a letter to each person to be transferred to MasterKey Personal Super as part of an intra-fund transfer of members from four existing corporate superannuation products (including those known as the Navigator Super Solutions – Employer Super and Personal Option) to the MasterKey Product as part of the "Encompass" project (**Encompass Trade-Up**), which letter:

        (i) listed "your new fees" by type and amount/percentage;

        (ii) provided information about reducing fees under the heading "How you can reduce your fees";

        (iii) but did not state that the linked member had the right to elect to turn off the Plan Service Fee;

        (iv) in the circumstances, represented that the linked member did not have the right to elect to turn off the Plan Service Fee, whereas the linked member did;

    (b) sent a letter to each person to be transferred to MasterKey Business Super as part of the Encompass Trade-Up which:

        (i) listed "your new fees" by type and amount/percentage;

(ii) provided information about reducing fees under the heading "How you can further reduce your fees";

(iii) but did not state that the linked member would have the right to elect to turn off the Plan Service Fee upon the member being transferred to MasterKey Personal Super;

(iv) in the circumstances, represented that the linked member would not have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super, whereas the linked member would; and

(c) enclosed with the letters referred to in the preceding two subparagraphs a reference guide which:

(i) provided information about reducing fees under the heading "How you can reduce your fees";

(ii) with reference to MasterKey Business Super, stated:

"**Plan service fee**

The Adviser services fee will be transferred into a Plan service fee, which can be up to 1.5% pa of your account balance. It may be a dollar amount, as long as it doesn't exceed this limit.

It is deducted monthly from your account and paid to your Plan adviser.

The fee is for providing financial services that are tailored to the needs of the employees in your company."

(iii) with reference to MasterKey Personal Super, stated:

"**Plan service fee**

The Adviser services fee will be transferred into a Plan service fee, which can be up to 1.5% pa of your account balance. It may be a dollar amount, as long as it doesn't exceed this limit.

It is deducted monthly from your account and paid to your adviser.

You can negotiate a lower fee with your adviser."

(iv) by stating without qualification, expansion or explanation that "You can negotiate a lower fee with your adviser", the reference guide represented that:

A. a linked member could not turn off the Plan Service Fee unless the Plan Adviser agreed, whereas the linked member had the right to elect to turn off the Plan Service Fee simply by notifying the trustee;

B. a linked member could lower the amount he or she had to pay but would still have to pay some amount for the Plan Service Fee, whereas the member had the option of turning off the fee altogether;

(v) did not at any place state that linked members in MasterKey Personal Super had the right to elect to turn off the Plan Service Fee;

(vi) in the circumstances, represented that linked members in MasterKey Personal Super did not have the right to elect to turn off the Plan Service Fee, whereas they did;

(vii) did not at any place state that linked members in MasterKey Business Super would have the right to elect to turn off the Plan Service Fee upon the member being transferred to MasterKey Personal Super; and

(viii) in the circumstances, represented that the linked member in MasterKey Business Super would not have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super, whereas they would.

18. Declares that by reason of the matters referred to in Declaration 17 above, during the period 17 September 2012 to 12 October 2012 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each person to be transferred to (and become a linked member of) the MasterKey Product for each of no fewer than approximately 38,000 accounts as part of the Encompass Trade-Up with respect to the fees to be paid by the person as a member of the MasterKey Product and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

19. Declares that by reason of the matters referred to in Declaration 17 above, during the period 17 September 2012 to 12 October 2012 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each person to be transferred to (and become a linked member of) the MasterKey Product for each of no fewer than approximately 38,000 accounts as part of the Encompass Trade-Up concerning the existence of a right of linked members of the MasterKey Product, namely the right to elect to turn off the Plan Service Fee once the

member was transferred to MasterKey Personal Super, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

20. Declares that, during the period 22 March 2013 to 12 April 2013, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that MLC Nominees:

(a) sent a letter to each person to be transferred to MasterKey Personal Super as part of an intra-fund transfer of members of The Employee Retirement Plan to the MasterKey Product (**TERP Trade-Up**), which letter:

(i) listed "your new fees" by type and amount/percentage;

(ii) stated:

"Plan service fee [x] % pa of your account balance

You can reduce your Plan service fee. To discuss this please contact your adviser or call us after the move."

(iii) by stating without qualification, expansion or explanation that "You can reduce your Plan service fee", the letter represented that a linked member could reduce the amount he or she had to pay but would still have to pay some amount for the Plan Service Fee, whereas the linked member had the option of turning off the fee altogether;

(iv) did not state that the linked member had the right to elect to turn off the Plan Service Fee;

(v) in the circumstances, represented that the linked member did not have the right to elect to turn off the Plan Service Fee, whereas the linked member did;

(b) sent a letter to each person to be transferred to MasterKey Business Super as part of the TERP Trade-Up which:

(i) listed "your new fees" by type and amount/percentage;

(ii) stated:

"Plan service fee [x] % pa of your account balance

If you want to amend your Plan service fee please contact your Plan adviser or call us after the move."

(iii) by referring without qualification, expansion or explanation to amending the Plan Service Fee, the letter represented that a linked member could change the amount he or she had to pay but would still have to pay some amount for the Plan Service Fee, whereas the linked member would have the right to elect to turn off the fee altogether;

(iv) did not state that the linked member would have the right to elect to turn off the Plan Service Fee upon the linked member being transferred to MasterKey Personal Super;

(v) in the circumstances, represented that the linked member would not have the right to elect to turn off the Plan Service Fee upon being transferred to MasterKey Personal Super, whereas the linked member would;

(c) enclosed with the letters referred to in the preceding two subparagraphs a reference guide which:

(i) provided information about "fees you pay";

(ii) provided information about reducing fees under the heading "How you can reduce your fees";

(iii) stated:

"**Plan service fee**

0.33% pa (or 0.22% pa if your employer's Plan used to be with National Flexi Super). It's deducted monthly from your account and paid to your Plan adviser."

(iv) did not at any place state that linked members in MasterKey Personal Super had the right to elect to turn off the Plan Service Fee;

(v) in the circumstances, represented that linked members in MasterKey Personal Super did not have the right to elect to turn off the Plan Service Fee, whereas they did;

(vi) did not at any place state that linked members in MasterKey Business Super would have the right to elect to turn off the Plan Service Fee upon the member being transferred to MasterKey Personal Super; and

(vii) in the circumstances, represented that linked members in MasterKey Business Super would not have the right to elect to turn off the Plan

Service Fee upon being transferred to MasterKey Personal Super, whereas they would.

21. Declares that by reason of the matters referred to in Declaration 20 above, during the period 22 March 2013 to 12 April 2013 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each person to be transferred to (and become a linked member of) the MasterKey Product for each of no fewer than approximately 50,000 accounts as part of the TERP Trade-Up with respect to the fees to be paid by the person as a member of the MasterKey Product and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

22. Declares that by reason of the matters referred to in Declaration 20 above, during the period 22 March 2013 to 12 April 2013 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or a misleading representation to each person to be transferred to (and become a linked member of) the MasterKey Product for each of no fewer than approximately 50,000 accounts as part of the TERP Trade-Up concerning the existence of a right of linked members of the MasterKey Product, namely the right to elect to turn off the Plan Service Fee once the member was transferred to MasterKey Personal Super, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

23. Declares that, between 8 September 2012 and 29 November 2013, MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that MLC Nominees issued to each person who became a new linked member in the MasterKey Product a "welcome kit" which:

    (a) listed "current fees" by type and amount/percentage;

    (b) did not at any place state that the member had the right to elect to turn off the Plan Service Fee once the member was transferred to MasterKey Personal Super; and

    (c) in the circumstances, represented that the linked member did not have the right to elect to turn off the Plan Service Fee once the member was transferred to MasterKey Personal Super, whereas the linked member did.

24. Declares that by reason of the matters referred to in Declaration 23 above, between 8 September 2012 and 29 November 2013, MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 61,000 accounts with respect to the fees to be paid by linked members of the MasterKey Product and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

25. Declares that by reason of the matters referred to in Declaration 23 above, between 8 September 2012 and 29 November 2013, MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 61,000 accounts concerning the existence of a right of linked members of the MasterKey Product, namely the right to elect to turn off the Plan Service Fee once the member was transferred to MasterKey Personal Super, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

26. Declares that between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that MLC Nominees issued a "porting kit" to each person who was a linked member in MasterKey Business Super as at 29 November 2013 and who was then transferred to MasterKey Personal Super, which "porting kit":

    (a) listed "your new account fees" by type and amount/percentage;

    (b) did not at any place state that the member now had the right to elect to turn off the Plan Service Fee; and

    (c) in the circumstances, represented that the member did not have the right to elect to turn off the Plan Service Fee, whereas the member did.

27. Declares that by reason of the matters referred to in Declaration 26 above, between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 48,000 accounts with respect to the fees to be paid by linked members of the MasterKey

Product and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

28. Declares that by reason of the matters referred to in Declaration 26 above, between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 48,000 accounts concerning the existence of a right of members of the MasterKey Product, namely the right to elect to turn off the Plan Service Fee once the linked member was transferred to MasterKey Personal Super, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

29. Declares that between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that MLC Nominees issued annual statements to each person who was a member of MasterKey Personal Super, which statements:

    (a) listed "current fees" by type and amount/percentage including the Plan Service Fee;

    (b) did not at any place state that the member had the right to elect to turn off the Plan Service Fee; and

    (c) in the circumstances, represented that the member did not have the right to elect to turn off the Plan Service Fee, whereas the member did.

30. Declares that by reason of the matters referred to in Declaration 29 above, between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 105,000 accounts with respect to the fees to be paid by linked members of the MasterKey Product, and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

31. Declares that by reason of the matters referred to in Declaration 29 above, between 8 September 2012 and 30 June 2016 MLC Nominees in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 105,000

accounts concerning the existence of a right of linked members of the MasterKey Product, namely the right to elect to turn off the Plan Service Fee, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

32. Declares that during the period 8 September 2012 to 30 June 2016 MLC Nominees failed to comply with the financial services laws and thereby contravened s 912A(1)(c) of the Corporations Act, in that MLC Nominees:

    (a) gave the product disclosure statements which were defective for the purposes of s 1022A of the Corporations Act as referred to in Declarations 11, 12 and 13 above;

    (b) contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act as referred to in Declarations 14, 17, 20, 23, 26 and 29 above;

    (c) contravened s 12DB(1)(g) of the ASIC Act as referred to in Declarations 15, 18, 21, 24, 27 and 30 above; and

    (d) contravened s 12DB(1)(i) of the ASIC Act as referred to in Declarations 16, 19, 22, 25, 28 and 31 above.

33. Declares that during the period 8 September 2012 to 30 June 2016 MLC Nominees failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 230702 were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act, in that MLC Nominees:

    (a) gave the product disclosure statements which were defective as referred to in Declarations 11, 12 and 13 above; and

    (b) engaged in the misleading or deceptive conduct referred to in Declarations 14, 17, 20, 23, 26 and 29 above.

34. Orders pursuant to s 12GBA of the ASIC Act that MLC Nominees pay to the Commonwealth a pecuniary penalty in respect of each declared civil penalty contravention, in the sum of $27 million.

Second Defendant (NULIS Nominees (Australia) Limited): linked members

35. Declares that since 1 July 2016 whilst NULIS Nominees (Australia) Limited (**NULIS**) was trustee of the MLC Super Fund, NULIS failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number

236465 were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act, in that NULIS:

(a) was party to standard Licensee Remuneration Agreements with Plan Advisers in respect of distribution of the MasterKey Product, which on 1 July 2016 had become part of the MLC Super Fund, which standard agreements imposed an obligation on NULIS to pay to the Plan Advisers the Plan Service Fee in respect of linked members in MasterKey Personal Super but did not impose any obligation on Plan Advisers to provide any services to linked members in MasterKey Personal Super;

(b) did not have in place an adequate system to enable it to form a reasonable belief, for the purposes of cl 4.4(a)(i) of the Licensee Remuneration Agreements, about whether Plan Advisers were providing services to linked members in MasterKey Personal Super to which the Plan Service Fee related;

(c) did not, upon becoming Trustee on 1 July 2016, form a reasonable belief, for the purposes of cl 4.4(a)(i) of the Licensee Remuneration Agreements, that the Plan Advisers were no longer providing linked members in MasterKey Personal Super with the financial services to which the Plan Service Fee related;

(d) did not, upon becoming Trustee on 1 July 2016, terminate the Plan Service Fee for each then linked member in MasterKey Personal Super;

(e) did not form a reasonable belief, for the purposes of cl 4.4(a)(i) of the Licensee Remuneration Agreements, upon each person who had been a linked member in MasterKey Business Super as at 29 November 2013 ceasing employment and being transferred to MasterKey Personal Super after 30 June 2016, that the Plan Adviser was no longer providing that member with the financial services to which the Plan Service Fee related;

(f) did not terminate payment of the Plan Service Fee for each such linked member upon that member ceasing employment and being transferred to MasterKey Personal Super after 30 June 2016;

(g) since 1 July 2016 has made or authorised the making of monthly deductions from the account balances of 144,033 linked members' accounts in MasterKey Personal Super for payment to Plan Advisers of Plan Service Fees totalling $12,813,076; and

(h) did not inform linked members in MasterKey Personal Super at any time, including when they were transferred from MasterKey Business Super to MasterKey Personal Super, that they had the right to elect to turn off the Plan Service Fee.

36. Declares that since 1 July 2016 NULIS in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that NULIS issued a "porting kit" to each person who was a linked member of MasterKey Business Super as at 29 November 2013 and who was transferred to MasterKey Personal Super after 30 June 2016, which "porting kit":

(a) listed "your new account fees" by type and amount/percentage;

(b) did not at any place state that the member now had the right to elect to turn off the Plan Service Fee; and

(c) in the circumstances, represented that the member did not have the right to elect to turn off the Plan Service Fee, whereas the member did.

37. Declares that by reason of the matters referred to in Declaration 36 above, since 1 July 2016 NULIS in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 16,000 accounts with respect to the fees to be paid by the linked member of the MasterKey Product and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

38. Declares that by reason of the matters referred to in Declaration 36 above, since 1 July 2016 NULIS in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 16,000 accounts concerning the existence of a right of linked members of the MasterKey Product, namely the right to elect to turn off the Plan Service Fee once the linked member was transferred to MasterKey Personal Super, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

39. Declares that since 1 July 2016 NULIS in trade or commerce engaged in conduct in relation to financial services that was misleading or deceptive or was likely to mislead or deceive and thereby contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act, in that NULIS issued annual statements to each person who was a member of MasterKey Personal Super, which statements:

(a) listed "current fees" by type and amount/percentage including the Plan Service Fee;

(b) did not at any place state that the member had the right to elect to turn off the Plan Service Fee; and

(c) in the circumstances, represented that the member did not have the right to elect to turn off the Plan Service Fee, whereas the member did.

40. Declares that by reason of the matters referred to in Declaration 39 above, since 1 July 2016 NULIS in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 52,000 accounts with respect to the fees to be paid by the linked member of the MasterKey Product, and by each such representation thereby contravened s 12DB(1)(g) of the ASIC Act.

41. Declares that by reason of the matters referred to in Declaration 39 above, since 1 July 2016 NULIS in trade or commerce in connection with the supply of a financial service made a false or misleading representation to each linked member for each of no fewer than approximately 52,000 accounts concerning the existence of a right of linked members of the MasterKey Product, namely the right to elect to turn off the Plan Service Fee, and by each such representation thereby contravened s 12DB(1)(i) of the ASIC Act.

42. Declares that since 1 July 2016 NULIS failed to comply with the financial services laws and thereby contravened s 912A(1)(c) of the Corporations Act, in that NULIS:

(a) contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act as referred to in Declarations 36 and 39 above;

(b) contravened s 12DB(1)(g) of the ASIC Act as referred to in Declarations 37 and 40 above; and

(c) contravened s 12DB(1)(i) of the ASIC Act as referred to in Declarations 38 and 41 above.

43. Declares that since 1 July 2016 NULIS failed to do all things necessary to ensure that the financial services covered by its Australian Financial Services Licence Number 236465 were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act, in that NULIS engaged in the misleading or deceptive conduct referred to in Declarations 36 and 39 above.

44. Orders pursuant to s 12GBA of the ASIC Act that NULIS pay to the Commonwealth a pecuniary penalty in respect of each declared civil penalty contravention, in the sum of $8 million.

Both Defendants

45. The defendants pay the plaintiff's costs of the proceedings to date in the sum of $834,620.

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

REASONS FOR JUDGMENT

YATES J:

INTRODUCTION

1 This proceeding concerns admitted contraventions of various provisions of the *Corporations Act 2001* (Cth) (the **Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) by the first defendant, MLC Nominees Pty Ltd (**MLC Nominees**) and the second defendant, NULIS Nominees (Australia) Limited (**NULIS**). The contraventions are related to the charging and deduction of fees, and representations about the right to charge and the obligation to pay those fees, in connection with the operation of two superannuation funds (one the successor of the other) using the superannuation product MLC MasterKey Super (the **MasterKey product** or **MasterKey**).

2 The parties agree that Declarations should be made about each admitted contravention and that penalties should be imposed under s 12GBA of the ASIC Act in respect of the contraventions of ss 12DB(1)(g) and (i) thereof. The parties also agree that an order for costs should be made against the defendants for an agreed amount.

3 What they do not agree on is the quantum of the penalties that should be imposed. The parties agree on the legal principles which the Court should apply in dealing with that question, but they disagree on how those principles should be applied in the circumstances of the case at hand.

4 In order to deal with that question it is necessary to consider the background to the contraventions; to identify the relevant provisions of the legislation and the legal principles to be applied; and then to address the submissions of the parties.

BACKGROUND

5 Up until 1 July 2016, National Australia Bank Limited (**NAB**) operated part of its superannuation business, including that part called The Universal Super Scheme (**TUSS**), through MLC Limited (**MLC**) and MLC Nominees.

6 MLC was part of the NAB Group of which NAB was the ultimate holding company. MLC was responsible for, amongst other things, the day-to-day operations of TUSS for which it charged fees. This included providing staff, infrastructure and technology. In practical terms,

this meant that MLC conducted all the operations of TUSS. Any resulting profits from the superannuation business were retained by MLC, which paid shareholder returns to NAB.

7 TUSS was established under a trust deed dated 12 May 1989 as a regulated superannuation fund under the *Superannuation Industry (Supervision) Act 1993* (Cth) (the **SIS Act**). At all material times, MLC Nominees was the trustee of the fund. It was also a wholly-owned subsidiary of MLC. NAB provided the bank guarantee that was necessary in order for MLC Nominees to hold its licence as a registrable superannuation entity.

8 Although MLC was responsible for the day-to-day operations of TUSS, MLC Nominees, as trustee, was responsible for overseeing and monitoring MLC's delivery of services. MLC Nominees did not itself charge fees. It was not a profit-earning entity in the NAB Group.

9 The MasterKey product is an MLC-branded corporate superannuation product. It was established as part of TUSS and had two divisions: MasterKey Business Super (**MKBS**) and MasterKey Personal Super (**MKPS**). MKBS was designed to enable employers to satisfy their superannuation guarantee requirements in relation to their employees. MKPS was the division to which employee members were automatically transferred (from MKBS) after ceasing employment with their relevant employer sponsor.

10 MKBS was distributed through financial advisers who introduced employers (and an employer's employees) to the MasterKey product. The advisers maintained their own relationship with employers and prospective employers. MLC Nominees' relationship with employers was primarily managed through MLC and the advisers. The terms of the MasterKey product provided that an employer could, but was not obliged to, nominate an adviser to be linked to the employer's superannuation plan in MKBS (**plan advisers**).

11 Up until 8 September 2012, the administration fees charged by MLC included a component for an asset-based commission to be paid to plan advisers. MLC was responsible for paying that commission. In addition, an employer could agree with a plan adviser that all members within the employer's plan would pay a fee for general advice services, called the "Employer Service Fee". Where this fee was agreed, it was deducted from members' accounts and paid to the plan adviser.

12 On 8 April 2012, MLC Nominees decided to introduce changes to the structure of fees and charges applicable to the MasterKey product, including commissions and fees paid to plan advisers. This was part of a project called "Superannuation with Fee Transparency Project",

dubbed **Project SWiFT**. Under Project SWiFT, a new fee was introduced, called the **plan service fee.** The component for asset-based commission and the Employer Service Fee were removed. MLC Nominees took on the responsibility for paying remuneration to plan advisers, as a cost or expense of TUSS. MLC Nominees (and later NULIS) authorised MLC to deduct the plan service fee from the accounts of members and to pay it to the plan advisers. Importantly to the present case, the plan service fee was only authorised to be deducted from the accounts of members with a plan adviser linked to their account (**linked members**). Further, the plan service fee was to be paid to plan advisers, no one else.

13 The new fee structure, which came into operation from 8 September 2012, and which marked a move from the commission-based structure to a fee for service structure, was designed, in part, to ensure that, on implementation, the existing services offered by plan advisers to members could continue and the fee structures in the MasterKey product would be simpler, more transparent, explicit and easier for members to understand. It was also designed to allow members to request lower fees.

14 From 8 September 2012, the terms of the MasterKey product provided that, if a plan adviser had been nominated by the employer, then the employer could agree with the plan adviser that all members within the employer's plan would pay the plan service fee to the plan adviser. In exchange for the plan service fee, the plan adviser would provide group-based advice and financial services tailored to the needs of the employees of that employer. Apart from these services, members were not entitled under the terms of the MasterKey product to receive any services from plan advisers in exchange for the plan service fee. The amount of the plan service fee would be agreed between the employer and the plan adviser up to a maximum of 1.5% per annum of the account balance of members in MKBS. The plan service fee would be deducted monthly from the member's account and paid to the plan adviser. Once again, importantly, the plan service fee could only be deducted and paid to a plan adviser.

15 Further, from 8 September 2012, the terms of the MasterKey product provided that, if there was a nominated plan adviser, then upon a member ceasing employment and being automatically transferred to MKPS, there was no provision for any services to be provided by the plan adviser to the member. Further, the member had the right to "turn off" the plan service fee. This right could be exercised by the member notifying the trustee—MLC Nominees and, later, NULIS. Unless the member elected to "turn off" the plan service fee, the member would continue to pay the fee capped at 0.44% per annum of the member's account balance.

However, unless "turned off", the plan service fee would continue to be deducted and paid to the plan adviser.

16 While the terms of the MasterKey product did not provide for the provision of any services by the plan adviser to a linked member in MKPS, MLC Nominees (and later NULIS) provided each linked member with the contact telephone number of his or her plan adviser. The member could contact the plan adviser to obtain general advice on a range of matters. However, since 8 September 2012, MLC Nominees (and later NULIS) offered members access to a telephone, email and website-based financial advice service called **MLC Direct** from which all members, including linked members in MKPS, could obtain free of charge general advice on the same range of matters as generally available from plan advisers. MLC Nominees (and later NULIS) also provided, directly, some limited general advice services through a customer contact centre. The practice of the customer contact centre was to refer linked members in MKPS to MLC Direct if the member requested financial product advice and did not want to contact a plan adviser.

17 From 8 September 2012, it was a term of the MasterKey product that members who did not have a plan adviser (i.e., those members who were not linked members) did not have to pay the plan service fee and that plan service fees could not be deducted from the account balances of those members.

18 On 19 July 2012, MLC Nominees decided to implement an intra-fund transfer of members of four existing corporate superannuation products to the MasterKey product as part of a project called the "Encompass" project (the **Encompass Trade-Up**). The Encompass Trade-Up took effect from 8 December 2012, following which the advisers' asset-based commission was replaced with the plan service fee deducted directly from members' accounts.

19 On 5 February 2013, MLC Nominees decided to implement an intra-fund transfer of members of a superannuation plan called "The Employee Retirement Plan" (**TERP**) to the MasterKey product (the **TERP Trade-Up**). The TERP Trade-Up took effect from 24 May 2013, following which the advisers' asset-based commission was replaced with the plan service fee deducted directly from members' accounts

20 There was a change in the structure of NAB's superannuation business on 1 July 2016. From that date, NAB operated its superannuation business through NULIS. NULIS is owned 100% by National Wealth Management Services Limited (**NWMSL**). NWMSL and NULIS are part

of the NAB Group. NULIS does not employ staff but NAB employees have been seconded to NWMSL to provide the services and resources required by NULIS.

21 Further, by a deed entitled "Successor Fund Merger Deed" dated 1 July 2016, the **MLC Super Fund** (which was established under a trust deed dated 9 May 2016 as a regulated superannuation fund under the SIS Act) became the successor fund of TUSS. NULIS is, and has been, the trustee of that fund.

22 The change in structure means that the trustee of the MLC Super Fund is now a profit-earning entity within NAB's superannuation business. Since 1 July 2016, NWMSL has administered the MLC Super Fund on behalf of NULIS pursuant to an agreement dated 30 June 2016. Since 30 June 2016, all superannuation profits have arisen within NULIS and have been paid as dividends to NWMSL, which has paid shareholder returns to NAB.

23 On 15 September 2016, NAB executed a share sale agreement to sell 80% of MLC to Nippon Life, resulting in the deconsolidation of MLC and MLC Nominees from the NAB Group on 3 October 2016.

24 The contravening conduct in this case falls into two broad categories. First, from 2012 to 2017, plan service fees amounting to over $33.62 million were deducted from approximately 220,000 accounts where there was no linked plan adviser. The parties refer to the members who held these accounts as **no-adviser members**. This money should not have been deducted. What is more, the money was retained by MLC who was not even a plan adviser. As I have noted, MLC was responsible for the day-to-day operation of TUSS. Throughout this period MLC Nominees represented to no-adviser members that they were obliged to pay the plan service fee, when they had no such obligation.

25 The second category concerns MLC Nominees and, later, NULIS, in relation to the deduction of plan service fees from the accounts of linked members in MKPS. As I have recorded, both the trustee of TUSS, and later the MLC Super Fund, and linked members in MKPS, had the right to turn off the plan service fee. The respective trustees (MLC Nominees and then NULIS) did not exercise this right. They represented that the linked members in MKPS did not have that right. Further, MLC Nominees represented in various documents that linked members in MKPS were able to negotiate a lower plan service fee with the linked plan advisers. This, however, was false or misleading because linked members in MKPS had the unilateral right to turn off the plan service fee, not merely the opportunity to negotiate a lower fee with the linked

plan adviser. The plan service fee continued to be deducted from these members' accounts. While MLC Nominees was trustee, it deducted or authorised the deduction of a sum in excess of $59 million from 313,078 linked members' accounts and paid this sum away to plan advisers. While NULIS was trustee, it deducted or authorised the deduction of $12,813,076 from 144,033 linked members' accounts and paid away this sum to plan advisers.

EVIDENCE

26 The parties prepared a Statement of Agreed Facts and Admissions (the **SAFA**) from which the above account has been taken. The statement was prepared pursuant to s 191 of the *Evidence Act 1995* (Cth) which, so far as relevant, provides:

> (1) In this section:
>
> "***agreed fact***" means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.
>
> (2) In a proceeding:
>
> (a) evidence is not required to prove the existence of an agreed fact; and
>
> (b) evidence may not be adduced to contradict or qualify an agreed fact;
>
> unless the court gives leave.
>
> (3) Subsection (2) does not apply unless the agreed fact:
>
> (a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding; or
>
> (b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

27 There are a number of documents exhibited to the SAFA.

28 The parties agree that the facts, matters and circumstances recorded in the SAFA and in the exhibited documents may be used by the Court to draw inferences of fact.

29 Apart from the SAFA and its exhibited documents, the parties tendered a large number of documents. The exhibited and other documents are which now included in Exhibits A and B. The parties' written submissions refer to some of these documents as well as to some of the documents exhibited to the statement. I was taken to some of these documents during the course of oral submissions.

30 The defendants also read two affidavits. The first affidavit was made by Peter John Promnitz on 6 November 2019. At the time he made the affidavit, Mr Promnitz was an independent non-

executive director, and the Chairman, of the Board of NULIS. He made the affidavit on behalf of both defendants. In the affidavit he said:

> 12. In this proceeding, the Trustees have made admissions of liability with respect to contraventions of sections 912A(1)(a), 912A(1)(c) and 1041H(1) of the *Corporations Act 2001* (Cth) and sections 12DA and 12DB of the *Australian Securities and Investments Commission Act 2001* (Cth) in relation to conduct concerning the Plan Service Fee.
>
> 13. On behalf of the Trustees, I wish to apologise to the Court and to our members for these contraventions.
>
> 14. The Trustees recognise that the admitted contraventions are a very serious matter. The Trustees deeply regret that these contraventions occurred.
>
> 15. The Trustees and National Australia Bank Limited have also previously publicly apologised for errors concerning the implementation of the Plan Service Fee in media releases dated 27 October 2016, 2 February 2017 and 26 July 2018, and in letters to members from the Trustees. …

31 Mr Promnitz annexed copies of the media releases referred to in paragraph 15 of his affidavit. I will refer to some aspects of these media releases in later paragraphs of these reasons.

32 The second affidavit was made by Jonathan James Albion Bennett on 21 May 2020. Mr Bennett is the General Manager, Financial Control Wealth Finance at NAB. In this affidavit, Mr Bennett provided high-level financial information extracted from NAB's general ledger in respect of the half-yearly financial results for 2020 for NULIS and NWMSL. Once again, I will refer to this evidence in later paragraphs of these reasons.

CONDUCT OF THE HEARING

33 It is appropriate at this point to record some matters about the conduct of the hearing.

34 Following mediation, this proceeding was listed for hearing on 16 March 2020, with an estimated duration of one day, to hear the parties on the disputed question of penalties and the question of the appropriateness of the other orders on which the parties had reached agreement. The hearing commenced as appointed but did not conclude on that day. I adjourned the proceeding for further hearing on 19 March 2020. However, on the afternoon of 17 March 2020 all listings at the Court were vacated because of the COVID-19 pandemic.

35 Having been satisfied that the further hearing could be conducted appropriately using remote access technology and, after liaising with the parties, I listed the proceeding for further hearing on 31 March 2020. At the commencement of the hearing on that day, ASIC applied for an

adjournment, having foreshadowed such an application the previous afternoon. The basis for the adjournment was explained by senior counsel for ASIC as follows:

> MR FAULKNER: … I am instructed to apply to have today's hearing vacated. The reason for the application is that the plaintiff, ASIC, wishes to consider whether it wants to make any further submissions about the quantum of the penalty, having regard to the recent economic upheaval and the implications of the upheaval for the participants in the financial system, including the banks.
>
> It may be that, after that consideration has been given, ASIC will not want to make any further submissions, and its overall provision will remain the same. However, as the regulator, under ASIC's constituent statute, when exercising its powers, it has to give consideration to its objective, which include maintaining, facilitating and improving the performance of the financial system, and the entities within that system. And it has to have regard to the interests of commercial certainty, reducing business costs and the efficiency and development of the economy.
>
> Now, we live in uncertain economic times, your Honour, and ASIC considers that it is obliged, having regard to those objectives, to give careful consideration to pursuing – to whether there are matters it needs to have taken into account in its conduct of this case. And, therefore, I'm instructed to apply for the vacation of today's hearing.
>
> Now, I've already said – but it's important that I emphasise – that it may be that after ASIC's had some time, that the position will be no different, and with hindsight, we could have proceeded today. However, it's very fluid, and having considered the matter carefully, ASIC feels that it needs more time to think about whether it needs to make some further submissions.
>
> So that's – those are my instructions. I make that application. I apologise that it wasn't foreshadowed before yesterday to your Honour and also to my friend. If – I think, where we were sitting last week, I probably would not have been making this application. But there's daily announcements of new developments, and that's the position we are in today. The defendants consent.
>
> We had originally thought that, perhaps, the allocation – if today was vacated, the allocation of a new hearing date in some time in June might be efficient. But we're now wondering whether it might be better if the matter was brought back merely for directions in about three weeks, with a view to ASIC then being better placed to know about timing going forward. Either that it needs less time or that it needs more time.
>
> In any event, that's my application, your Honour.

36 I granted the adjournment and listed the proceeding for case management on 20 April 2020.

37 When the proceeding came before me on 20 April 2020, I made orders by consent which provided for certain steps to be taken before any further hearing of the matter. The parties also sought a date after 11 June 2020 for the further hearing. I listed the proceeding for further hearing on 19 June 2020. The further hearing took place on 19 June 2020, at which time I reserved judgment.

RELEVANT PROVISIONS

38 The defendants' respective contravening conduct involves "misleading or deceptive conduct", and "false or misleading representations".

39 As to "misleading or deceptive conduct", s 1041H(1) of the Corporations Act provides:

> (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

40 The reference in s 1041H(1) to engaging in conduct in relation to a financial product includes "dealing in a financial product" which, in turn, includes a trustee of a superannuation entity (within the meaning of the SIS Act) dealing with a beneficiary of that entity as such a beneficiary, and carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, dealing with such a beneficiary: s 1041H(2)(a) and s 1041H(2)(b)(vi) and (x).

41 Also, s 12DA(1) of the ASIC Act provides:

> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

42 Section 12BAB of the ASIC Act answers the question: when does a person provide a financial service? A number of acts are referred to, including "deal in a financial product": s 12BAB(1)(b). The expression "deal in a product" is given meaning by s 12BAB(7) to include applying for or acquiring a financial product (s 12BAB(7)(a)); issuing a financial product (s 12BAB(7)(b); and varying a financial product (s 12BAB(7)(d)).

43 A "financial product" is defined to include "a beneficial interest in a superannuation fund" (as defined by s 10 of the SIS Act): s 12BAA(7)(f). Section 10 of the SIS Act provides that a "superannuation interest" means a beneficial interest in a "superannuation entity". The definition of "superannuation entity" includes a "regulated superannuation fund".

44 Another act in relation to providing a financial service within the meaning of s 12BAB is "provide a service … that is otherwise supplied in relation to a financial product …": s 12BAB(1)(g). "Services" are defined in s 12BA(1):

> "***services***" includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce but does not include:
>
> (a) the supply of goods within the meaning of the *Competition and*

Consumer Act 2010; or

(b) the performance of work under a contract of service.

45 As to "false or misleading representations", s 12DB(1) relevantly provides:

> (1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> …
>
> (g) make a false or misleading representation with respect to the price of services; or
>
> …
>
> (i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); …

46 The expression "financial services", as used in this provision, has the same meaning and application discussed immediately above with respect to s 12DA(1).

47 Although the contraventions involved "misleading or deceptive conduct" and "false or misleading representations", the cases establish that there is no material difference between these expressions in terms of their legal application: *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14]; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; 317 ALR 73 at [40]; *Australian Securities and Investments Commission v Westpac Banking Corporation* [2018] FCA 751; 266 FCR 147 at [2263].

48 The contravening conduct also involved the obligations imposed on financial services licensees. Section 912A(1) of the Corporations Act provides:

> (1) A financial services licensee must:
>
> (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and
>
> …
>
> (c) comply with the financial services laws; and …

49 It is accepted that MLC Nominees and NULIS are financial services licensees.

50 The parties accept that the meaning of the expression "efficiently, honestly and fairly" as used in s 912A(1) is settled. Its scope is illustrated by the Court's acceptance in *Australian Securities and Investments Commission v Camelot Derivatives Pty Limited (in Liquidation); In the matter*

of Camelot Derivatives Pty Limited (in Liquidation) [2012] FCA 414; 88 ACSR 206 (***Camelot***) at [69] – [70] of the following propositions:

> 69 In support of the relief which it seeks based upon s 912A(1)(a) of the Corporations Act, ASIC made the following submissions:
>
> (a) The words *"efficiently, honestly and fairly"* must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty: ***Story v National Companies and Securities Commission*** (1988) 13 NSWLR 661 at 672.
>
> (b) The words *"efficiently, honestly and fairly"* connote a requirement of competence in providing advice and in complying with relevant statutory obligations: ***Re Hres and Australian Securities and Investments Commission*** (2008) 105 ALD 124 at [237]. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client's affairs: ***Re Hres and Australian Securities and Investments Commission*** (2008) 105 ALD 124 at [237].
>
> (c) The word *"efficient"* refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate: ***Story v National Companies and Securities Commission*** (1988) 13 NSWLR 661 at 672. Inefficiency may be established by demonstrating that the performance of a licensee's functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect: ***Story v National Companies and Securities Commission*** (1988) 13 NSWLR 661 at 679.
>
> (d) It is not necessary to establish dishonesty in the criminal sense: ***R J Elrington Nominees Pty Ltd v Corporate Affairs Commission*** (SA) (1989) 1 ACSR 93 at 110. The word "honestly" may comprehend conduct which is not criminal but which is morally wrong in the commercial sense: ***R J Elrington Nominees Pty Ltd v Corporate Affairs Commission*** (SA) (1989) 1 ACSR 93 at 110.
>
> (e) The word *"honestly"* when used in conjunction with the word *"fairly"* tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound: ***Story v National Companies and Securities Commission*** (1988) 13 NSWLR 661 at 672.
>
> 70 The submissions which I have extracted at [69] above are correct and I accept them.
>
> (Emphasis in original.)

51 The defendants stress that a finding of contravention of s 912A(1)(a) does not import, or necessitate, a finding of actual dishonesty. As made clear in *Camelot*, the provision covers conduct that is not necessarily criminal in nature but morally wrong in a commercial sense. Such conduct does not rely on any proof or finding of intent. Rather, it is determined by

reference to objective circumstances. Therefore, a finding of contravention of s 912A(1)(a) can be made even though it is not shown that the contravener engaged in intentional wrong-doing. In the present case, ASIC accepts that the facts before the Court do not permit a finding that MLC Nominee's or NULIS' conduct was deliberate.

52 At the time of the contravening conduct, "financial services laws", as understood by s 912A(1)(c), included a provision of Chapter 7 of the Corporations Act (which includes ss 912A, 1013C, 1022A and 1041H) and a provision of Div 2 of Pt 2 of the ASIC Act (which includes ss 12DA and 12DB).

53 Further, the contravening conduct involved the issue of product disclosure statements. The parties accept that when an employee became a "member of the MasterKey product", the trustee (here, MLC Nominees or NULIS) issued a financial product within the terms of s 761E of the Corporations Act. By dint of ss 1012B(3) and 1013C, each trustee was required to give a product disclosure statement each time it issued a financial product, with the product disclosure statement containing certain statements and information. Given the agreement between the parties as to how the relevant provisions operated at the time of the contravening conduct (including certain regulations in the *Corporations Regulations 2001* (Cth), it will suffice for me to say that a product disclosure statement in respect of the MasterKey product had to explain what fees may be paid to the employer entity's financial adviser and how the fees were determined, and include information about any change in fee structure that was dependent on a person's employment.

54 Section 1022B(2) of the Corporations Act provides a civil action for loss or damage should, amongst other things, one person give another person a product disclosure statement that is "defective". At times relevant to the contravening conduct in this case, s 1022A(1)(a)-(b) provided that such a statement would be "defective" if it contained a misleading or deceptive statement or an omission of material required by s 1013C.

OVERVIEW OF THE CONTRAVENING CONDUCT

Introduction

55 The conduct and related contraventions are identified in some detail by the Declarations which, it is agreed, the Court should make. For the purpose of these reasons, it will be sufficient for me to provide the following broad overview of the contravening conduct.

Declarations 1 to 8

56 Declarations 1 to 8 concern the case against MLC Nominees in relation to members whose superannuation was provided under the terms of the MasterKey product but who were not linked members.

57 Declaration 1 is directed to MLC Nominees' contravention of s 912(1)(a) of the Corporations Act by reason of its failure to do all things necessary to ensure that it provided financial services efficiently, honestly and fairly in the period 8 September 2012 to 30 June 2016. MLC, who had been retained by MLC Nominees to administer TUSS, deducted plan service fees from the accounts of these members when there was no entitlement to do so. MLC Nominees admits that it contravened s 912(1)(a) by failing to ensure that deductions were made consistently with the terms of the MasterKey product. There were approximately 220,000 accounts involved. The total amount deducted exceeded $33,620,000 (gross of tax credits received by members). This money was not paid to plan advisers because the relevant members were not linked members. The money was retained by the administrator, MLC, and ultimately paid to NAB as shareholder returns.

58 Declaration 2 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period 4 July 2012 to 12 April 2013. MLC Nominees admits that it engaged in conduct, in trade or commerce in relation to financial services, that was misleading or deceptive or likely to mislead or deceive, by sending a letter to each existing member which represented that the trustee of the fund (MLC Nominees) was entitled to deduct plan service fees from the particular member's account, which the member was obliged to pay, when there was no such entitlement or obligation.

59 Declaration 3 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period 8 September 2012 to 29 November 2013. MLC Nominees admits that it engaged in conduct, in trade or commerce in relation to financial services, that was misleading or deceptive or likely to mislead or deceive, by sending "welcome kits" to each new member (whose account was not linked to a financial adviser) which represented that the trustee of the fund (MLC Nominees) was entitled to deduct plan service fees from the particular member's account, which the member was obliged to pay, when there was no such entitlement or obligation.

60 Declaration 4 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period 8 September 2012 to 30 June 2016. MLC

Nominees admits that it engaged in conduct, in trade or commerce in relation to financial services, that was misleading or deceptive or likely to mislead or deceive, by sending an annual statement to each member which represented that the trustee (MLC Nominees) was entitled to deduct plan service fees from the particular member's account, which the member was obliged to pay, when there was no such entitlement or obligation.

61 Declaration 5 is based on the conduct set out in Declarations 2, 3 and 4. It is directed to MLC Nominees' contravention of s 12DB(1)(g) of the ASIC Act. MLC Nominees admits that, by reason of that conduct in connection with the supply of financial services, it made a false or misleading representation to each member with respect to the fees to be paid by that member.

62 Declaration 6 is also based on the conduct set out in Declarations 2, 3 and 4. It is directed to MLC Nominees' contravention of s 12DB(1)(i) of the ASIC act. MLC Nominees admits that, by reason of that conduct in connection with the supply of financial services, it made a false or misleading representation to each member concerning the existence of a right (the right to deduct the plan service fee) and the existence of a condition (the obligation of members to pay that fee).

63 The contraventions declared in Declarations 5 and 6 are of civil penalty provisions. The false or misleading representations were made to members representing the (no fewer than approximately) 220,000 accounts to which I have referred.

64 Declaration 7 is directed to MLC Nominees' contravention of s 912A(1)(c) of the Corporations Act by failing to comply with the financial services laws in the period 8 September 2012 to 30 June 2016. It is based on the contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act referred to in Declarations 2, 3 and 4; the contravention of s 12DB(1)(g) of the ASIC Act referred to in Declaration 5; and the contravention of s 12DB(1)(i) of the ASIC Act referred to in Declaration 6.

65 Declaration 8 is directed to MLC Nominees' contravention of s 912A(1)(a) of the Corporations Act, also in the period 8 September 2012 to 30 June 2016. MLC Nominees admits that it failed to do all things necessary to ensure that it provided financial services efficiently, honestly and fairly by reason of the conduct set out in Declarations 2, 3, 4, 5 and 6.

Declarations 10 to 33

66 Declarations 10 to 33 concern the case against MLC Nominees in relation to members whose superannuation was provided under the terms of the MasterKey product and who were linked

members. It is to be recalled that when these members transferred from MKBS to MKPS, MLC Nominees and the member each had a right to "turn off" the plan service fee. MLC Nominees did not exercise that right. It also issued a number of documents to linked members in which it represented that these members did not have the right to "turn off" the plan service fee, when in fact those members did have that right. The plan service fee continued to be deducted and was paid to the relevant linked plan adviser. Hundreds of thousands of linked members in MKPS were affected by this conduct.

67 Declaration 10 is directed to MLC Nominees' contravention of s 912A(1)(a) of the Corporations Act by reason of its failure to do all things necessary to ensure that it provided financial services efficiently, honestly and fairly in the period 8 September 2012 to 30 June 2016. The contravening conduct is represented by MLC Nominees' failure to inform members that, when they transferred from MKBS to MKPS, they could "turn off" their plan service fee; its failure to exercise its own right, as trustee, to terminate the plan service fee of members who had transferred from MKBS to MKPS; and the fact that it made or authorised the making of monthly deductions from the accounts of 313,078 members of plan service fees totalling $59,073,846.

68 Declarations 11 to 13 are directed to MLC Nominees' contraventions of s 1022A of the Corporations Act in respect of the giving of defective product disclosure statements. The product disclosure statements were defective because they did not comply with legislative provisions that required them to explain how plan service fees were determined. The product disclosure statements also did not comply with legislative provisions that required them to set out information about all the changes in the structure of the plan service fee that were dependent on a member's change in employment. Essentially, the product disclosure statements did not explain that linked members in MKPS had the right to "turn off" the plan service fee and that linked members in MKBS would have the right to "turn off" the plan service fee upon ceasing employment and transferring to MKPS.

69 Declaration 11 concerns contraventions in the period 10 September 2012 to 19 November 2012 in respect of a product disclosure statement dated 10 September 2012. Declaration 12 concerns contraventions in the period 19 November 2012 to 1 July 2013 in respect of a product disclosure statement dated 19 November 2012. Declaration 13 concerns contraventions in the period 1 July 2013 to 29 November 2013 in respect of a product disclosure statement dated 1 July 2013.

70 Declarations 14 to 31 can be considered in groups of three: Declarations 14, 15 and 16; Declarations 17, 18 and 19; Declarations 20, 21 and 22; Declarations 23, 24 and 25; Declarations 26, 27 and 28; and Declarations 29, 30 and 31. Each group comprises contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act; a contravention of s 12DB(1)(g) of the ASIC Act; and a contravention of s 12DB(1)(i) of the ASIC Act. The latter two contraventions are of civil penalty provisions.

71 Declaration 14 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period prior to 8 September 2012. The contraventions concern then-existing members whose superannuation was provided under the MasterKey product. MLC Nominees admits that it engaged in conduct, in trade or commerce in relation to financial services, that was misleading or deceptive or likely to mislead or deceive, by, firstly, sending a letter and a reference guide to each linked member in MKPS that represented that the member did not have the right to "turn off" the plan service fee, when the member did have that right; and, secondly, by sending a letter and reference guide to each linked member in MKBS which represented that the member would not have the right to "turn off" the plan service fee upon being transferred to MKPS, when the member would have that right.

72 Declaration 15 is directed to MLC Nominees' contravention of s 12DB(1)(g) of the ASIC Act. It is based on the conduct set out in Declaration 14. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each member in MKPS with respect to the fees to be paid by that member.

73 Declaration 16 is directed to MLC Nominees' contravention of s 12DB(1)(i) of the ASIC Act. It is also based on the conduct set out in Declaration 14. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each member in MKPS concerning the existence of a right (the right to "turn off" the plan service fee once the member transferred to MKPS).

74 The contraventions declared in Declarations 15 and 16 are of civil penalty provisions. The false or misleading representations were made to members representing no fewer than approximately 219,000 accounts.

75 Declaration 17 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period 17 September 2012 to 12 October 2012. These contraventions concern members who were transferred to the MasterKey product as part of the

"Encompass" project. MLC Nominees admits that it engaged in conduct, in trade or commerce in relation to financial services, that was misleading or deceptive or likely to mislead or deceive, by, firstly, sending a letter to each person to be transferred to MKPS that represented that the linked member did not have the right to "turn off" the plan service fee, when the member did have the right; secondly, sending a letter to each person to be transferred to MKBS that represented that the member would not have the right to "turn off" the plan service fee upon being transferred to MKPS; and, thirdly, providing a reference guide with the letters which represented that linked members in MKPS did not have the right to "turn off" the plan service fee, when the members did have that right, and which also represented that linked members in MKBS would not have the right to "turn off" the plan service fee upon being transferred to MKPS, when the members would have that right.

76 Declaration 18 is directed to MLC Nominees' contravention of s 12DB(1)(g) of the ASIC Act. It is based on the conduct set out in Declaration 17. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each person to be transferred with respect to the fees to be paid by that person as a member.

77 Declaration 19 is directed to MLC Nominees' contravention of s 12DB(1)(i) of the ASIC Act. It is also based on the conduct set out in Declaration 17. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each person to be transferred concerning the existence of a right (the right to "turn off" the plan service fee once the person was transferred to MKPS).

78 The contraventions declared in Declarations 18 and 19 are of civil penalty provisions. The false or misleading representations were made to members representing no fewer than approximately 38,000 accounts.

79 Declaration 20 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period 22 March 2013 to 12 April 2013. The contraventions concern members who transferred to the MasterKey product from TERP. MLC Nominees admits that it engaged in conduct, in trade or commerce in relation to financial services, that was misleading or deceptive or likely to mislead or deceive, by, firstly, sending a letter to each person to be transferred to MKPS that represented that the linked member did not have the right to "turn off" the plan service fee, when the member did have that right; secondly, sending a letter to each person to be transferred to MKBS that represented that the

linked member would not have the right to "turn off" the plan service fee upon being transferred to MKPS, when the member would have that right; and, thirdly, providing a reference guide which represented that linked members in MKPS did not have the right to "turn off" the plan service fee, when the members did have that right, and which also represented that linked members in MKBS would not have the right to "turn off" the plan service fee upon being transferred to MKPS, when the members would have that right.

80 Declaration 21 is directed to MLC Nominees' contravention of s 12DB(1)(g) of the ASIC Act. It is based on the conduct set out in Declaration 20. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each person to be transferred with respect to the fees to be paid by that person as a member.

81 Declaration 22 is directed to MLC Nominees' contravention of s 12DB(1)(i) of the ASIC Act. It is also based on the conduct set out in Declaration 20. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each person to be transferred concerning the existence of a right (the right to "turn off" the plan service fee once the person was transferred to MKPS).

82 The contraventions declared in Declarations 21 and 22 are of civil penalty provisions. The false or misleading representations were made to members representing no fewer than approximately 50,000 accounts.

83 Declaration 23 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period 8 September 2012 to 29 November 2013. The contraventions concern the provision of "welcome kits" to new linked members. The "welcome kits" represented that the linked member did not have the right to "turn off" the plan service fee once the member was transferred to MKPS, when the member did have that right.

84 Declaration 24 is directed to MLC Nominees' contravention of s 12DB(1)(g) of the ASIC Act. It is based on the conduct set out in Declaration 23. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member with respect to the fees to be paid by that member.

85 Declaration 25 is directed to MLC Nominees' contravention of s 12DB(1)(i) of the ASIC Act. It is also based on the conduct set out in Declaration 23. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or

misleading representation to each linked member concerning the existence of a right (the right to "turn off" the plan service fee once the member was transferred to MKPS).

86 The contraventions declared in Declarations 24 and 25 are of civil penalty provisions. The false or misleading representations were made to members representing no fewer than approximately 61,000 accounts.

87 Declaration 26 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period 8 September 2012 to 30 June 2016. The contraventions concern the provisions of "porting kits" to each linked member in MKBS as at 29 November 2013 who was then transferred to MKPS. The "porting kits" represented that the member did not have the right to "turn off" the plan service fee, when the member did have that right.

88 Declaration 27 is directed to MLC Nominees' contravention of s 12DB(1)(g) of the ASIC Act. It is based on the conduct set out in Declaration 26. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member with respect to the fees to be paid by that member.

89 Declaration 28 is directed to MLC Nominees' contravention of s 12DB(1)(i) of the ASIC Act. It is also based on the conduct set out in Declaration 26. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member concerning the existence of a right (the right to "turn off" the plan service fee once the member was transferred to MKPS).

90 The contraventions declared in Declarations 27 and 28 are of civil penalty provisions. The false or misleading representations were made to members representing no fewer than approximately 48,000 accounts.

91 Declaration 29 is directed to MLC Nominees' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in the period 8 September 2012 to 30 June 2016. The contraventions concern the issuing of annual statements. MLC Nominees admits that it engaged in conduct, in trade or commerce in relation to financial services, that was misleading or deceptive or likely to mislead or deceive by issuing statements to each member of MKPS that represented that the member did not have the right to "turn off" the plan service fee, when the member did have that right.

92 Declaration 30 is directed to MLC Nominees' contravention of s 12DB(1)(g) of the ASIC Act. It is based on the conduct set out in Declaration 29. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member with respect to the fees to be paid by linked members.

93 Declaration 31 is directed to MLC Nominees' contravention of s 12DB(1)(i) of the ASIC Act. It is also based on the conduct set out in Declaration 29. MLC Nominees admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member concerning the existence of a right (the right to "turn off" the plan service fee).

94 The contraventions declared in Declarations 30 and 31 are of civil penalty provisions. The false or misleading representations were made to members representing no fewer than approximately 105,000 accounts.

95 Declaration 32 is directed to MLC Nominees' contravention of s 912A(1)(c) of the Corporations Act by failing to comply with the financial services laws in the period 8 September 2012 to 30 June 2016. It is based on the contraventions of s 1022A of the Corporations Act declared in Declarations 11, 12 and 13; the contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act declared in Declarations 14, 17, 20, 23, 26 and 29; the contraventions of s 12DB(1)(g) of the ASIC Act declared in Declarations 15, 18, 21, 24, 27 and 30; and the contraventions of s 12DB(1)(i) of the ASIC Act declared in Declarations 16, 19, 22, 25, 28 and 31.

96 Declaration 33 is directed to MLC Nominees' contravention of s 912A(1)(a) of the Corporations Act also in the period 8 September 2012 to 30 June 2016. MLC Nominees admits that it failed to do all things necessary to ensure that it provided financial services efficiently, honestly and fairly by reason of the conduct set out in Declarations 11, 12 and 13 and the conduct set out in Declarations 14, 17, 20, 23, 26 and 29.

Declarations 35 to 43

97 Declarations 35 to 43 concern the case against NULIS in relation to members whose superannuation was provided under the terms of the MasterKey product and who were linked members. The conduct is similar to MLC Nominees' contravening conduct referred to at [66] – [96] above. Although on a smaller scale, a very large number of linked members in MKPS were affected.

98 Declaration 35 is directed to NULIS' contravention of s 912A(1)(a) of the Corporations Act by reason of its failure to do all things necessary to ensure that it provided financial services efficiently, honestly and fairly, since 1 July 2016. The contravening conduct is represented by NULIS' failure to inform members that, when they transferred from MKBS to MKPS, they could "turn off" their plan service fee; its failure to exercise its own right, as trustee, to terminate the plan service fee of members who had transferred from MKBS to MKPS; and the fact that it made or authorised the making of monthly deductions from the accounts of 144,033 members of plan service fees totalling $12,813,076.

99 Declaration 36 is directed to NULIS' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in relation to the provision of "porting kits" since 1 July 2016 to each linked member in MKBS as at 29 November 2013 who was transferred to MKPS after 30 June 2016. NULIS admits that it engaged in conduct, in trade or commerce in relation to financial services, that was misleading or deceptive or likely to mislead or deceive in that the "porting kits" represented that the member did not have the right to "turn off" the plan service fee, when the member did have that right.

100 Declaration 37 is directed to NULIS' contravention of s 12DB(1)(g) of the ASIC Act since 1 July 2016. It is based on the conduct set out in Declaration 36. NULIS admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member with respect to the fees to be paid by that member.

101 Declaration 38 is directed to NULIS' contravention of s 12DB(1)(i) of the ASIC Act since 1 July 2016. It is also based on the conduct set out in Declaration 36. NULIS admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member concerning the existence of a right (the right to "turn off" the plan service fee once the member was transferred to MKPS).

102 The contraventions declared in Declarations 37 and 38 are of civil penalty provisions. The false or misleading representations were made to members representing no fewer than approximately 16,000 accounts.

103 Declaration 39 is directed to NULIS' contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act in relation to the issuing of annual statements to each member in MKPS, since 1 July 2016. NULIS admits that it engaged in conduct, in trade or commerce in relation

to financial services, that was misleading or deceptive or likely to mislead or deceive in that the annual statements represented that the member did not have the right to "turn off" the plan service fee, when the member did have that right.

104 Declaration 40 is directed to NULIS' contravention of s 12DB(1)(g) of the ASIC Act since 1 July 2016. It is based on the conduct set out in Declaration 39. NULIS admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member with respect to the fees to be paid by that member.

105 Declaration 41 is directed to NULIS' contravention of s 12DB(1)(i) of the ASIC Act since 1 July 2016. It is also based on the conduct set out in Declaration 39. NULIS admits that, by reason of that conduct in connection with the supply of a financial service, it made a false or misleading representation to each linked member concerning the existence of a right (the right to "turn off" the plan service fee).

106 The contraventions declared in Declarations 40 and 41 are of civil penalty provisions. The false or misleading representations were made to members representing no fewer than approximately 52,000 accounts.

107 Declaration 42 is directed to NULIS' contravention of s 912A(1)(c) of the Corporations Act by failing to comply with the financial services laws since 1 July 2016. It is based on the contraventions of s 1041H of the Corporations Act and s 12DA of the ASIC Act declared in Declarations 36 and 39; the contraventions of s 12DB(1)(g) of the ASIC Act declared in Declarations 37 and 40; and the contraventions of s 12DB(1)(i) of the ASIC Act declared in Declarations 38 and 41.

108 Declaration 43 is directed to NULIS' contravention of s 912A(1)(a) of the Corporations Act since 1 July 2016. NULIS admits that it failed to do all things necessary to ensure that it provided financial services efficiently, honestly and fairly by reason of the conduct set out in Declarations 36 and 39.

IS IT APPROPRIATE TO MAKE THE DECLARATIONS THAT ARE SOUGHT?

109 I have referred to the fact that the parties have agreed that declarations should be made. Notwithstanding this agreement, the parties accept that it is for the Court to decide whether this relief is appropriate.

110 The broad discretionary power to make declarations of right is conferred on the Court by s 21 of the *Federal Court of Australia Act 1976* (Cth). Generally speaking, the power is properly exercised when the question in issue is real and not theoretical; when the person raising the question has a real interest in raising it; and where there is a proper contradictor: *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448; as accepted in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 (Gibbs J) at 437-438.

111 These requirements are satisfied in the present case. The question of contravention is real and not theoretical; ASIC has a real interest in raising the question; and MLC Nominees and NULIS are proper contradictors. The facts necessary to underpin each declaration are provided in the SAFA.

112 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 (***ABCC v CFMEU***) the Full Court said:

> 93 Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; (2007) ATPR 42-140 at [6], and the cases there cited; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [95].

113 These observation are apposite to the present case.

114 It is also appropriate to recognise the parties' agreement, and in particular the defendants' consent, to making declarations. That agreement and consent was achieved in the context of a partial resolution of the matters in issue in the proceeding. Although the proceeding is one involving the imposition of civil penalties, it is desirable that effect be given to agreements on appropriate civil remedies where the Court is persuaded, sufficiently, as to the accuracy of the parties' agreement as to relevant facts and their consequences, and that what is proposed, by way of relief, is appropriate: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (***Commonwealth v Director, Fair Work***) at [57]-[59]. I am satisfied of both matters. It is appropriate that the declarations that are sought, be made.

ASSESSMENT OF PENALTY: GENERAL PRINCIPLES

115 The parties agree that MLC Nominees and NULIS should pay a pecuniary penalty to the Commonwealth in respect of each declared civil penalty provision. The liability for such penalties arises under s 12GBA of the ASIC Act in the form that provision took before its repeal when the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) was enacted. Three pecuniary penalties are sought: first, for MLC Nominees' contraventions covered by Declarations 5 and 6; secondly for MLC Nominees' contraventions covered by Declarations 15, 16, 18, 19, 21, 22, 24, 25, 27, 28, 30 and 31; and thirdly, for NULIS' contraventions covered by Declarations 37, 38, 40 and 41.

116 In its then form, s 12GBA(2) of the ASIC Act provided:

> In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
>
> (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
>
> (b) the circumstances in which the act or omission took place; and
>
> (c) whether the person has previously been found by the Court in proceedings under this Subdivision to have engaged in any similar conduct.

117 There is no dispute between the parties as to the principles to be applied. For this reason, I do not propose to discuss them at length. It will suffice for me to commence with the following extract from ASIC's written submissions, which I accept and adopt (omitting footnote references to the source authorities):

> 4. Section 12GBA(1) provides that the Court "may" impose a penalty. The Court has a discretion to impose a penalty, which discretion must be exercised judicially.
>
> 5. The amount of each penalty to be imposed is that which the Court determines is "appropriate": section 12GBA(1). Parliament has left it to the Court to decide what amount constitutes an appropriate penalty in all the circumstances, having regard to the Court's own independent opinion.
>
> 6. Assessment of amount of the penalty is not an exact science. It is not susceptible to scientific or mathematical formulation. Rather, a penalty is to be assessed by an intuitive or instinctive synthesis. The task of the Court is to take account of all the relevant (and potentially competing) factors and to arrive at a single result which takes due account of them all. This involves taking into account the objective circumstances of the contravention and the subjective factors relating to the contravener.
>
> 7. Having taken into account all relevant circumstances and discussed their significance, the Court makes a value judgment as to what is the appropriate amount of the penalty.

> 8. Civil penalty regimes are included in statutory regimes for the purpose of protecting or advancing the public interest in compliance with the statutory regime. Each statutory regime has a statutory purpose of protecting or advancing a particular aspect of the public interest. Where the statutory regime involves a specialist industry or activity regulator, its statutory functions will include securing compliance with the provisions of the regime.
>
> 9. For this reason, the appropriateness of the amount of a penalty must be assessed by reference to the specific civil penalty provision which has been contravened in light of its context and purpose, and the objects of the relevant statute as a whole.
>
> 10. In this case, the specific penalty provision is section 12DB and the relevant objects are the objects of the ASIC Act as a whole.

118 In relation to the objects of the ASIC Act, s 1(2) thereof provides, relevantly:

> (2) In performing its function and exercising its powers, ASIC must strive to:
>
> (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
>
> (b) promote the confident and informed participation of investors and consumers in the financial system; and
>
> …

119 Undoubtedly, the principal object of imposing a pecuniary penalty in civil proceedings is deterrence, both specific and general: *Commonwealth v Director, Fair Work* at [55]. The Court puts a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene. The penalty should make it clear to the contravener and others that the cost of courting risk cannot be regarded as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 at [64] citing *SingTel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [68]; see also *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157 at [116]. That said, the penalty should be no greater than is necessary to achieve that object; severity beyond this would amount to oppression: *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 293; *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2018] FCA 155 (***ASIC v ANZ***) at [22].

120 In relation to assessing a penalty of appropriate deterrent value, the parties agree that regard should be had to the factors identified by French J in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at [42]:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.
3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the contravention and the period over which it extended.
7. Whether the contravention arose out of the conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

121 As will be apparent, a number of these factors overlap the mandatory factors referred to in s 12GBA(2) itself.

122 The maximum penalty for a contravention of s 12DB(1) by a body corporate is 10,000 penalty units: s 12GBA(3). The value of these units is fixed by s 4AA of the *Crimes Act 1914* (Cth) and, in the present case, varies over time:

(a) for the period 1 June 2008 to 27 December 2012, the penalty unit value is $110 (resulting in a maximum penalty for each contravention of $1.1 million);

(b) for the period 28 December 2012 to 30 July 2015, the penalty unit value is $170 (maximum penalty for each contravention of $1.7 million);

(c) for the period 31 July 2015 to 30 June 2017 the penalty unit value is $180 (maximum penalty for each contravention of $1.8 million); and

(d) for the period 1 July 2017 onwards, the penalty unit value is $210 (maximum penalty for each contravention of $2.1 million).

123 Thus, over the total period of the defendants' contraventions, the statutory maximum ranged from $1.1 million to $2.1 million.

124 In *Markarian v The Queen* [2005] HCA 25; 228 CLR 357, the plurality observed (at [30]) that "Legislatures do not enact maximum available sentences as mere formalities". In developing that observation, their Honours said:

> [31] It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. …

125 Although these observations were made in the context of criminal sentencing, the plurality's reasoning has been applied consistently by this Court in relation to the assessment of civil penalties: see, for example, *Director of Consumer Affairs, Victoria v Alpha Flight Services Pty Ltd* [2015] FCAFC 118 at [43]; *Australian Competition and Consumer Commission v BAJV Pty Ltd* [2014] FCAFC 52 at [50]-[52]; *Setka v Gregor (No 2)* [2011] FCAFC 90; 195 FCR 203 at [46]; *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29; 202 IR 467 at [28]-[29]; *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 (***Reckitt Benckiser***) at [154]-[155].

126 In *Reckitt Benckiser*, the Full Court cautioned against a mechanical application of the maximum penalty:

> [156] Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.

127 Part of this caution was directed to the problem that arises when a very large number of contraventions are involved:

> [157] In this case, the theoretical maximum was in the trillions of dollars (some 5.9 million contraventions at $1.1 million per contravention). By way of example only, even if the appropriate penalty per contravention for each sale was $1, the penalty would approach $6 million. It follows that the assessment of the appropriate range for penalty in the circumstances of this case is best assessed by reference to other factors, as there is no meaningful overall maximum penalty given the very large number of contraventions over such a long period of time. ...

128 The course of conduct (or one transaction) principle is relevant to the assessment of penalty. This holds that where there is a sufficient interrelationship in the legal and factual elements of the acts or omissions constituting the contravening conduct, the Court may, in its discretion, penalise the acts or omissions as a single course of conduct. The principle has its origin in criminal sentencing. Its rationale in that context was explained by Owen JA in *Royer v Western Australia* [2009] WASCA 139; 197 A Crim R 319 at [22]:

> 22 I hesitate to add to the plethora of writings on the issue but I think it is necessary to embark on a short examination of the rationale and proper application of the one transaction principle. At its heart, the one transaction principle recognises 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. The interrelationship may be legal, in the sense that it arises from the elements of the crimes. It may also be factual, because of a temporal or geographical link or the presence of other circumstances compelling the conclusion that the crimes arise out of substantially the same act, omission or occurrences.

129 In *ABCC v CFMEU* the Full Court explained (at [113]) that, in the criminal sentencing context, the course of conduct principle is a tool of analysis that generally assists a sentencing judge to determine whether sentences of imprisonment should be served concurrently or consecutively: see, in that regard, *Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93. This does not permit the 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. The sentencing judge imposes separate sentences for each offence, with the option of concurrency.

130 In the context of civil penalties, the course of conduct principle does not apply in this way. There is no occasion for adjustment of consecutive or cumulative sentences. Moreover, the rationale of avoiding double punishment is inapplicable. In the civil penalty context, deterrence is the direct objective. Even so, it is not doubted that the principle is applicable in that context: *Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; 262 ALR 417 at [26]; *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; 269 ALR 1 at [39]-[41]; *ABCC v CFMEU* at [111]. It coheres at a higher level of analysis—proportionality. When the course of conduct principle is applied in this context, the Court is not required to start from the position that the maximum penalty for a course of conduct is the maximum penalty for a single offence.

131 The totality principle is also relevant to the assessment of penalty. It too derives from criminal sentencing principles, and has been picked up and applied to civil penalties: *Mornington Inn*

Pty Ltd v Jordan [2008] FCAFC 70; 168 FCR 383 at [5]-[7] (Gyles J) and [41]-[43] (Stone and Buchanan JJ); *ABCC v CFMEU* at [120]. Under this principle, the Court considers the entirety of the underlying contravening conduct to determine whether the "total" or aggregate penalty is just and appropriate: *Mill v The Queen* (1988) 166 CLR 59 at 62-63. In the context of criminal sentencing, the sentencing discretion is not properly exercised by "doing the arithmetic and passing the sentence which the arithmetic produces"; rather, the Court must look at "the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences": Thomas *Principles of Sentencing* 2nd ed. (1979), pp 56-57. So, too, in the civil penalty context, the totality principle, often in conjunction with the course of conduct principle, has been applied analogously to support the imposition of a single pecuniary penalty for multiple contraventions: *ABCC v CFMEU* at [121]. Once again, this is an aspect of proportionality.

132 Finally, the parity principle is relevant to the assessment of penalty. This involves consideration of the penalties imposed in analogous cases. It is directed to the objective of equal treatment in similar cases so as to meet the principle of equal justice: *Australian Competition and Consumer Commission v Optus Mobile Pty Limited* [2019] FCA 106 (***Optus Mobile***) at [40]. The limitations of reviewing the penalties imposed in past cases must be recognised. Given the variety of facts and circumstances with which the Court is presented in cases involving contraventions based on false or misleading representations, the analogical value of other cases might be very limited indeed or even non-existent. Thus, reliance on the penalties imposed in other cases must be treated with caution: *ASIC v ANZ* at [22].

MLC NOMINEES – DEDUCTION OF PLAN SERVICE FEE: NO ADVISER MEMBERS

ASIC's submissions

133 ASIC submits that the appropriate penalty for the contraventions of s 12DB(1)(g) and s 12DB(1)(i) of the ASIC Act covered by Declarations 5 and 6 in respect of no-adviser members is in the range of $60 million – $70 million.

134 ASIC submits that s 12DB of the ASIC Act is not like its counterpart s 29 of the Australian Consumer Law (Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (the **Australian Consumer Law**). ASIC argues that s 12DB is directed to conduct in connection with the supply (or possible supply) of financial services. As such, the provision has a focused application which extends beyond consumer protection to the performance of the financial

system and the entities within it, and to investor and consumer confidence, and informed participation in the financial system: see s 1(2) of the ASIC Act, referred to at [118] above. Thus, ASIC submits, a contravention of s 12DB involves not just the public interest in protecting consumers, but also the public interest in the efficacy of the financial system—here, superannuation.

135 In this connection, ASIC stresses the important role that superannuation plays in the Australian financial system (see *Finch v Telstra Super Pty Ltd* [2010] HCA 36; 242 CLR 254 (***Finch***) at [33]-[36]) and the economic and social functions it performs within that system. It points to the fact that superannuation affects almost all Australians and that, within an efficient, fair and well-regulated superannuation system, such as under the SIS Act, beneficiaries—especially those who are compulsory participants—have legitimately high expectations that superannuation funds will be soundly operated.

136 Relatedly, ASIC stresses the role of the trustee within a regulated system of superannuation that adopts, as here, the trust mechanism. Subject to statutory modification, superannuation trustees, within such systems, have the same duties as other trustees, including the core obligations of adhering to and carrying out the terms of the trust (including, here, the rules of the fund) and to avoid conflicts of duty and interest.

137 In relation to the MasterKey product, the trustee (relevantly, MLC Nominees and, later, NULIS) had the complete management control of the superannuation fund, with the power to determine the terms of each Member Package, including the fee structure of that package. ASIC submits that such an arrangement is typical of the asymmetry of knowledge that exists between the superannuation trustee and the beneficiaries under the fund. ASIC submits that, for the performance of superannuation generally, and investor and consumer confidence in particular, nothing is more critical than the members being able to rely on information provided by the trustee about the terms of the fund, including as to fees. And yet, ASIC says, here is a case where the trustee made false or misleading representations about the fees the members had to pay (or did not have to pay) to plan advisers.

138 ASIC submits that this is a feature of MLC Nominees' conduct (and, later, NULIS' conduct), and thus one of the circumstances of the case, to which regard must be had in assessing an appropriate penalty: see s 12GBA(2). It is a feature which ASIC, in its written submissions, says warrants a significantly higher penalty in relation to these particular contraventions than would otherwise be the case:

> 149. ... There are two separate but related reasons for this. First, the fact that MLC Nominees made the false and misleading representations to its own beneficiaries means the conduct was objectively more serious per se. This feature sets MLC Nominees' case apart from other cases where the Court has considered what penalty is appropriate for false or misleading representations, including under section 12DB. Other cases have typically arisen in the context of a supplier/consumer relationship where the parties were on opposite sides of a contractual relationship from which each sought to benefit. The contractual relationship between a supplier and a customer certainly warrants protection, but it is qualitatively different to the fiduciary relationship between a trustee and its beneficiary. The difference in quality arises from the fact that the beneficiary is entitled to expect that the trustee will act in the beneficiaries' interest in relation to matters such as the payment of fees to third parties. Misleading conduct by the trustee is objectively more serious and warrants a higher penalty.
>
> 150. Secondly, MLC Nominees' conduct had a much greater potential to undermine the performance of superannuation and investor and consumer confidence in superannuation (and hence participation) because of the central relationship of trust and confidence which it infringed. That greater potential to undermine the financial system makes the need for deterrence more pronounced than might otherwise be the case, not just for MLC Nominees but for all trustees of superannuation funds.

139 ASIC advances two further aggravating circumstances. The first is that members were misinformed by MLC Nominees about their obligation to pay a plan service fee (there was no obligation) in circumstances where MLC Nominees accepts that it failed to adhere to its separate obligation, under s 912A(1)(a) of the Corporations Act, to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly. Over a near four-year period, the plan service fee was deducted and retained by MLC, who was responsible for the day-to-day management of TUSS, including the MasterKey product, an undertaking for which it charged fees. Importantly, the ostensible reason for the deduction was for the payment of plan service fees, but MLC was not a plan adviser. It could have no entitlement to such fees.

140 The second aggravating circumstance advanced by ASIC is that the representations took place in circumstances where MLC Nominees had communicated to members that it was putting in place a fee structure that was transparent and easier for members to understand, and which improved members' control over fees. ASIC submits that the stated purposes for the new fee structure would have fuelled members' expectations that the information they were receiving about plan service fees was accurate, rendering them more vulnerable to future representations by MLC Nominees. The making of the representations was, therefore, antithetical to MLC Nominees' stated purposes respecting the new fee structure.

141 ASIC submits that the course of conduct principle has no relevant application to this case. MLC Nominees issued one or more of the letters, "welcome kits" and annual statements to no fewer than approximately 220,000 no-adviser members' accounts. ASIC submits that, having regard to the personalised nature of the letters, "welcome kits" and annual statements—I was taken to a number of these during the course of oral submissions—it would be appropriate to regard MLC Nominees' conduct as constituting 220,000 separate contraventions, not a single course of conduct. As ASIC puts it, each individual document was directed to a different individual member, each of whom had his or her own rights infringed. Moreover, ASIC submits that MLC Nominees' conduct was not isolated. It occurred systematically over an extended period of almost four years and was not confined to a single type of document. ASIC therefore submits that, to view the conduct as a single course of conduct, would be to obscure, and thus fail to have regard to, the extent of MLC Nominees' contraventions. It contends that the more appropriate approach is to assess the penalty on the basis that there were 222,000 separate contraventions, and then "temper" the total or aggregate penalty by the totality principle.

142 MLC deducted $33.62 million from the accounts concerned as plan service fees. ASIC submits that the Court may "readily infer" that this represents loss or damage suffered as a result of MLC Nominees' contraventions of s 12DB(1), even though the affected members have been fully remediated. ASIC submits that this sum represents the risk to which these members were exposed when MLC Nominees made the false or misleading representations. It submits that it cannot be suggested that a member who was aware that he or she did not have to pay a monthly fee for which no service was provided, would nonetheless have been willing to pay it.

143 With regard to the involvement of company officers in the contravening conduct, ASIC submits that, ultimately, responsibility for the approval and distribution of the relevant documents, in which the representations were made, resides in MLC Nominees' Board of Directors. This submission is based, in part, on the fact that MLC Nominees had a Disclosure Governance Committee whose function was to ensure appropriate oversight of disclosure documents and to assist the board to fulfil certain of its statutory, fiduciary and regulatory responsibilities, as outlined in a charter. The committee had a minimum of five members (or four in NULIS' case), two of whom were directors, at least one being a non-Executive Director.

144 ASIC submits that the facts and admissions in the SAFA do not permit a finding that the false or misleading representations were made deliberately. It argues, however, that no explanation

has been made by MLC Nominees as to why the representations were made for such a prolonged period to so many members. It also relies on the fact that MLC Nominees engaged in misleading or deceptive conduct by making statements about the plan service fee in the circumstances referred to in Declarations 14, 17, 20 and 26 concerning linked members. Further, it relies on the fact that three successive Product Disclosure Statements were issued by MLC Nominees to linked members which were defective for the reasons identified in Declarations 11, 12 and 13. ASIC submits that, in each instance, the deficiency in communication was a failure to address properly the member's right not to pay the plan service fee or the right to turn off the fee. As ASIC puts it, the representations in all the documents consistently prejudiced the members' interests and advantaged those who received the plan service fees (MLC and plan advisers). It also submits that there is nothing in the Disclosure Governance Committee's charter which required the committee to have regard to the interests of members when reviewing and approving documents. ASIC submits that this demonstrates a lack of regard for the interests of members. The information which MLC Nominees consistently chose to provide members did not include the very information which it was in the members' interests to receive.

145 I record, now, that I do not understand how MLC Nominees' contravening conduct in relation to linked members reflects on the deliberateness or otherwise of its conduct in relation to no-adviser members, particularly when ASIC also accepts that the statements and admissions in the SAFA do not permit a finding that MLC Nominees' false or misleading representations to linked members were deliberately made. I will return to this topic later in these reasons.

146 As to the requirement of s 12GBA(2)(c) to have regard to previous similar conduct, ASIC makes a similar submission. It submits that, in assessing the penalty in respect of misleading representations to no-adviser members, it is relevant to take into account MLC Nominees' admitted contraventions with respect to linked members (see below) because this is "similar conduct".

147 As to the question of deterrence, ASIC submits that two matters warrant emphasis – the relationship between the size of the penalty and the size of the contravener who is required to pay the penalty, and the relationship between the size of the penalty and the size of the gain that the contravener has made or could have made by reason of its contravening conduct.

148 As to the first relationship, ASIC submits that MLC Nominees contravened s 12DB in circumstances where it was "part of a highly profitable superannuation business conducted on

the largest scale". Here, ASIC commences with the proposition that, all things being equal, the larger the scale of the business, the larger the penalty that is warranted if it is to secure deterrence and not merely stand as an acceptable cost of doing business. Bearing this in mind, ASIC argues that the appropriate approach in the present case is to consider the scale of the superannuation business in which MLC Nominees was involved by reference to the business group through which NAB conducted that business at the time of the contraventions, not simply by reference to MLC Nominees as an isolated entity within that business group.

149 I have already referred to the fact that NAB operated part of its superannuation business, including TUSS, through MLC and MLC Nominees, where MLC Nominees acted as the trustee of TUSS and MLC was responsible for the fund's day-to-day operation. Profits from the superannuation business were retained by MLC, which paid shareholder returns to NAB. MLC Nominees did not charge fees itself, and was not a profit-earning entity.

150 In order to better understand the significance of MLC Nominees within NAB's superannuation business group, it is necessary to record some further agreed facts.

151 MLC Nominees reported the following revenue and profit for the financial years ending 2012 to 2016 (the financial year ended on 30 September):

Year	**2012**	**2013**	**2014**	**2015**	**2016**
Revenue from rendering trustee services	$5,000	$5,000	$5,000	$5,000	$3,750
Total profit before income tax from revenue including interest revenue	$198,002	$270,230	$169,226	$155,979	$130,621

152 In each of those years, the administration fees and other revenue received by MLC referable to the MasterKey product was:

Year	**FY12**	**FY2013**	**FY2014**	**FY2015**	**FY2016 (Oct 2015 – June 2016)**
Administration fees and other revenue	$92,658,688.06	$173,237,994.48	$227,394,664.67	$228,763,753.29	$159,476,607.35

153 The segment of MLC's operations in which administration fees and other revenue referable to the MasterKey product were reported was "Investment management and origination". MLC reported revenue and profit in these financial years as follows:

Year	2012	2013	2014	2015	2016
Investment Management and origination fees	$525,000,000	$544,000,000	$576,000,000	$600,000,000	$434,000,000
Total profit before income tax from activities including investment management	$684,000,000	$862,000,000	$395,000,000	$489,000,000	$439,000,000

154 The funds under management were:

Project	Project SWIFT	TERP Trade-Up	Encompass
FUM ($billions)	$7.93	$2.14	$1.426

155 The NAB Wealth segment of NAB's operations reported the following income and profit for the financial years 2012 to 2018:

	2012 $millions	2013 $millions	2014 $millions	2015 $millions	2016 $millions	2017 $millions	2018 $millions
Net operating income	$1,887	$1,829	$1,440	$1,586	$1,208	$5,481	$5,505
Cash earnings before tax and distributions	$732	$664	$490	$645	$422	$2,304	$2,188

156 As at 30 June 2016, MLC Nominees had 8.42% market share of the managed funds in Australia's retail superannuation sector or 3.56% market share of the managed funds in Australia's entire superannuation sector, with over $45.8 billion in funds under management.

157 ASIC submits that, having regard to the structure in which MLC Nominees operated, neither the profits nor the costs of the superannuation business were experienced by it. The cost of any penalty imposed on it will ultimately be borne by its shareholders who are the entities who received the profits from that business. In this regard I note that, in its financial statements for the 2019 year, NULIS records that "the potential outcome" and total costs associated with the present proceedings are expected to be incurred by NAB, thereby underpinning the submission that ASIC makes. As ASIC puts it, a small penalty imposed on MLC Nominees will quickly be absorbed by the wider business, without achieving deterrence.

158 In its written submissions, ASIC submits:

> 214. When assessing the penalty for the false and misleading representations made to no-adviser members, a relevant consideration is that, to date, no adverse financial consequences have been visited upon MLC Nominees for the contraventions. Nor have NAB, MLC Limited or NULIS experienced any adverse financial consequences. Although NAB has remediated the affected members, the remediation has in effect been a repayment of the members' own money because the deducted fees were retained by MLC Limited. NAB has in addition paid sums to compensate the affected members for the time NAB had their money, but that compensation cannot be seen as a net expense to NAB because NAB had the use of the money during the same period.
>
> 215. To date, the only adverse consequence for NAB and its subsidiaries is that they have not been able to retain the $33.62m profit they would otherwise have wrongfully received.

159 As to the second relationship (see [147] above), ASIC submits that MLC and the NAB Group stood to gain $33.62 million. ASIC argues that the penalty should be "well in excess" of that potential gain. ASIC submits that if the penalty is only marginally larger than the potential gain, it will not have a deterrent effect. It illustrates the size of the penalty that will have a deterrent effect by reference to the concept of "treble damages", which has now been recognised by s 12GBCA(1) and s 12GBCA(2)(b), inserted into the ASIC Act by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

160 On the question of cooperation, ASIC acknowledges that MLC Nominees (or at least NAB and NULIS on its behalf) complied with its statutory obligations in relation to its related contraventions of s 912A(1)(a) of the Corporations Act (lodgement of breach reports, responding to compulsory notices and effecting remediation). But these were actions that MLC Nominees was required to undertake: see ss 912B, 912C and 912D of the Corporations Act. ASIC also acknowledges that MLC Nominees (or NAB or NULIS on its behalf) has voluntarily cooperated with ASIC's investigations with respect to the wrongful deduction of the plan

service fee from no-adviser members. ASIC agrees that this cooperation is, to an extent, relevant to the assessment of penalty. ASIC points out, however, that this cooperation was directed to other contraventions, not the contraventions of s 12DB for which the penalty is sought. To explain, when this proceeding was commenced on 6 September 2018, MLC Nominees, whilst admitting certain contraventions, denied the relevant contraventions of s 12DB. It was only in about May 2019 that MLC Nominees admitted its contraventions of s 12DB. ASIC accepts that, from that time, MLC Nominees has worked cooperatively with ASIC, including by reaching agreement as to the relief that should be granted (albeit not the quantum of the penalties to be imposed) and, importantly, on the SAFA, resulting in a significant saving of the Court's and ASIC's respective resources.

161 In its written submissions, ASIC summarised the justification for the imposition of a penalty in the order of $70 million:

> 217. No one factor or no combination of factors can be applied mechanically to determine the appropriate amount, but a penalty of, say, $70m is warranted having regard to the following matters:
>
> (a) $70m reflects the seriousness of the contraventions, including in relation to undermining confidence in superannuation to which the trustee's communications to members is central;
>
> (b) having regard to the magnitude of NAB's superannuation business, $70m may be sufficiently high to go some way towards operating as an effective deterrent of future conduct both, specifically and generally;
>
> (c) $70m takes into account the amount of the potential gain from committing the contraventions ($33.62m);
>
> (d) there is no basis for any concern that a penalty of $70m will be oppressive or cause any hardship to MLC Nominees, MLC Limited, NULIS or NAB; and
>
> (e) it would also be a penalty that members of the public will recognize as significant and proportionate to the seriousness of the contravention.
>
> 218. A penalty of $70m would correspond to a penalty of $318 for each of the 220,000 contraventions which occurred in this case. Compared to the statutory maximum for each contravention of between $1.1m and $2.1m, $318 is obviously small. It is less than 0.003% of the lowest statutory maximum. That comparison would support the imposition of an aggregate penalty which is larger than $70m. For current purposes, the comparison demonstrates that a penalty of $70m is not excessive.

MLC Nominees' submissions

162 MLC Nominees submits that the appropriate penalty for these contraventions of s 12DB of the ASIC Act is $10 million.

163 Although these contraventions concern MLC Nominees and not NULIS, ASIC's submissions raise an approach to determining penalties that is applicable to both defendants. The defendants therefore made a joint response to some of ASIC's submissions. This is reflected in the following summary.

164 The defendants accept that the "superannuation context" is a relevant matter for the Court to consider. They submit, however, that the way in which ASIC relies on this context is erroneous, for a number of reasons.

165 First, the defendants submit that it is wrong in principle to conclude that the superannuation context automatically justifies (i.e., as a matter of course) a significantly augmented penalty. They submit that there is nothing in the text, context or purpose of s 12DB that supports the contention that contraventions of that provision by superannuation trustees are more serious than contravention of that provision by others. Section 12DB deals with false or misleading representations in relation to the supply or promotion of financial services, which covers dealings in a range of financial products, not just superannuation products. Section 12DB does not discriminate between these dealings. Further, the ASIC Act does not penalise contraventions of s 12DB in relation to financial services involving superannuation differently from contraventions involving other financial services.

166 Secondly, in relation to ASIC's reliance on the defendants acting as trustees, the defendants submit that ASIC has abandoned the case it initially brought against each of them, in which it alleged that their respective conduct involved breaches of trust and contraventions of the SIS Act. That being so, the defendants submit that ASIC should be held to the case on which it has reached agreement with them, respectively, and that it should not be permitted to re-characterise their conduct away from contravention of s 12DB into a case of other conduct, which it no longer pursues, in order to justify (what the defendants call) the "higher than normal" penalties ASIC now seeks. Relying on observations made by the Full Court in *Reckitt Benckiser* at [37], the defendants submit that the Court must determine the question of penalty on the basis of the contraventions admitted, not on the basis of more serious contraventions or conduct which ASIC no longer pursues. As the defendants put it, when assessing the penalties to be imposed for contravention of s 12DB, the Court can be comforted that none of the general law or statutory duties specific to superannuation trustees are said to have been contravened.

167 Thirdly and relatedly, contravention of s 12DB is a matter of strict liability. In their written submissions, the defendants contend:

> 55. In these circumstances, any attempt by ASIC to leverage off the existence of a range of statutory and general law obligations owed by a trustee qua trustee is not only unpleaded but fails to recognise the absence of any logical connection between a breach of s 12DB and a breach of trust or breach of the SIS Act. In short, different systems are at work with different standards.

168 Fourthly, the defendants submit that ASIC's reliance on their position as superannuation trustees, for the purpose of justifying the penalties it seeks, is misplaced for another reason. The defendants submit that the SIS Act, not the Corporations Act or the ASIC Act, is the primary statutory mechanism through which Parliament regulates the conduct of superannuation trustees. They submit that it is "bespoke legislation that recognises the particular context of the superannuation industry". One noteworthy aspect of this legislation, at the time of the contravening conduct, was the absence of criminal or civil penalties for breaches of the statutory covenants in s 52. The defendants submit that this demonstrates, as a matter of legislative determination, that it was not appropriate to render superannuation trustees liable to criminal or civil penalties for failure to comply with well-recognised trust duties. The SIS Act has now been amended in this regard but, the defendants say, the absence of such penalties during the relevant period is a further reason why ASIC's analysis of the "superannuation context" is wrong. The defendants submit:

> 60. Far from supporting ASIC's position that contraventions by a superannuation trustee are inherently more serious, the above review of the wider statutory scheme suggests that Parliament did not consider breaches of statutory covenants by a superannuation trustee to its members as worthy of censure beyond declaratory relief. Whether that Parliamentary judgment was correct as a matter of policy is not a question that arises in the present forum.

169 Fifthly, the primary remedy provided by the SIS Act for a trustee's breach of the s 52 covenants was damages, supplemented by members' general law rights for equitable compensation. The defendants submit that this is relevant because, in the present case, the no-adviser and linked members affected by the defendants' separate contraventions of s 12DB have been fully remediated. Thus, even if ASIC had alleged, pursued and proved breaches by the defendants of their general law and statutory trust duties, their liability to members, as a consequence thereof, would already be satisfied, as informed by the SIS Act's own standards.

170 Sixthly, the defendants submit that the distinction that ASIC makes between s 12DB of the ASIC Act and s 29 of the Australian Consumer Law is "baseless". They submit that ASIC's "suggestion" that conduct that contravenes s 12DB of the ASIC Act is inherently more serious than conduct that contravenes s 29 of the Australian Consumer Law is not grounded in statutory language or in the authorities. Further, the defendants submit that there is no logical basis for

assuming that contraventions of s 12DB of the ASIC Act are necessarily more serious than those arising under s 29 of the Australian Consumer Law.

171 Turning to the specific case against MLC Nominees in respect of no-adviser members, and dealing with the circumstances in which MLC Nominees' contravening conduct took place (s 12GBA(2)(b)), MLC Nominees submits that the circumstances surrounding the introduction of the plan service fee stand as a "significant mitigating factor".

172 As I have recorded, the plan service fee was introduced from 8 September 2012. It was designed, in part, to ensure that, on implementation, the existing services offered by plan advisers to members could continue and that the fee structures in the MasterKey product would be simpler, more transparent, explicit, easier for members to understand, and provide members with the opportunity to request lower fees. MLC Nominees argues that, by introducing the plan service fee, it was motivated by an overall imperative to benefit members. It argues that ASIC's submissions fail to give "appropriate recognition to the context in which the fee was approved".

173 MLC Nominees submits that, once the error in relation to the deduction of plan service fees from no-adviser accounts was identified, it acted to investigate and resolve the issue. The following facts are agreed. On about 24 August 2015, MLC Nominees first became aware that the unauthorised deductions of the plan service fee may have been occurring when it identified a potential issue with deductions from the accounts of no-adviser members who had transferred to the MasterKey product as part of the TERP Trade-Up. On 24 December 2015, NAB Wealth, by its Chief Risk Officer, lodged breach reports with ASIC on behalf of MLC Nominees and MLC respectively in relation to charging the plan service fee to no-adviser members in MKBS and MKPS as part of the TERP Trade Up. In those reports, NAB Wealth explained that TERP was a legacy product operating on an outdated administration platform. The legacy nature of the product meant that not all members had a plan adviser. The management paper outlining the TERP Trade-Up, which was prepared by MLC as administrator and provided to MLC Nominees as trustee, did not identify that there would be a group of transferring members who did not have a plan adviser pre- and post- the transfer. After considering the management paper, MLC Nominees approved the intra-fund transfer. When implementing the transfer, MLC established the administration systems to apply the plan service fee to the accounts of all transferring members, including no-adviser members. As a result, the plan service fee was deducted from no-adviser members' accounts and retained by MLC. The breach reports

outlined the steps that would be taken to rectify the breach, which included validating a list of members and past members impacted by the breach, ceasing to charge the plan service fee in respect of those members, and compensating those members.

174 MLC Nominees did not become aware of the deduction of the plan service fee from the accounts of other no-adviser members until about July 2016. On 14 September 2016, NAB Wealth, by its Chief Risk Officer, lodged further breach reports with ASIC on behalf of MLC Nominees and MLC in relation to charging the plan service fee to no-adviser members as part of Project SWiFT and the Encompass Trade-Up. In those reports, NAB Wealth said it expected to carry out the same rectification steps referred to in the earlier breach reports of 24 December 2015. MLC Nominees' breach report said:

> The potential breaches … fundamentally arose because, whilst Project SWiFT and Encompass were extensive projects through which there was significant consideration of member benefits and rights (including equivalency of rights in the case of Encompass), the management papers and disclosures produced by the Administrator were silent on the fact that the PSF would be deducted from the accounts of Unadvised Members and retained by the Administrator.

175 In relation to loss and damage, MLC Nominees disputes that the total sum deducted as plan service fees from the accounts of no-adviser members is loss or damage to be taken into account for the purposes of s 12GBA(2)(a). It points to the fact that the affected members have been fully remediated, with appropriate external assurance having been undertaken. The remediation was completed by 30 April 2019, with the vast bulk of affected members receiving payment much earlier, by 30 June 2017. MLC Nominees submits that, when assessing the appropriate penalty, the present case should be distinguished from other cases where remediation has not been provided.

176 In relation to s 12GBA(2)(a), and the nature and extent of the contravening conduct, MLC Nominees contests ASIC's rejection of the course of conduct principle as an appropriate tool of analysis in the present case. It submits that, in relation to no-adviser members, the representations were to the effect that the trustee was entitled to deduct the plan service fee and that the no-adviser members were obliged to pay it. These representations were made in three types of standard form documents (the letters, "welcome kits" and annual statements). The factual elements of each contravention of s 12DB were similar in relevant respects. MLC Nominees submits, therefore, that there was a single course of conduct; the factual substratum with respect to the representations is "unitary":

> 101. ... The conduct may be traced back to a single homogenous cause: namely, a

> system design defect upon the introduction of the PSF that permitted its deduction from the accounts of no-adviser members (in circumstances where MLCN was not aware at the time of approving the introduction of the fee that such deductions would occur: as reflected at SAFA [86]). Unfortunately, the corollary was that statements made in disclosure documents to members were false or misleading. Absent the existence of no-adviser members, the impugned representations would not have been conveyed.

177 While proposing a single course of conduct, MLC Nominees accepts that an alternative analysis is open, which treats the contraventions of s 12DB in relation to no-adviser members as three courses of conduct referable to the three modes of communicating the representations. However, MLC Nominees submits that, if so analysed, it would be appropriate to take into account the substantial overlap in the acts constituting each such course of conduct. It argues that, if that is done, the resultant evaluation would be very similar to treating the contraventions as a single course of conduct. In any event, it submits that it should not be penalised twice for common contraventions.

178 In relation to s 12GBA(2)(c), MLC Nominees relies on the fact that it has not previously been found to have engaged in similar conduct. It contests ASIC's contention that its admitted contraventions with respect to linked members stand as a "previous" finding of "similar conduct". It submits that s 12GBA(2)(c) should be given effect according to its terms. It submits that ASIC's reliance on its contraventions with respect to linked members is a circumvention of a "limitation" in s 12GBA(2)(c) and an impermissible "double-counting" given that ASIC seeks a separate penalty in respect of MLC Nominees' linked member contraventions.

179 MLC Nominees also contests ASIC's reliance on the admitted contraventions of s 912A(1)(a) of the Corporations Act as a matter which "increases the seriousness" of its conduct. Contravention of s 912A, as it applies in this present case, does not attract a pecuniary penalty. MLC Nominees argues that coupling its contraventions of s 12DB of the ASIC Act with its contraventions of s 912A of the Corporations Act for the purpose of assessing the appropriate penalty, would penalise it, by proxy, for contravention of s 912A, when no such penalty is applicable. This, it submits, would be contrary to the applicable legislative scheme.

180 In relation to the deliberateness of its conduct, MLC Nominees calls in aid ASIC's acceptance that the facts and admissions in the SAFA do not permit a finding that the false or misleading representations to no-adviser members were made deliberately. MLC Nominees submits that the absence of deliberateness in the present case is in stark contrast to other cases which have come before this Court in respect of the making of false or misleading representations. MLC

Nominees also points to the fact that ASIC has not even alleged that its contravening conduct was deliberate or, indeed, reckless or negligent. It submits that ASIC's contention that its conduct demonstrates a lack of regard for the interests of members is not open given that ASIC does not present a case that MLC Nominees breached the best interests covenant in s 52(2)(c) of the SIS Act. When no particular state of mind is established in respect of the contraventions in question, the Court must determine penalty on no more than the fact of the proscribed nature of the conduct: *Reckitt Benckiser* at [131].

181 In relation to ASIC's submission that ultimate responsibility for the approval and distribution of the documents communicating the false or misleading representations rests with MLC Nominees' Board of Directors, MLC Nominees submits that there is no evidence before the Court that its senior management drafted or communicated the representation to the affected members. It submits that an argument advancing ultimate responsibility in the Board of Directors is no more than an anodyne statement of the operation of the general rule of corporate attribution. The pertinent question, which is more granular, is whether the contravention arose out of the conduct of senior management or at a lower level? MLC Nominees submits that there is no evidence of the involvement of its senior management and ASIC's reliance on the existence of the Disclosure Governance Committee does not fill that evidentiary gap.

182 In relation to the question of deterrence, MLC Nominees submits that ASIC's proposed penalty of $60 million – $70 million with respect to no-adviser conduct clearly offends the principle that a civil penalty should not be fixed at an amount that is greater than necessary to achieve the objectives of general and specific deterrence. It relies on the fact that there is no allegation of deliberateness. It relies on the fact that it is no longer a Registrable Superannuation Entity (**RSE**) licensee, with the consequence that considerations of specific deterrence have a limited role to play.

183 While accepting that it was, at the relevant times, the trustee of a large retail superannuation fund with significant revenue and substantial market share, MLC Nominees submits that, as a general principle, the size of a contravener does not, of itself, justify a higher penalty than might otherwise be imposed, although it accepts, nonetheless, that the size and resources of a contravener are relevant to the size of the penalty that might be required to achieve specific deterrence and be publicly recognised as general deterrence: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR

540 at [89] – [92]; *Australian Competition and Consumer Commission v Pental Limited* [2018] FCA 491 at [52].

184 Contrary to ASIC's submission, and relying on statements made in *Schneider Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission* [2003] FCAFC 2; 127 FCR 170 (***Schneider***) at [48] – [49], MLC Nominees argues that it is not permissible for the Court to consider the scale of NAB's insurance business, of which it was part. In this connection, MLC Nominees submits that there is no allegation, nor evidence, that NAB, NAB Wealth or MLC had any involvement in the admitted contraventions; it has not put in issue its capacity to pay a pecuniary penalty; it carried on a substantial superannuation business in its own right; and, as trustee, it was an independent body with its own Board of Directors and governance framework. MLC Nominees submits that, in any event, there is no specific evidence before the Court concerning the extent to which any income or profit of NAB Wealth was attributable to the MasterKey product, let alone the plan service fee. Further, it submits that no reliable inferences can be drawn from the income and profit figures reproduced at [151], [153] and [155] above.

185 MLC Nominees criticises ASIC's recourse to the concept of "treble damages" as representing a penalty of appropriate deterrent effect, based on the "potential gain" to MLC and the NAB Group of $33.62 million. MLC Nominees submits that this alleged "potential gain" is illusory because no profit or gain, in any form, was obtained by MLC Nominees or any NAB entity. The affected members have been fully remediated. Further, it submits that it is difficult to see how any such "gain" could have incentivised it to contravene given that it is not alleged that it made the false or misleading representations deliberately. MLC Nominees submits that recourse to the concept of "treble damages" is inapposite in any event because it finds no support in the legislation governing the present case or in the case law.

186 With respect to the question of cooperation, MLC Nominees submits that it has demonstrated cooperation by admitting its contraventions; proposing and participating in mediation with ASIC; subsequently resolving, by agreement, all questions of its liability; and by reaching agreement on the facts stated in the SAFA to permit the question of penalty to be determined by the Court.

187 MLC Nominees also submits that it has adduced evidence of contrition and remorse through the apology contained in Mr Promnitz's affidavit. It has also publicly expressed its contrition in various media releases. MLC Nominees submits that these acts, together with the

cooperation that has been given and the remediation that has been made—which, it says, also signify contrition—stand as mitigating factors.

188 The defendants submit that the Court should conclude that both MLC Nominees and NULIS had a corporate culture conducive to compliance, and a commitment to continuous improvement over time. To support this submission, the defendants refer to the fact that, throughout the contravening period, MLC Nominees and NULIS had documented processes and frameworks in relation to trustee governance, risk and compliance management, and disclosure governance. These processes and frameworks form part of the steps taken by MLC Nominees and NULIS to ensure that their duties as trustee were performed, and to monitor and supervise the performance of MLC and NWMSL, as administrators. They also refer to the fact that, from the date of the first breach report of 24 December 2015, ASIC was updated as to the progress of internal investigations and remediation.

189 The defendants also rely on the fact that, in 2017, NULIS agreed to the imposition by ASIC of conditions on NULIS' Australian Financial Services (**AFS**) licence. These conditions required NULIS to engage an ASIC-approved independent expert to assess and report on the adequacy of its compliance and risk management practices for its retail and wrap superannuation funds. KPMG was appointed as the expert. KPMG delivered reports in July 2017 and August 2018.

190 In its July 2017 report, KPMG reported a strong commitment by NWMSL and NULIS to addressing the licence conditions and ensuring that KPMG's recommendations were acted upon and resolved. KPMG observed that NULIS demonstrated a strong commitment to continuous improvement and that, overall, it had been able to demonstrate strong governance, and risk management change processes.

191 In its August 2018 report, KPMG referred to a number of improvements made by NULIS in response to recommendations made in the July 2017 report. The improvements included: those made by NULIS in respect of its assessment and oversight of NWMSL; improvements in relation to the three lines of defence risk management framework; improvements in relation to risk management reports prepared by NWMSL; and improvements with respect to NULIS' processes and procedures for assessing, approving, implementing and/or monitoring product changes, including further development of training material.

192 In September 2019, KPMG issued a summary report in which it referred to the recommendations made in five earlier reports. It noted that NULIS had accepted all its recommendations.

193 The defendants submit that these matters evidence that they have both sought to continually improve their systems and controls over time and as specific deficiencies became evident.

194 Finally, the defendants refer to the fact that the plan service fee was progressively switched off from 29 November 2013.

195 In their written submissions, MLC Nominees summarised the justification for the imposition of the pecuniary penalty of $10 million:

> 178. Having regard to all of the relevant factors addressed above, MLCN respectfully submits that a pecuniary penalty of $10 million is an appropriate penalty in the circumstances of this case. In particular:
>
> a) a penalty of $10 million is a significant penalty with substantial deterrent effect, which appropriately recognises the gravity of the conduct, including its nature, extent and duration;
>
> b) whilst MLCN's position as a superannuation trustee is relevant, for the reasons canvassed above, this is not a matter which of itself justifies the substantial augmentation in penalty for which ASIC contends;
>
> c) there was no deliberate conduct by MLCN;
>
> d) the Court should give significant credit to the fact of full and early remediation, which is conduct to be encouraged;
>
> e) the Court should similarly afford credit to MLCN for the systems, processes and frameworks in place which evidence a culture of compliance;
>
> f) MLCN is entitled to a substantial discount for co-operation in the course of ASIC's investigation and in these proceedings;
>
> g) similarly, MLCN's contrition is a mitigating factor;
>
> h) as MLCN is no longer an RSE licensee and, separately, the PSF is no longer deducted from member accounts, the need for specific deterrence is less relevant here than in other cases; and
>
> i) properly characterised, the contraventions with respect to no-adviser members arose out of a common factual substratum and the Court may have regard to the course of conduct principle as a useful tool of analysis.

Analysis

196 The Court must determine the question of penalty on the basis of the contraventions that have been admitted. Those contraventions are of s 12DB of the ASIC Act. Such contraventions do not involve a mental element on the part of a contravener. In that sense, a contravention of

s 12DB is one of strict liability. Here, ASIC has not alleged that the contravening conduct involved a particular mental element. It goes further to submit that the evidence before the Court does not permit a finding that the false or misleading representations which each defendant has admitted, were made deliberately. Unsurprisingly, the defendants join in that submission.

197 As I have noted, the parties agree that the facts, matters and circumstances recorded in the SAFA and the documents exhibited thereto may be used by the Court to draw inferences of fact. That being the case, I do not feel bound by ASIC's and the defendants' submission. However, I accept that the evidence does not permit a finding of deliberateness, in the sense of (on this limb of ASIC's case) MLC Nominees embarking on a course of purposefully representing that no-adviser members were obliged to pay and that, in respect of those members, MLC Nominees was entitled to deduct plan service fees, dishonestly and deceitfully knowing that those members were under no such obligation and that it had no such entitlement.

198 Recognising that the evidence does not support such a finding of deliberateness, and that ASIC does not allege and has not established that any other mental element was involved in the contraventions, I turn to the parties' other submissions concerning the nature and extent of the conduct in question and the circumstances in which that conduct took place.

199 ASIC contends, and the defendants accept, that the "superannuation context" is a relevant matter for the Court to consider in assessing the appropriate pecuniary penalty. I agree. The present case is one involving "compulsory" superannuation where employers have entered into arrangements with MLC Nominees (and, later, NULIS) to hold and manage, as a superannuation trustee, contributions to superannuation that they (the employers) were required to deduct from the salaries of their employees. In this arrangement, each employee who became a member of the fund was a very small cog in a very large wheel. What is more, MLC Nominees (and, later, NULIS) effectively had complete management control over the superannuation fund with power to determine the terms on which the accumulated contributions of members were to be held and managed, subject of course to the requirements of applicable legislation and the general law.

200 I accept that, in that arrangement, there was an asymmetry of knowledge between, on the one hand, MLC Nominees (and, later, NULIS) as trustee and, on the other hand, the members as individuals. Each individual member was entitled to expect that MLC Nominees (and, later, NULIS) would provide accurate information to him or her in respect of his or her accumulated

superannuation savings, including as to the fees, charges and other deductions which MLC Nominees (and, later, NULIS) was properly entitled to make in performing its functions. It can be taken that members would not knowingly permit unauthorised fees and charges to be deducted from their savings and would be justifiably angered by the assertion of a false entitlement to do so.

201 The no-adviser members were badly let down by MLC Nominees in this regard because, plainly, MLC Nominees misrepresented the true position to these members about their obligation to pay plan service fees. This is particularly so in circumstances where MLC Nominees had informed members that it was putting in place a fee structure that was transparent and easier for members to understand, and which improved an individual member's control over fees. I accept, as ASIC submits, that the stated purposes for the new fee structure would have fuelled members' expectations that the information they were receiving about plan service fees was accurate. So far as members were concerned, MLC Nominees was best placed to know the terms and conditions on which members' superannuation savings were being held and managed.

202 Curiously, MLC Nominees contends that the introduction of the plan service fee should be taken as a significant mitigating factor in the assessment of penalty. I say "curiously" because, whatever merit may have attended the introduction of that fee as a replacement for the previous commission-based fee, MLC Nominees' false or misleading representations to no-adviser members effectively subverted the professed objects for which the plan service fee was introduced.

203 While these circumstances must be borne in mind, I do not accept, as ASIC appeared to suggest in its written submissions, that a contravention of s 12DB of the ASIC Act is necessarily more serious than a contravention of the corresponding provision in s 29 of the Australian Consumer Law, attracting more substantial penalties as a result. Similarly, I do not accept that a more substantial penalty for a contravention of s 12DB is necessarily warranted when the contravening conduct is undertaken by a trustee towards a beneficiary, as ASIC also appeared to suggest in its written submissions. When determining the appropriate pecuniary penalty, the injunction of s 12GBA(2)(a) and (b) of the ASIC Act is to have regard to the nature and extent of the act or omission giving rise to the contravention, and to the circumstances in which the act or omission takes place. The injunction is not to impose, automatically, higher penalties on

certain actors compared to others, or to impose, automatically, higher penalties when certain circumstances exist.

204 Further, I do not accept that it is appropriate, as ASIC contends, to have regard to the circumstance that, concurrently, MLC Nominees has admitted that it failed to adhere to its separate obligation under s 912A(1)(a) of the Corporations Act to act efficiently, honestly and fairly in relation to the provision of the financial services that were covered by its licence. The penalty that the Court is tasked with imposing is, as I have said, for the contraventions of s 12DB of the ASIC Act with respect to no-adviser members, not other contraventions. I accept MLC Nominees' submission that coupling its contraventions of s 12DB of the ASIC Act with its admitted contravention of s 912A of the Corporations Act for the purposes of assessing penalty, would be, in effect, to penalise it for contravention of s 912A when no such penalty is applicable.

205 I have also remarked on the fact that, in assessing the penalty for contravention of s 12DB of the ASIC Act in respect of the no-adviser members, it is not appropriate for me to take into account MLC Nominees' conduct giving rise to the contraventions of s 12DB in respect of linked members. As I observed at [145] above, ASIC sought to do this when making submissions about the deliberateness of MLC Nominees' conduct. To repeat what I there said, I do not understand how this submission can be advanced when ASIC has accepted (and, I would add, when MLC Nominees has relied on ASIC's acceptance) that the evidence does not permit a finding that the contraventions of s 12DB by MLC Nominees were made deliberately.

206 In any event, for the purpose of assessing penalty in respect of MLC Nominees' contraventions of s 12DB in respect of no-adviser members, it would be inappropriate for me to take into account its conduct giving rise to its admitted contraventions of s 12DB in respect of linked members when the latter conduct will be subjected to the imposition of a separate penalty. MLC Nominees should not be punished twice for its conduct with respect to linked members.

207 Contrary to ASIC's submission, I am persuaded that it is appropriate to apply a course of conduct analysis. While I understand how it might be said that there is but one course of conduct (as MLC Nominees contends), I think the better view is that, in respect of no-adviser members, MLC Nominees engaged in three courses of conduct constituted by sending the letters, sending the "welcome kits" and sending the annual statements. Each mode of communication stands as a distinct and separate occasion of representational conduct, even though communicating the same false or misleading representations.

208 In reaching the view that a course of conduct analysis is appropriate, I accept ASIC's submission that, when each letter, "welcome kit" and annual statement (referred to in Declarations 2, 3 and 4) was sent to a no-adviser member, it was personalised to that member's particular account and to the amount that was claimed to be payable by that member as a plan service fee. Even so, the letters, "welcome kits" and annual statements were otherwise standard form documents, and were sent to no-adviser members in standardised circumstances. I propose to assess penalties on that footing. In doing so, I observe that the evidence that the parties have placed before me does not permit me to make a more specific finding as to the scope of each course of conduct than that the letters, "welcome kits" and annual statements were sent to no-adviser members for each of no fewer than approximately 220,000 accounts and that, in the ordinary course, for each of the approximately 220,000 accounts, the no-adviser member would have received one or more of those documents.

209 Even though MLC Nominees conduct resulted in the unauthorised deduction of a very large sum from the accounts of no-adviser members ($33.62 million), I do not think that this deduction stands as loss or damage for the purposes of s 12GBA(2)(a) of the ASIC Act, although it is true that the no-adviser members were exposed to a potential loss of that magnitude by MLC Nominees' conduct. The exposure to that risk is a circumstance to be taken into account in assessing penalty. But, as events have transpired, the no-adviser members have been fully remediated for the amounts that were deducted, and appropriate external assurance has been undertaken to confirm that such remediation has taken place. This too must be taken into account in assessing penalty.

210 As to the involvement of company officers in the contravening conduct, I note MLC Nominees' submission that there is no evidence before the Court that its senior management drafted or communicated the false or misleading representations. The difficulty with that negative proposition is that I do not know (because MLC Nominees has not told the Court) who was responsible for causing the representations to be made, or who sanctioned them, or what MLC Nominees means by "senior management". I think it is highly unlikely that the representations came to be made because of the acts or omissions of junior functionaries. They must have been caused to be made and sanctioned by officers holding positions of significant responsibility and thus positions of seniority commensurate with that responsibility.

211 Another difficulty with the proposition is that it appears to be personalised to MLC Nominees itself. If that was MLC Nominees' intention, I do not accept that it can hide behind the fact

that the making of the representations might have stemmed from MLC's administration of TUSS. This is because MLC Nominees could not have carried out its role as trustee without MLC carrying out the day-to-day operations of TUSS. It is agreed that, in that regard, MLC Nominees was responsible for overseeing and monitoring MLC's delivery of services in respect of the superannuation funds of which MLC Nominees was trustee.

212 On the state of the evidence, ASIC was driven to submit that the ultimate responsibility for the approval and distribution of the relevant documents rests with MLC Nominees' Board of Directors. In a sense, that is true. But, generally speaking, that proposition is equally true of all corporate contraveners and does not materially advance matters.

213 As to the application of s 12GBA(2)(c) of the ASIC Act, I do not accept that MLC Nominees' admitted contraventions of s 12DB in respect of linked members can stand as similar conduct which the Court has "previously found" MLC Nominees to have engaged in. With respect, to hold otherwise would not be a sensible reading of the provision or a sensible application of it to the case at hand. I accept, therefore, that, on the evidence before me, MLC Nominees has not previously been found by a court to have engaged in similar conduct.

214 As to deterrence, I accept ASIC's submission that it is appropriate to consider the scale of the business in which MLC Nominees was involved. I do not think that the corporate structure through which NAB operated its superannuation business, as it involved the MasterKey product, can be compartmentalised as MLC Nominees would have it. I certainly do not regard the position of MLC Nominees to be analogous with the position of the contravening corporation in *Schneider*.

215 Of particular significance in understanding the scale of that business are the administration fees and other revenue received by MLC in the 2012 to 2016 financial years referable to the MasterKey product (see [152] above); MLC's reported revenues and profits for those years in the segment of MLC's operations in which those fees and other revenue were reported (see [153] above); and the funds under management affected by Project SWiFT, the TERP Trade-Up and the Encompass Trade-Up (see [154] above). It would be artificial to look only at MLC Nominees' revenues and profits for those years (see [151]), which in no way realistically represent the size or scale of the business activities in which it was engaged. It would be a very limited focus to proceed on the basis that MLC Nominees carried on a substantial superannuation business in its own right (as MLC Nominees contends) without equally

acknowledging that it was only able to carry on that business with MLC conducting the day-to-day operations of TUSS.

216 I have already acknowledged that one of the circumstances of the case is that MLC Nominees exposed the no-adviser members to the risk of loss of, in aggregate, a very large sum. Of course, MLC Nominees is not to be penalised for deducting the plan service fees but for representing to non-members that it was entitled to do so and that they were obliged to pay that fee. ASIC has called in aid the notion of treble damages as indicating a penalty which would likely have a deterrent effect in respect of similar conduct. As I have recorded, MLC Nominees submits that recourse to the notion of treble damages is inapposite in the present case. That is so, but the purpose for which ASIC invoked the notion was limited to illustrating its central proposition that deterrence (both specific and general) will not be achieved where the only risk to the contravener is the possibility of disgorging, by way of penalty, an amount that is really no more than the wrongful gain that has been made.

217 Here, the aggregate amount of the plan service fees that were deducted throws light on the magnitude and seriousness of the conduct in question and has a role in setting the appropriate penalty, including by reference to its likely deterrent effect. But the fact remains that the conduct was not deliberate in the sense I have described (or shown to have been carried out with any other particular mental element), and remediation has been effected on MLC Nominees' initiative, or at least on the initiative of the entities standing behind it. These features of the case cannot be ignored.

218 As regards cooperation, I accept that MLC Nominees has provided considerable cooperation in dealing with its contraventions generally. However, the focus for present purposes is its contraventions of s 12DB. These contraventions were not acknowledged by MLC Nominees for some time (until May 2019), well after this proceeding had been commenced. On the evidence before me, I do not see how there could have been a cogent argument that contraventions of s 12DB were not involved. I will return to this topic when dealing with the second category of MLC Nominees' contraventions concerning linked members. But, as matters have transpired, MLC Nominees has acknowledged these contraventions concerning the no-adviser members and has worked cooperatively with ASIC, particularly in relation to this proceeding, in the ways referred to in the parties' submissions. This must be taken into account.

219 As I have noted, MLC Nominees and NULIS submit they have demonstrated their contrition and remorse for their contravening conduct, not only through an apology given to the Court in Mr Promnitz's affidavit, but through other public statements, specifically media releases dated 27 October 2016, 2 February 2017 and 26 July 2018, and in letters to members.

220 In oral submissions, ASIC challenged the sincerity of the apology given, arguing that, as delivered through Mr Promnitz, it is couched in formulaic language without descending to explain why, as Mr Promnitz said, the defendants "deeply regretted" their conduct or why they recognised the admitted contraventions to be "a very serious matter". ASIC went so far as to submit that the defendants have not proved their contrition as a matter of fact.

221 In oral submissions on this topic, ASIC drew particular attention to the media releases. With respect to the media release dated 27 October 2016 (dealing with the deduction of plan service fees from no-adviser member accounts), ASIC queried whether the statements signified contrition or were made only for public relations purposes.

222 There is some substance to these submissions. The media release of 27 October 2016 (which is on NAB letterhead) extols NAB's corporate culture; its strong track record of "delivering for our customers" and "doing the right thing"; its culture of "driving our continuous improvement within our wealth business"; and its "customer-centric" approach compared to many competitors who "elected to continue with commission-based legacy products". It is in this context that the media release acknowledges that "we didn't execute the change [resulting in the new plan service fee] well" and said "we're sorry to those customers affected". Even then the immediate context for this apology was NAB lauding its "proactive restructuring of corporate super fees"; "providing greater transparency"; and "providing better outcomes for many customers". Unfortunately, the media release has the tenor of not just a public relations exercise, but a marketing opportunity.

223 As to the apology given to the Court, I have no reason to doubt its genuineness as such, particularly as Mr Promnitz was not cross-examined. I accept, however, that it was expressed somewhat briefly and in formulaic language. It did not give me a sense of how seriously, in fact, MLC Nominees and those within the NAB Group actually viewed this conduct. I will return to the apology when dealing with the contraventions of s 12DB involving linked members.

224 I accept that MLC Nominees has demonstrated that, at the time of the contravening conduct, it had a corporate culture conducive to compliance. However, its fund governance was such that MLC did not report to MLC Nominees to confirm that fees deducted from members' accounts were applied for the purpose intended or as disclosed to members. Plainly, its systems clearly failed by not recognising that many members that were or came to be involved with the MasterKey product did not have a plan adviser. One would have thought that, before representing that no-adviser members were obliged to pay a plan service fee (intended to be paid to a plan adviser), steps would have been taken to confirm that each such member actually had a plan adviser to whom the fee was to be paid. One would have thought that alarm bells would have rung when the fees deducted from no-adviser members' accounts were paid to and retained by MLC itself. Apparently, they did not; at least not for an inexplicably long period of time. As I have said, the no-adviser members were badly let down in this regard.

225 I accept that, as MLC Nominees is no longer an RSE licensee and acting as a superannuation trustee, the need for specific deterrence is less relevant than it might otherwise have been had it remained such a licensee.

Conclusion

226 MLC Nominees' contraventions of s 12DB in respect of no-adviser members are very serious. However, I am not persuaded that these contraventions should attract a pecuniary penalty in the order of $60 million – $70 million, as ASIC contends. In my view, a penalty of that order is far in excess of that which is warranted, particularly to achieve the objectives of deterrence.

227 On the other hand, I do not think that the pecuniary penalty which MLC Nominees has proposed ($10 million) fully recognises the seriousness of its conduct or will achieve the objectives of deterrence, particularly general deterrence. As I have said, I accept that specific deterrence is less relevant than it might otherwise have been in MLC Nominees' case.

228 Assisted by the submissions that the parties have made, and taking into account the observations I have made at [196] – [225] above, I have come to the conclusion that a penalty of $22.5 million should be imposed. I have arrived at this amount by adopting a course of conduct approach which recognises that the contraventions can be grouped appropriately as three courses of conduct, each of which (on the available evidence) would warrant a penalty of $7.5 million. Having considered the totality principle, I do not think that the overall amount of $22.5 million requires adjustment.

MLC NOMINEES – DEDUCTION OF PLAN SERVICE FEE: LINKED ADVISER MEMBERS

ASIC's submissions

229 ASIC submits that the appropriate penalty for the contraventions of s 12DB(1)(g) and s 12DB(1)(i) of the ASIC Act with respect to linked members covered by Declarations 15, 16, 18, 19, 21, 22, 24, 25, 27, 28, 30 and 31 is in the range of $50 million – $60 million.

230 For these contraventions ASIC relies on the analysis and reasoning which informs its case in respect of the contraventions concerning no-adviser members. It says, however, that there are some differences between the two cases which "necessitate some adjustments".

231 First, it submits that, in the case of linked members, MLC Nominees' conduct was significantly more extensive—more types of documents were involved; more members were affected; and more fees were deducted (in excess of $59 million). The period of the contravening conduct was the same (just under four years). These differences are reflected in the number of declarations ASIC seeks, and the terms in which those declarations are expressed.

232 Secondly, different matter was misrepresented—in substance, that linked members did not have the right to "turn off" the plan service fee.

233 Thirdly, ASIC submits that the linked members had their own special need for accurate information about the fees they were charged, because of other failings by MLC Nominees. ASIC advances two reasons. The first reason is that, quite apart from each member's right to turn off the plan service fee, MLC Nominees had its own separate and independent right to do so on a member's behalf. As ASIC explains in its written submissions:

> 233. First, not only did the members have the right to turn off the Plan Service Fee but MLC Nominees had its own independent right to turn off the Plan Service Fee on their behalf. MLC Nominees' right arose under clause 4.4(a)(i) of the Licensee Remuneration Agreement between MLC Nominees and each Plan Adviser. MLC Nominees' right depended upon MLC Nominees first forming a reasonable belief that the Plan Adviser was no longer providing the member with the financial services to which the Plan Services Fee related. That was an important safeguard for linked members at the time they ceased employment and were transferred to MKPS because at that time they ceased to be entitled to receive any services from the Plan Adviser.

234 As is made clear in Declaration 10 (dealing with MLC Nominees' contravention of s 912A(1)(a) of the Corporations Act in respect of linked members), MLC Nominees did not have an adequate system to enable it to form a reasonable belief as to whether the plan advisers, who were receiving the plan service fee, were providing services to linked members, and it did

not, in fact, form any such belief upon the member transferring from MKBS to MKPS, when that consideration should have been within MLC Nominees' contemplation.

235 The second reason is that MLC Nominees issued Product Disclosure Statements which were defective in they did not explain that linked members in MKPS had the right to turn off the plan service fee or that linked members in MKBS would also have that right on ceasing employment and transferring to MKPS. This is covered by Declarations 11, 12 and 13 dealing with contraventions of s 1022A of the Corporations Act, and Declaration 33 dealing with contravention of s 912A(1)(a) of the Corporations Act. ASIC submits that MLC Nominees effectively undermined these safeguards, thus making its false or misleading representations more serious.

236 Fourthly, unlike the case with no-adviser members, the plan service fee was deducted from the accounts of linked members and was not retained by MLC but paid to plan advisers, some of whom were external to the NAB Group (in value, about two thirds of the plan advisers), and some of whom were part of the NAB Group (salaried or aligned advisers) - in value, about one third of the plan advisers.

237 ASIC submits that the Court can infer from the facts agreed in the SAFA that MLC Nominees and MLC received a direct commercial benefit from plan advisers receiving the plan service fee. This is because the MasterKey product was distributed by plan advisers who introduced employers to the product. Payment of the plan service fee was, therefore, an incentive to plan advisers to distribute the MasterKey product rather than a competitive superannuation product. Therefore, ASIC says, MLC Nominees and MLC derived an "obvious commercial benefit" from the "uninterrupted payment" of the plan service fee to plan advisers, albeit that the benefit cannot be quantified on the facts before the Court.

238 ASIC submits that MLC Nominees also received an indirect financial benefit. When the plan service fee was introduced, MLC Nominees assumed direct responsibility to pay the fee to plan advisers, which was not conditional on reimbursement of the fee from linked members. The fact that the plan service fee was deducted from the accounts of linked members (for an amount in excess of $59 million) meant that MLC Nominees did not bear the burden of that payment from its own resources.

239 ASIC submits that the NAB Group also derived a benefit from the contravening conduct because advisers who were part of the NAB Group (salaried or aligned plan advisers) received the plan service fee (in the amount of approximately $19.75 million).

240 It is convenient to record at this point that, as with the contraventions concerning no-adviser members, ASIC submits that the deduction of the plan service fees from the accounts of linked members represents loss or damage suffered as a result of MLC Nominees' contraventions. It is agreed that, ceasing employment and being transferred to MKPS, members ceased to be entitled to any services from plan advisers. While MLC Nominees provided these members with the plan adviser's contact number, it also operated its own free telephone, email and website services which provided the same general advice that might have been obtained from a plan adviser. ASIC submits that, in those circumstances, the right to turn off the plan service fee was obviously attractive to MKPS members. ASIC submits that, even though remediation has occurred, the fact that $59 million was deducted in fees is a measure of how important it was that members should not be misled.

241 Fifthly, unlike the case with no-adviser members, the remediation to linked members was not simply the disgorging of money paid to MLC. Total remediation in excess of $94.8 million has been paid to linked members. This sum comprises a refund of the deducted plan service fees, interest and Fund Tax. It was paid pursuant to a remediation scheme which was subject to external assurance by KPMG. The total remediation relates to remediation for the contraventions of s 12DB addressed in this section of the reasons, and remediation for the contraventions of s 12DB addressed in the next section of these reasons (involving NULIS). ASIC estimates that, in relation to the contraventions addressed in this section of the reasons, the remediation was in excess of $77.9 million.

242 As I have noted, the deducted plan service fees were paid to plan advisers. However, the remediation appears to have been funded from within the NAB Group. On the facts before me, it is not possible to be more specific about the source of funding other than to say that the remediation was not funded by MLC Nominees or NULIS or paid out of the MLC Super Fund.

243 Sixthly, on the question of the deliberateness, ASIC accepts, as I have already said, that the statements and admissions in the SAFA do not permit a finding that MLC Nominees' false or misleading representations to linked members were deliberately made. However, it refers, again, to the fact that MLC Nominees has not provided an explanation as to why the representations were made for such a prolonged period and to so many members.

244 ASIC submits that, when considering MLC Nominees' conduct in relation to linked members, it is important to note that, on some occasions, the representations were made when explicitly addressing the question: "How you can further reduce your fees". ASIC submits that this fact, together with the other documents that were consistently misleading about the plan service fee, and the defective Product Disclosure Statements, emphasises that the information that MLC Nominees chose to provide to members did not include the very information that was in the members' interests to receive. ASIC submits that the pattern of MLC Nominees' other contravening conduct demonstrates that it had a lack of regard for the interests of members, and that its conduct fell short of that required of a superannuation trustee.

245 Seventhly, ASIC submits that, in relation to these contraventions of s 12DB, MLC Nominees has shown only limited cooperation with ASIC's investigation. ASIC explains the position in its written submissions:

> 272. … MLC Nominees was aware from the outset that linked members in MKPS had a right to turn off the Plan Service Fee and that this was not disclosed to members.
>
> 273. Despite that knowledge, prior to retiring as Trustee on 1 July 2016 MLC Nominees had not lodged a breach notification with ASIC with respect to its unlawful conduct in relation to linked members in MKPS, including its contraventions of section 12DB and its contraventions of other provisions which proscribe misleading or deceptive conduct.
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> 274. Nor were the contraventions reported by NULIS until after concerns were raised and pressed by ASIC. In 2017, whilst investigating the case of no-adviser members, ASIC raised concerns about the Plan Service Fees being deducted from linked members in MKPS and the provision of fee information to those members. ASIC issued a number of section 912C notices and the Trustees responded. The Trustees acknowledged the right of linked members in MKPS to turn off the Plan Service Fees but did not volunteer or accept that the documents sent to members were misleading.
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> 275. On 27 October 2017 ASIC issued the Trustees with a document entitled "Outline of Suspected Offending by the NAB Group" in which ASIC expressed concern about contraventions of section 12DB in relation to information given to linked members in MKPS. When NAB and the Trustees responded, it was their view that the disclosure to members was "appropriate disclosure" and that the members were "properly informed" even though they had not been told of their right to turn off the fee.
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> 276. On 29 March 2018 the Trustees proposed remediation for linked members in MKPS, but only on a limited "opt-in" basis. They also maintained that there had been no unlawful conduct. ASIC insisted upon full remediation to which the Trustees agreed on 7 June 2018.
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> 277. On behalf of MLC Nominees, on 14 June 2018 a breach notice was finally lodged with ASIC by NULIS. The notice related to the unlawful conduct in relation to linked members in MKPS and for the first time identified

> contraventions of section 912A(1)(a) and section 12DA. Even then, no contravention of section 12DB was notified. This was the first breach notice lodged for conduct in relation to linked members in MKPS.
>
> 278. In these proceedings, MLC Nominees denied contraventions of section 12DB up until May 2019.

246 ASIC submits that, in light of these circumstances, only MLC Nominees' conduct after it made the admissions concerning contravention of s 12DB warrants consideration as cooperation for the purpose of penalty reduction. As with the case in respect of no-adviser members, MLC Nominees' consent to orders and agreement in relation to the SAFA should be taken into account as relevant cooperation. However, MLC Nominees' conduct in the period leading up to the making of the admissions was, according to ASIC, entirely reactive to ASIC and lacking proactivity, the hallmark of cooperation. ASIC says that MLC Nominees had done little, if anything, which it was not required to do by statute. ASIC submits that MLC Nominees (and NULIS) have not displayed an attitude that will ensure that this conduct will not happen again.

247 In its written submissions, ASIC justifies the imposition of a penalty in the range of $50 million – $60 million:

> 288. ASIC submits that a penalty in the range of $50m to $60m is an appropriate penalty in this case. A penalty in that range may be viewed as relatively low:
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> (a) when compared with the financial and commercial benefits to MLC Nominees from the contravening conduct ($59,073,846); and
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> (b) when compared with the penalty sought against MLC Nominees for the contraventions affecting the no-adviser members even though the contraventions for this part of the case were more serious.
>
> 289. However, the deterrence value of a penalty of, say, $60m, should not be considered in isolation. It should be considered in the light of the cost of remediation already incurred (unlike for no-adviser members).
>
> 290. A penalty of $60m would correspond to a penalty of $192 for each of the 313,078 contraventions which occurred in this case. Again, compared to the statutory maximum this is a small figure. Again, this comparison supports the conclusion that a penalty of $60m is not excessive.

MLC Nominees' submissions

248 MLC Nominees submits that the appropriate penalty for these contraventions of s 12DB(1)(g) and s 12DB(1)(i) is $8 million.

249 In advancing that penalty, MLC Nominees relies on the analysis and reasoning which informs the defendants' submissions in respect of the contraventions involving no-adviser members. In particular, it relies on the submissions made with respect to (what the defendants characterise

as) ASIC's misplaced reliance on the "superannuation context" (see [164] – [168] above) and ASIC's erroneous attempt to elevate s 12DB over cognate provisions in other legislation (see [170] above).

250 With respect to the circumstances of the case, MLC Nominees repeats its submissions concerning the reasons for the introduction of the plan service fee: see [171] – [172] above. It also argues that, even though the linked members were not told of their right to turn off the plan service fee, they were told that they could negotiate a lower fee and that the fee could be reduced. In these circumstances, MLC Nominees characterises the contravening representations as "incomplete", arguing:

> 216. In the Trustees' submission, MLCN's references to the topic "How you can further reduce your fees" in some of the documents do not render the misrepresentations more "pronounced" … . On the contrary, the presence in the documents of that information, although incomplete, is indicative of an intent on the part of MLCN to provide members with relevant information regarding their ability to control their fees.
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> 217. Similarly, that MLCN's stated purposes for introducing the PSF included improving members' control over fees indicates that MLCN made the representations in the context of changes designed to benefit members. ASIC does not suggest that MLCN lacked the purpose it stated; nor would the evidence support any such submission. Whilst the change was poorly executed, it was well-motivated.
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> 218. Of course, as reflected in the admissions made in the Consent Orders, the Trustees accept that the relevant disclosures should have been clearer and that they contravened s 12DB of the ASIC Act. However, the above context is pertinent in characterising the seriousness of the conduct.

251 In relation to the extent of its conduct, MLC Nominees submits, once again, that the false or misleading representations were made in standard form documents. It argues that the number or types of documents deployed do not necessarily mean that the seriousness of its conduct is thereby increased. This submission is related to MLC Nominees' further submission concerning the application of the course of conduct principle. In this connection, it submits that the representations were to the effect that linked members did not have the right to turn off the plan service fee whereas those in MKPS did have that right. These representations were made in six standard form, albeit personalised, documents (the letters and reference guides to all linked members; the letters and reference guides to each transferring member in the Encompass Trade-Up; the letters and reference guides to each transferring member in the TERP Trade-Up; the "welcome kits"; the "porting kits"; and the annual statements). The factual elements of each contravention of s 12DB in this group were similar in relevant respects. MLC Nominees submits that it is open to the Court to recognise this commonality by characterising

the conduct as forming a single course of conduct which attracts the penalty of $8 million it proposes.

252 However, MLC Nominees accepts that an alternative analysis is open, which treats the contraventions of s 12DB in relation to linked members as six courses of conduct referable to the six modes of communicating the representations. It submits that, if this is done, the penalty for each course of conduct should be closer to the maximum penalty for a single contravention. It submits that the significant overlap in the acts constituting each course of conduct should be recognised. Once again, it submits that it should not be punished twice for common contraventions.

253 In relation to the question of loss and damage, MLC Nominees disputes, as it did in the case of the no-adviser member contraventions, that the total sum deducted as plan service fees from the accounts of linked members is loss or damage to be taken into account for the purposes of s 12GBA(2)(a). It submits that remediation negates the existence of loss or damage and is, in fact, a mitigating circumstance in relation to penalty.

254 MLC Nominees also disputes that linked members necessarily obtained no benefit from remaining linked to a plan adviser. It argues, for example, that there may have been value in a member retaining a direct access relationship with a particular plan adviser with whom the member had a pre-existing relationship, even though the general advice which the plan adviser was required to provide was of the type which the member could obtain free from MLC Direct.

255 MLC Nominees further submits that there is no evidence before the Court that any member was, in fact, misled. In other words, there is no evidence of loss actually having been suffered. It submits that, to use the total amount of the plan service fees deducted from linked members' accounts as a measure of loss would be to assume that every member would have turned off the plan service fee if informed of the right to do so. It submits that this outcome is implausible and is not supported by any evidence before the Court.

256 In relation to the involvement of senior management, MLC Nominees repeats the submissions it makes in respect of the no-adviser member contraventions: see [181] above.

257 In relation to deterrence, MLC Nominees submits that the penalty proposed by ASIC in respect of this group of contraventions is manifestly excessive. It argues that the proposed penalty is more than is appropriate to secure deterrence and is, in fact, retributive when regard is had to the fact that full remediation of (approximately) $78 million has already been paid to the

affected linked members in respect of this group of contraventions. MLC Nominees developed this submission in the following way.

258 First, contrary to ASIC's submissions, it disputes that either it or MLC received a direct commercial benefit from plan advisers receiving the plan service fees. It points to the fact that neither it nor MLC received the amount of the plan service fees that were deducted ($59 million). What is more, an even greater sum has been paid to affected members as remediation.

259 Further, the fact that MLC Nominees and MLC might have received some form of intangible commercial benefit from plan advisers receiving the plan service fee, it does not follow that they gained a commercial benefit from making the contravening representations. It submits, once again, that there is no evidence that any affected linked member was, in fact, misled or would have turned off the plan service fee if informed of the right to do so.

260 Further, MLC Nominees submits that even if it be assumed that it and MLC received a commercial benefit from the continued payment of plan service fees to plan advisers, the value of that commercial benefit is not capable of being determined. Certainly, the quantum of the plan service fees deducted cannot be seen as representing an exchange of value between MLC Nominees and MLC, on the one hand, and plan advisers on the other.

261 Further, MLC Nominees takes issue with ASIC's reliance on the proposition that the continued deduction of plan service fees from linked members' accounts in MKPS relieved MLC Nominees of the burden of paying these fees itself. Although MLC Nominees accepts that its obligation to pay plan service fees to plan advisers was not conditioned on it being reimbursed by the members, it argues that if (as ASIC would have it) it ought itself to have turned off the plan service fees in respect of linked members in MKPS, it would follow that it would no longer have the burden of paying those fees. Similarly, if the linked members would have turned off the plan service fee upon being advised of that right, then, once again, MLC Nominees would have been relieved of that burden.

262 Thus, MLC Nominees submits:

> 258. In the Trustees' submission, the proposed penalty of $8 million with respect to linked member conduct by MLCN is sufficient to operate as an effective deterrent, particularly when viewed in conjunction with the full remediation undertaken by the Trustees and the substantial financial disadvantage occasioned on behalf of the Trustees by that remediation.
>
> 259. It is very unlikely that a sizeable penalty of $8 million, in addition to an existing loss from the misconduct of some $78 million in the form of remediation,

would be viewed as an acceptable cost of doing business.

263 In relation to the issue of cooperation, MLC Nominees submits that it has, in fact, demonstrated its cooperation in ASIC's investigation. In this connection, it relies on the submissions it advances in relation to the no-adviser contraventions at [186] above. It disputes ASIC's contention that it was aware from the outset that linked members in MKPS had a right to turn off the plan service fee and that this had not been disclosed. MLC Nominees argues that ASIC's contention suggests that it had engaged in deliberate conduct, when the agreed position is that the false or misleading representations were not deliberately made and there is no evidence to suggest the contrary.

264 Contrary to ASIC's submission, MLC Nominees says that its initial position in relation to whether s 12DB had been contravened does not signify any lack of cooperation on its part, but merely a difference of opinion between the defendants and ASIC, during the course of ASIC's investigation, as to the existence of a "right" to "turn off" the plan service fee, and the adequacy of the defendants' disclosures.

265 At the time, the defendants' point was that they did disclose to members that they could negotiate the plan service fee with the linked plan adviser. They contended that this "right" to negotiate did not preclude the possibility of reducing the plan service fee to "zero". They expressed the view that linked members in MKPS were properly informed of the right to negotiate and were, thereby, empowered to take action to reduce the plan service fee. In reliance on this argument, MLC Nominees submits that the question of whether the defendants had engaged in unlawful conduct was "nuanced".

266 MLC Nominees argues that, despite the defendants' view that there had been no unlawful conduct, they agreed, nonetheless, to implement the remediation process and thus "showed a high degree of cooperation with ASIC's investigation". MLC Nominees submits that this cooperation reduces the need for specific deterrence and entitles it to a discount in penalty. Relatedly, it argues that, as the plan service fee has been discontinued, the misconduct in this proceeding cannot re-occur.

267 MLC Nominees also repeats the submissions it makes in respect of its contrition: see [187] above. It argues that, as is the case with the no-adviser contraventions, full remediation in respect of the linked members in MKPS, in advance of the commencement of the present proceeding, is a further sign of contrition.

268 MLC Nominees also repeats its submissions with respect to the existence of a corporate culture that is conducive to compliance and a willingness to take corrective steps: see [188] – [193] above.

269 In their written submissions, MLC Nominees summarised the justification for the imposition of a pecuniary penalty of $8 million:

> 276. Having regard to all of the relevant factors addressed above, MLCN respectfully submits that a pecuniary penalty of $8 million is an appropriate penalty in the circumstances of this case. In particular:
>
> a) a penalty of $8 million is a significant penalty with substantial deterrent effect, which appropriately recognises the gravity of the conduct, including its nature, extent and duration;
>
> b) whilst MLCN's position as a superannuation trustee is relevant, for the reasons canvassed above, this is not a matter which of itself justifies the substantial augmentation in penalty for which ASIC contends;
>
> c) the nature of the contravening conduct was less serious than the contravening conduct in relation to no-adviser members, in light of the following:
>
> i. the Trustee did expressly inform members that they could negotiate a lower fee or that the fee could be reduced; and
>
> ii. MLCN made the representations in the context of changes designed to benefit members;
>
> d) no member has suffered loss, as all members have been remediated with interest;
>
> e) by reason of the payment of remediation in circumstances where MLCN has not retained the PSF revenue, a significant financial disadvantage has already been borne on behalf of the Trustees, in the amount of approximately $78 million in respect of MLCN's linked member conduct;
>
> f) the conduct was not deliberate, nor is there any allegation that it was reckless or negligent;
>
> g) there is no evidence before the Court that the making of the false or misleading representations was the consequence of deliberate or reckless conduct by any member of the Board or senior management;
>
> h) MLCN has not previously been found by a court to have engaged in similar conduct;
>
> i) MLCN co-operated with ASIC's investigation, in particular by paying remediation on the basis requested by ASIC, and has co-operated with ASIC in the conduct of these proceedings;
>
> j) MLCN has shown contrition and remorse, including directly to the Court;
>
> k) the Court should afford credit to MLCN for the systems, processes and

frameworks in place which evidence a culture of compliance;

l) as MLCN is no longer an RSE licensee and, separately, the PSF is no longer deducted from member accounts, the need for specific deterrence is less relevant here than in other cases; and

m) there is substantial commonality in the legal and factual elements of the contraventions with respect to linked members and the Court may have regard to the course of conduct principle as a useful tool of analysis.

Analysis

270 The false or misleading representations involved in this group of contraventions of s 12DB of the ASIC Act concern the right of linked members to "turn off" the plan service fee upon transferring to MKPS. In substance, MLC Nominees represented that linked members did not or would not have that right when, in fact, linked members did have or would have that right. I accept that the evidence does not permit a finding of deliberateness, in the sense of MLC Nominees embarking on a course of purposefully not informing linked members of their right to "turn off" the plan service fee, so as to dishonestly and deceitfully ensure that these members continued to pay that fee when transferred to MKPS. ASIC does not allege, and has not established, that any other mental element was involved in these contraventions.

271 The broad context in which these contraventions took place is the same as that discussed above. It will be appreciated that many of the findings I have made concerning MLC Nominees and its conduct concerning no-adviser members will apply equally with respect to this group of contraventions. There are, however, differences between the two groups of contraventions, which I will now address.

272 The present group of contraventions involves more extensive representational conduct having regard to the number of occasions on which the conduct took place and the number of linked members' accounts involved. In my view, the present group of contraventions is best analysed as involving six distinct and separate occasions of representational conduct (the letters and reference guides to all linked members (Declarations 15 and 16); the letters and reference guides to each transferring member in the Encompass Trade-Up (Declarations 18 and 19); the letters and reference guides to each transferring member in the TERP Trade-Up (Declarations 21 and 22); the "welcome kits" (Declarations 24 and 25); the "porting kits" (Declarations 27 and 28); and the annual statements (Declarations 30 and 31)), even though the substance of MLC Nominees' representations was the same. As with the no-adviser member contraventions, each communication was personalised to a particular member's account but, once again, the occasions when those communications were made were standardised. The

evidence as to the scope of each course of conduct is more specific than the evidence available for the no-adviser member contraventions.

273 Unlike the case with no-adviser members, the plan service fee which MLC Nominees continued to deduct from the accounts of linked members in MKPS was in fact paid to plan advisers, including those employed by, or aligned with, NAB. I accept that the continued payment of that fee to plan advisers was of benefit to MLC Nominees and MLC because, in all likelihood, it would have functioned as an ongoing incentive for plan advisers to recommend the MasterKey product to their clients. This is so even though the evidence does not support a finding of deliberateness or any other mental element on MLC Nominees' part.

274 MLC Nominees is correct to point out that there is no direct evidence that any of the affected linked members were, in fact, misled or would have "turned off" the plan service fee had they been explicitly informed of the right to do so. But I do not think that the absence of direct evidence precludes me from finding, as a matter of human experience and commonsense, that, in the main, linked members would not knowingly pay a fee which they had no obligation to pay. Of course, the value of the benefit that MLC Nominees or MLC is likely to have received in this regard is not capable of being determined in any concrete way.

275 I do not accept ASIC's written submission that the amount deducted as plan service fees from the accounts of linked members in MKPS ($59,073,846) stands as loss or damage for the purposes of s 12GBA(2)(a) of the ASIC Act. However, as with the case of the deductions made from no-adviser members' accounts, the aggregate amount deducted from linked members' accounts throws light on the magnitude and seriousness of the conduct in question and has a role in setting the appropriate penalty, including by reference to its likely deterrent effect.

276 Linked members have, of course, been fully remediated for the deductions that were made. This is a very important feature of this group of contraventions because the remediation did not simply involve the disgorgement of funds retained by MLC or some other entity within the NAB Group. The service plan fees were, in fact, paid away to plan advisers. As I have said, the remediation appears to have been funded from within the NAB Group. I accept MLC Nominees' submission that this remediation not only negates the existence of loss or damage, but also stands as a significant mitigating circumstance in relation to the assessment of penalty.

277 In relation to the involvement of senior management in the contraventions, I repeat the observations I made at [210] – [212] above.

278 I reject MLC Nominees' characterisation of its contravening representations as "incomplete". There is a disturbing persistence by MLC Nominees and NULIS (see below) in advancing this contention. It relies on the fact that MLC Nominees and, later, NULIS advising linked members that they could negotiate the plan service fee with their plan advisers. As the argument runs, by informing linked members that they could negotiate the plan service fee with their plan advisers, linked members were empowered to control the amount of fees they paid, including by negotiating a "zero" amount for such fees. This argument finds expression in correspondence between the defendants and ASIC and, regrettably, persists to the present time in the submissions made in this case.

279 The simple answer to this contention is that "turning off" the plan service fee was not a matter of negotiation between a linked member in MKPS and his or her linked plan adviser. It was an unrestricted right that members in MKPS could exercise unilaterally, simply by notifying the trustee. That is why the representations that MLC Nominees and NULIS made in this regard were false or misleading: whatever else they told the linked members about the plan service fee, they did not tell them that they (the linked members) had the right to "turn off" that fee when transferred to MKPS. The fact that MLC Nominees and NULIS persist with this contention leads me to conclude that they do not truly comprehend the nature and seriousness of the representations they each made in this regard. Indeed, the defendants' reliance on this contention causes them to submit that the contraventions involving linked members in MKPS are not as serious as the contraventions involving no-adviser members. I do not accept that submission. In fact, I reject it.

280 My concerns in this regard carry over into other aspects of the submissions, in particular the submissions advanced on the question of contrition. Here, the defendants rely, in part, on the media release of 26 July 2018 (dealing with the deduction of plan service fees from the accounts of linked members in MKPS) as conveying contrition. The media release (on MLC letterhead, with MLC clearly and explicitly shown as an NAB company) includes the following statement:

> As advisers moved away from the commission-based remuneration, the Plan Service Fee allowed us to make the fee structure in MKPS simpler, more transparent and easier to understand. It gave members greater visibility of their adviser fees, replaced commission payments that had previously been bundled into administration fees and allowed members to agree the level of fee with their adviser.

281 I pause to note once again that the position of linked members in MKPS was not that they could agree upon the level of fee with their adviser, they could simply "turn off" the fee.

282 The media release continues:

> MKPS members regularly received the contact details of their financial adviser through communications such as their annual statements, but where we let our members down is that we did not clearly explain that they could elect to not have this service and they could turn off the fee. That is why we will fully refund MKPS members for any Plan Service Fees paid while in the product.

283 The difficulty with this paragraph of the media release is that it links the fee, which could be "turned off", to a service which the linked member could elect not to receive. But, as I have recorded (at [15] above), upon a linked member ceasing employment and being automatically transferred to MKPS, there was no provision for any services to be provided by the plan adviser. Although each linked member was provided with a contact number for his or her plan adviser, and the member could contact the plan adviser to obtain general advice on a range of matters, MLC Nominees and NULIS, at the same time, offered the MLC Direct service from which all members, including linked members in MKPS, could obtain free of charge general advice on the same range of matters as generally available from plan advisers.

284 The defendants suggested that there may have been value to members in retaining contact with a plan adviser based on a pre-existing relationship. Arguably this might be so, but there was no evidence of that fact and I doubt that that would have been the case for a great many linked members. Indeed, it is an agreed fact that, while it was trustee, MLC Nominees did not obtain any information about whether there were any agreements by plan advisers to provide services to linked members after those members ceased employment (i.e., transferred to MKPS).

285 I am not persuaded that linked members in MKPS would have seen any value in paying a plan service fee to a nominated plan adviser when the same advice, if sought, could be obtained free of charge from MLC Direct. In my view, the linking in the media release of a plan service fee, which did not have to be paid, to a service for which no provision was made in the MasterKey product and which could be obtained free of charge from MLC Direct, is illusory, especially when it is not known as a matter of fact whether any plan advisers actually provided any services to linked members in MKPS. The fact that within the NAB Group it was decided that there should be full remediation for the plan service fees deducted from the accounts of all linked members in MKPS suggests that, as a matter of commercial reality, those responsible

for making the remediation decision within the NAB Group recognised, and fully appreciated, that lack of value.

286 Further, while I have already recorded my acceptance that the apology given through Mr Promnitz's affidavit is genuine, the brevity of that apology does not assuage my concern that the defendants still do not truly comprehend the nature and extent of the seriousness of the contraventions of s 12DB that occurred with respect to linked members.

287 Without derogating from these observations, I nevertheless accept, once again, that, as MLC Nominees is no longer an RSE licensee and acting as a superannuation trustee, the need for specific deterrence is less relevant than it might otherwise have been had it remained such a licensee.

288 I also accept, once again, that MLC Nominees has provided considerable cooperation in dealing with its contraventions generally. However, I repeat my observation at [218] above that, on the evidence before me, I do not see how there could have been a cogent argument that contraventions of s 12DB were not involved, especially when the elision involved in treating an asserted right to negotiate the amount of plan service fees as tantamount to the right to "turn off" those fees is exposed. Nevertheless, MLC Nominees has worked cooperatively with ASIC in relation to this proceeding, and this must be taken into account.

289 As with the contraventions involving no-adviser members, I accept that MLC Nominees has demonstrated that, at the time of the contravening conduct, it had a corporate culture conducive to compliance. However, MLC Nominees did not have in place an adequate system to enable it to form a reasonable belief about whether plan advisers were providing services to linked members in MKPS to which the plan service related. Indeed, the parties agree that, had such a belief been formed, MLC Nominees should, itself, have "turned off" the plan service fee. Most importantly for present purposes, there was an abject failure on the part of MLC Nominees to recognise the clear difference between linked members having the ability to negotiate fees and their right to terminate the plan service fee on being transferred to MKPS, without negotiation.

290 Finally, for completeness, I record that, when discussing the circumstances of the case, ASIC's submissions tended to stray into other contraventions which MLC Nominees has admitted. As I stressed above, in assessing the pecuniary penalty that should be imposed, the focus must be the admitted contraventions of s 12DB.

Conclusion

291 MLC Nominees' contraventions of s 12DB of the ASIC Act in respect of linked members in MKPS are also very serious. As I have explained, these contraventions are also more extensive than its contraventions in respect of no-adviser members. I am not persuaded, however, that a pecuniary penalty of the magnitude sought by ASIC ($50 million - $60 million) is warranted. On the other hand, the penalty for which MLC Nominees contends ($8 million) does not recognise the seriousness of its contraventions or the extent to which the representations were made. Further, it would not achieve the objectives of deterrence.

292 I am satisfied that the appropriate pecuniary penalty for these contraventions is $27 million. I have arrived at this penalty by adopting, once again, a course of conduct approach in which the contraventions can be grouped appropriately as six courses of conduct warranting penalties as follows: for the contraventions covered by Declarations 15 and 16, $6 million; for the contraventions covered by Declarations 18 and 19, $4 million; for the contraventions covered by Declarations 21 and 22, $4 million; for the contraventions covered by Declarations 24 and 25, $4 million; for the contraventions covered by Declarations 27 and 28, $4 million; and for the contraventions covered by Declarations 30 and 31, $5 million. Each component amount takes into account the extent to which the contravening representations were made on the occasion in question. Each component also takes into account the significant sum paid to effect remediation, recognising that the deductions made for plan service fees were not retained by MLC Nominees, MLC or any other entity within the NAB Group. But for the payments for remediation, a greater overall penalty would have been warranted. I do not think that the overall amount of $27 million otherwise requires adjustment. I am satisfied that a pecuniary penalty of this order, seen with the payments for remediation, is appropriate to achieve the objectives of deterrence.

NULIS – DEDUCTION OF PLAN SERVICE FEE: LINKED ADVISER

ASIC's submissions

293 ASIC submits that the appropriate penalty for the contraventions of s 12DB(1)(g) and s 12DB(1)(i) of the ASIC Act covered by Declarations 37 and 38, and 40 and 41, in respect of linked members, is in the range of $10 million – $12 million. The false or misleading representations made by NULIS were in substantially the same form as those made by MLC Nominees to linked members. Once again, ASIC relies on the analysis and reasoning which informs its case in respect of the contraventions concerning no-adviser members and aspects

of its submissions in respect of MLC Nominees' contraventions relating to linked members. There are, however, some differences between its case against NULIS and its case against MLC Nominees in relation to linked members.

294 ASIC accepts that, in every respect, NULIS' conduct was less extensive. NULIS commenced as trustee on 1 July 2016 when the structure through which NAB conducted its superannuation business changed. The plan service fee was discontinued by September 2018. Fewer types of documents were issued containing false or misleading representations; the conduct involved 144,033 account-holders; and $12,813,076 was deducted for plan service fees. Of the total amount deducted, just over $9 million was paid to external plan advisers, with the rest paid to plan advisers who were employed in or aligned with the NAB Group. Of the sum paid to remediate all linked members, $16,897,241 (according to ASIC) should be taken as referable to the case against NULIS. However, the cost of remediating linked members arising out of NULIS' conduct has not been paid from its assets.

295 NULIS was a profit-earning entity in its own right. For the 2017 and 2018 financial years, it earned profits of approximately $217.66 million and $268.63 million, respectively. The revenue contribution to those profits from the MasterKey product in each year was approximately $170.77 million and $166.81 million, respectively. In each of those financial years, NULIS' immediate parent, NWMSL earned profits of $152.65 million and $178.53 million, respectively. It received revenue referable to the MasterKey product of approximately $13.7 million and $9.4 million, respectively. As at 30 June 2018, NULIS had 16.33% market share of the managed funds in Australia's retail superannuation section and 5.73% market share of the managed funds in Australia's entire superannuation section, with over $101.4 billion funds under management.

296 Once again, ASIC accepts that the statements and admissions made in the SAFA do not permit a finding that NULIS' false or misleading representations were made deliberately. Nevertheless, ASIC submits that, when NULIS succeeded MLC Nominees as trustee, it had a fresh opportunity to consider and form a reasonable belief about whether linked members in MKPS were receiving services to which the plan service fee related. ASIC points to the fact that NULIS accepts that, upon becoming trustee, it did not form a reasonable belief that plan advisers were no longer providing linked members in MKPS with the financial services to which the plan service fee related. ASIC submits that this is a reason why linked members were in need of accurate information about their own right to turn off the plan service fee.

297 ASIC submits that there has been no relevant cooperation by NULIS with ASIC's investigation in relation to linked members. NULIS has not lodged a breach report in respect of its own conduct. It only made admissions in respect of its own conduct in May 2019. ASIC submits that NULIS' conduct does not indicate a resolve by it to comply with the law.

298 In its written submissions, ASIC summarised the justification for the penalty it seeks:

> 319. Although less extensive, the case against NULIS is serious and warrants a significant penalty. As with MLC Nominees, a significant penalty is also necessary in order to achieve the object of deterrence having regard to the highly profitable superannuation business on the largest scale which is conducted through NULIS and the significant benefits which NULIS stood to gain from the contraventions. For the reasons outlined in Part G above, NULIS stood to receive commercial and financial benefits from Plan Service Fees being paid to Plan Advisers just as MLC Nominees had previously. The benefits NULIS stood to receive were no less valuable than the $12,813,076 which was paid for it.
>
> 320. Whilst some discount is warranted for the admissions now made by NULIS in these proceedings, no discount is warranted for co-operation with ASIC's anterior investigation.
>
> 321. ASIC submits that a penalty in the range of $10m to $12m is an appropriate penalty in the case against NULIS. Again, a penalty in that range may seem relatively low because of all the matters referred to above and a comparison with the potential gains to NULIS from the contravening conduct, but the deterrence value of the penalty needs to be considered in the light of the cost of remediation which NAB has already incurred.
>
> 322. A penalty of $12m would correspond to a penalty of only $83 for each of the 144,033 contraventions which occurred in this case. This comparison supports the conclusion that a penalty of $12m is not excessive.

NULIS' submissions

299 NULIS submits that the appropriate penalty for these contraventions of s 12DB is $2 million. It identifies, correctly, that these contraventions are, effectively, a continuation of the linked member conduct engaged in by MLC Nominees, involving standard form communications to linked members containing false or misleading representations in substantially the same form. For this reason, NULIS submits that the submissions made with respect to MLC Nominees' conduct affecting linked members have equal application, except for some distinguishing features.

300 In relation to NULIS' contraventions, the communications fall into two categories: "porting kits" in respect of members transferring from MKBS to MKPS, and annual statements. NULIS submits that it is open to the Court to recognise the commonality of the contraventions by characterising them as one course of conduct. NULIS also recognises, however, that the

contraventions could be grouped as two, separate courses of conduct. If so grouped, NULIS submits that each course should attract a lesser penalty which, it argues, should be close to the maximum penalty for a single contravention.

301 NULIS stresses ASIC's acceptance that, in every respect, its conduct was less extensive than MLC Nominees' conduct in connection with linked members. Further, the quantum of plan service fees deducted from linked members in MKPS was $12,813,076.

302 The defendants supplemented the evidence concerning NULIS' financial position so as to show NULIS' and NWMSL's revenues and profits, and the NAB Wealth segment's income and profits, for the 2019 financial year and the first half of the 2020 financial year. The defendants submitted that, if in assessing penalties the Court were to have regard to the scale of profitability of the wider business group in which MLC Nominees and NULIS functioned, it should take into account the most recent financial information of the relevant entities and business segments. The defendants highlighted these features: NULIS' profit before income tax expense has declined from $268.63 million in the 2018 financial year to $77.17 million for the first half of the 2020 financial year (a decline of approximately 42% if the figure for the first half of the 2020 financial year is annualised); and NAB Wealth's cash earnings before tax and distributions have declined in the period 2012 to 2020 from a peak of $732 million in the 2012 financial year to $58 million for the first half of the 2020 (a decline of approximately 84% since 2012 and 66% since 2018 if the figure for the first half of the 2020 financial year is annualised).

303 NULIS submits that the penalty sought by ASIC is manifestly excessive for the purposes of deterrence, particularly when viewed with the fact that full remediation has been undertaken in respect of the affected members. It submits that it is very unlikely that a penalty of $2 million, taken with remediation of some $16 million, would be viewed as an acceptable cost of doing business.

304 In its written submissions, NULIS summarised the justification for a penalty of $2 million:

> 302. Having regard to all of the relevant factors addressed in Part E and in this Part F above, NULIS respectfully submits that a pecuniary penalty of $2 million is an appropriate penalty in the circumstances of this case. In particular:
>
> a) a penalty of $2 million is a significant penalty with substantial deterrent effect, which appropriately recognises the gravity of the conduct, including its nature, extent and duration;
>
> b) whilst NULIS' position as a superannuation trustee is relevant, for the

reasons canvassed above, this is not a matter which of itself justifies the substantial augmentation in penalty for which ASIC contends;

c) the nature of the contravening conduct was less serious than the contravening conduct in relation to no-adviser members, in light of the following:

   i. NULIS *did* expressly inform members that they could negotiate a lower fee or that the fee could be reduced;

   ii. NULIS had an entitlement to deduct the PSF from member accounts in the absence of a determination under the equivalent LRA that PSFs should be switched off;

d) no member has suffered loss, as all members have been remediated with interest;

e) none of the PSFs deducted from linked members were retained by NULIS or by any other entity in the NAB Group. Rather, the PSFs were transferred to individual Plan Advisers;

f) by reason of the payment of remediation in circumstances where NULIS did not retain the PSF revenue, a significant financial disadvantage has been suffered;

g) NULIS has not previously been found by a court to have engaged in similar conduct;

h) the conduct was not deliberate, nor is there any allegation that it was reckless or negligent;

i) there is no evidence before the Court that the making of the false or misleading representations was the consequence of deliberate or reckless conduct by any member of the Board or senior management;

j) NULIS co-operated with ASIC's investigation, including by remediating members on the basis requested by ASIC, and has co-operated with ASIC in the conduct of these proceedings;

k) NULIS has shown contrition and remorse;

l) the Court should afford credit to NULIS for the systems, processes and frameworks in place which evidence a culture of compliance;

m) as the PSF is no longer deducted from member accounts, the need for specific deterrence is less relevant here than in other cases; and

n) there is substantial commonality in the legal and factual elements of the contraventions with respect to linked members and the Court may have regard to the course of conduct principle as a useful tool of analysis.

Analysis

305 The contraventions of s 12DB of the ASIC Act by NULIS with respect to linked members corresponds to MLC Nominees' contraventions discussed at [229] – [292] above, as recognised in the parties' submissions. NULIS' conduct was, effectively, a continuation of the conduct engaged in by MLC Nominees in that regard. Therefore, the observations I have made about

MLC Nominees' conduct apply equally to NULIS. I will, however, draw attention to some particular matters.

306 I accept that the evidence does not justify a finding that NULIS' conduct was deliberate in the sense I have discussed. Further, ASIC does not allege, and has not established, that NULIS acted with any other particular mental element. I also accept that NULIS' conduct in respect of linked members was less extensive than MLC Nominees' conduct. However, the observations I have made above at [280] – [288] concerning cooperation and contrition apply equally to NULIS. So, too, do the observations I made about the involvement of senior personnel in the conduct: see [277] above with reference to [210] – [212]. Nevertheless, despite its failings, I am satisfied that NULIS has a corporate culture that is conducive to compliance: see, in that regard, the matters I have noted at [289] above.

307 Unlike MLC Nominees, NULIS remains a superannuation trustee holding an RSE licence. However, like MLC Nominees, NULIS has not been found by a court to have engaged in similar conduct previously.

308 Contrary to ASIC's submissions, I am satisfied that a course of conduct approach is warranted. Although NULIS had argued that its conduct involves one course of conduct, the better view for the purpose of assessing an appropriate penalty is that two courses of conduct were involved—the sending of the "porting kits" and the sending of the annual statements. On each separate occasion, the false or misleading representations were made.

Conclusion

309 NULIS' contraventions of s 12DB of the ASIC Act in respect of linked members in MKPS are very serious. Those contraventions should attract a pecuniary penalty commensurate with the penalty to be imposed for MLC Nominees' similar contraventions. I am satisfied that the appropriate pecuniary penalty is $8 million. I have arrived at this penalty by adopting, once again, a course of conduct approach in which I have determined that $4 million should be attributable to the contraventions covered by Declaration 36 and $4 million should be attributable to the contraventions covered by Declarations 39. Each component takes into account the extent to which the contravening representations were made on the occasion in question. Each component also takes into account the fact that payments have been made by way of remediation. Once again, but for the payments for remediation, a greater overall penalty would have been warranted. I am satisfied that the overall amount of $8 million does not

otherwise require adjustment. I am satisfied that it is a pecuniary penalty which, when seen with the payments for remuneration, is appropriate to achieve the objectives of deterrence.

OTHER OBSERVATIONS

310 There are two further observations I wish to make.

311 The first concerns the updated financial information that the defendants have placed before the Court. The defendants submit that, while it might be too early to reliably assess the impact of the COVID-19 pandemic on the financial position of NULIS, and more broadly on the financial position of NAB Wealth, it is appropriate for the Court to assess penalties that would be sufficient to act as an effective deterrent in light of the unprecedented upheaval caused by the pandemic and the consequent uncertain economic outlook.

312 ASIC takes issue with the significance of the updated financial information that the defendants have placed before the Court. It submits that the additional evidence has been presented at a high level of generality and disputes the fact that it shows any material change in the financial position of NULIS or NAB Wealth. It submits that the financial position which the defendants have projected is likely to be more complex, and has provided various examples of why that is so.

313 I am not persuaded that the updated financial information alone shows any material change in financial circumstances that would warrant any different view on the pecuniary penalties that should be imposed. MLC Nominees operated, and NULIS operates, as a superannuation trustee in a very large business within the MLC Wealth segment of the NAB Group. In setting the appropriate level of penalty, this fact must be recognised.

314 The second observation I wish to make concerns the large number of cases arising under the ASIC Act and the Australian Consumer Law which the defendants, in particular, have drawn to my attention for the purpose of illustrating the quantum of pecuniary penalties that have been imposed by the Court for contraventions involving the making of false or misleading representations. As I have previously remarked, because of the variety of facts and circumstances presented, the analogical value of such cases can be very limited or even non-existent. I have found that to be the case here. The facts and circumstances of the present case are unique.

DISPOSITION

315 For the reasons I have given, I will order that MLC Nominees pay a pecuniary penalty of $22.5 million for its contraventions of s 12DB of the ASIC Act in respect of no-adviser members and a penalty of $27 million for its contraventions of 12DB in respect of linked members. I will order that NULIS pay a pecuniary penalty of $8 million for its contraventions of s 12DB in respect of linked members. I will grant the declarations and make the other orders that the parties, by agreement, propose.

I certify that the preceding three hundred and fifteen (315) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates.

Associate: 

Dated: 11 September 2020