FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v MobiSuper Pty Limited [2022] FCA 990

File number:	SAD 237 of 2019
Judgment of:	**CHARLESWORTH J**
Date of judgment:	26 August 2022
Catchwords:	**CONSUMER LAW** – defendants operating and promoting a superannuation fund with insurance benefits – defendants and their representatives soliciting the custom of consumers – defendants promoting superannuation fund by offering to locate consumers' "lost super" and to consolidate their existing funds – alleged contraventions of provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) – defendants admitting facts – contravening conduct resulting in consumers not making informed decisions concerning their superannuation and insurance – instances of consumers losing the benefit of existing insurance cover attaching to existing superannuation accounts – Court satisfied contraventions proven on the admitted facts – declarations of contravention made – Australian Securities and Investments Commission seeking the imposition of pecuniary penalties in respect of some of the contraventions – parties agreeing the sum of pecuniary penalties – joint submissions proposing penalties at lowest end of permissible range having regard to the contravening conduct – parties submissions not wholly accepted – whether nonetheless appropriate to impose penalties in the amounts agreed by the parties
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAB, 12BB, 12DB, 12GBA *Corporations Act 200*1 (Cth) ss 50, 761A, 766B, 766C, 769B, 910A, 912A, 944A, 946A, 947D, 961, 961B, 961G, 961H, 961J, 961K, 961L, 1317E *Evidence Act 1995* (Cth) s 191 *Federal Court of Australia Act 1976* (Cth) ss 21, 43
Cases cited:	*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 399 ALR 599 *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* (2014) 234 FCR 343

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

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560

Australian Securities and Investments Commission v Allianz Australia Insurance Limited [2021] FCA 1062; 156 ACSR 638

Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2) [2020] FCA 69; 377 ALR 55

Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq) [2012] FCA 414; 88 ACSR 206

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

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

Australian Securities and Investments Commission v Marco (No 6) [2020] FCA 1781

Australian Securities and Investments Commission v MobiSuper Pty Ltd [2021] FCA 855

Australian Securities and Investments Commission v Westpac Securities Administration Ltd (2019) 272 FCR 170

Australian Securities Investments Commission v TAL Life Ltd (No 2) [2021] FCA 193; 389 ALR 128

Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482

Director of Fair Work Building Industry Inspectorate v Stephenson (2014) 146 ALD 75

QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2010] FCAFC 150; 204 IR 142

Sankey v Whitlam (1978) 142 CLR 1

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

Trade Practices Commission v CSR Limited [1990] FCA 762; ATPR 41-076

Westpac Securities Administration Limited v Australian Securities and Investments Commission (2021) 270 CLR 118

Division: General Division

Registry:	South Australia
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	138
Date of hearing:	13 December 2021
Counsel for the Plaintiff:	Mr S Senathirajah QC with Mr Luxton, Mr Boadle and Ms Johnston
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the First, Second and Fourth Defendants:	Mr Izzo SC with Mr Jones and Ms Mackenzie
Solicitor for the First, Second and Fourth Defendants:	Mills Oakley
Counsel for the Third Defendant:	The Third Defendant did not appear

ORDERS

SAD 237 of 2019

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**MOBISUPER PTY LIMITED (ACN 613 581 981)** First Defendant
	ZIB FINANCIAL PTY LIMITED (ACN 609 197 971) Second Defendant
	TIDSWELL FINANCAL SERVICES LIMITED (ACN 010 810 607) (and another named in the Schedule) Third Defendant

ORDER MADE BY:	**CHARLESWORTH J**
DATE OF ORDER:	**26 AUGUST 2022**

THE COURT NOTES THAT

A. The plaintiff (the Australian Securities and Investments Commission) the first defendant (MobiSuper Pty Limited), the second defendant (ZIB Financial Pty Limited) and the fourth defendant (Mr Andrew Richard Grover) have agreed to jointly propose orders to the Court on the basis of the Statement of Agreed Facts and Admissions (SAFA) marked Exhibit P1.

B. The first defendant and the second defendant undertake to the Court not to pay the pecuniary penalties and costs referred to in paragraphs 4 and 6 of the orders below from funds of members of the MobiSuper Division of the Tidswell Master Superannuation Plan (the Fund).

THE COURT DECLARES THAT:

1. In respect of the telephone calls made on the dates identified in Annexure A (Admitted Calls) by its customer service operators (CSOs) the first defendant provided personal advice within the meaning of s 766B(3) of the *Corporations Act 2001* (Cth) to each of the Consumers referred to in Annexure A, each of whom was a retail client.

2. The first defendant contravened:

   (a) s 946A of the *Corporations Act 2001* (Cth) by failing to provide a Statement of Advice in relation to the provision of personal advice to each of the Consumers, each of whom was a retail client and on each of the dates;

   (b) s 947D of the *Corporations Act 2001* (Cth) by failing to provide a Statement of Advice in accordance with s 947D in relation to the provision of personal advice to each of the Consumers; and

   (c) s 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth):

      (i) in trade or commerce;

      (ii) 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;

      (iii) by making false or misleading representations to each of the Consumers (on each of the dates) with respect to the price of services, that is, to the effect that Consumers could save fees in the relevant amount by opening an account with the Fund and consolidating or rolling over their superannuation into a Fund account (Fee Saving Representations), where those representations were with respect to a future matter and the first defendant did not have reasonable grounds to make any of those representations.

3. The second defendant ZIB Financial Pty Limited contravened:

   (a) s 961K(2) of the *Corporations Act 2001* (Cth) by reason of it being the responsible licensee for the contravening conduct of certain of its representatives (being the CSOs who conducted the Admitted Calls), who contravened s 961B of the *Corporations Act 2001* (Cth) by failing to act in the best interests of clients in the provision of personal advice to each of the Consumers in the Admitted Calls on each of the dates identified in Annexure A;

   (b) s 961K(2) of the *Corporations Act 2001* (Cth) by reason of it being the responsible licensee for the contravening conduct of certain of its representatives (being the CSOs who conducted the Admitted Calls), who contravened s 961H of the Act by failing to warn clients in the provision of

personal advice to each of the Consumers in the Admitted Calls (where the advice was based on incomplete or inaccurate information relating to the clients' relevant personal circumstances) in accordance with the requirements of s 961H of the *Corporations Act 2001* (Cth), on each of the dates identified in Annexure A;

(c) s 961L of the *Corporations Act 2001* (Cth) by failing to take reasonable steps to ensure that certain of its representatives (being the CSOs who conducted the Admitted Calls) complied with s 961B and s 961H of the *Corporations Act 2001* (Cth) in the provision of personal advice to each of the Consumers in the Admitted Calls; and

(d) s 912A(1)(a) of the *Corporations Act 2001* (Cth) by failing to do all things necessary to ensure that the financial services covered by the Australian Financial Services Licence Numbered 482464, provided by the first defendant (including by the CSOs), were provided efficiently, honestly and fairly, in that the second defendant:

(i) failed to ensure that no false or misleading representations were made by the CSOs to the Consumers;

(ii) failed to ensure that no personal advice was given by the CSOs to the Consumers;

(iii) failed to ensure that the CSOs acted in the best interests of the Consumers in relation to the provision of personal advice, in accordance with s 961B of the *Corporations Act 2001* (Cth);

(iv) failed to ensure that CSOs provided the warning required by s 961H of the *Corporations Act 2001* (Cth) to the Consumers; and

(v) failed to ensure that the first defendant gave to the Consumers Statements of Advice in accordance with s 946A of the *Corporations Act 2001* (Cth) and Statements of Advice meeting the requirements of s 947D of the *Corporations Act 2001* (Cth).

(e) s 912A(1)(a) of the *Corporations Act 2001* (Cth), by failing to do all things necessary to ensure that the financial services covered by the Australian Financial Services Licence Number 482464, provided by the first defendant (including by the CSOs), were provided efficiently, honestly and fairly, in that

during the relevant period the second defendant contravened s 961K(2) and s 961L of the *Corporations Act 2001* (Cth), as declared in sub-paragraphs (a) to (d) above.

THE COURT ORDERS BY CONSENT THAT:

4. On or before 24 October 2022:

   (a) pursuant to s 12GBA(1)(a) of the ASIC Act, the first defendant pay to the Commonwealth of Australia total pecuniary penalties of $125,000, in respect of the contraventions by the first defendant of s 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth), declared in paragraph 2(c) above;

   (b) pursuant to s 1317G(1E) of the *Corporations Act 2001* (Cth), the second defendant pay to the Commonwealth of Australia total pecuniary penalties of $125,000, in respect of the contraventions by ZIB of s 961K and s 961L of the Act, declared in paragraphs 3(a), 3(b) and 3(c) above.

5. The originating application, so far as it concerns each of the first defendant, the second defendant and the fourth defendant, is otherwise dismissed.

6. On or before 24 October 2022 the first defendant and the second defendant pay the plaintiff its costs of the claims against them fixed in the sum of $50,000.

7. Each of the first, second and fourth defendants are to bear their own costs, including the costs of the dismissed claims.

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

ANNEXURE A

Consumer	Indicative date of call	CSO involved in call
1	23 October 2017	JR
4	26 October 2017	NS
6	26 October 2017	MZ
8	23 October 2017	MS
10	18 October 2017	JV
11	18 October 2017	NS
14	21 November 2017	NS

REASONS FOR JUDGMENT

CHARLESWORTH J

1 The Australian Securities and Investments Commission (ASIC) alleged contraventions of the ***Corporations Act*** *2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) by four defendants, MobiSuper Pty Limited (Mobi), ZIB Financial Pty Limited (ZIB), **Tidswell** Financial Services Limited and Mr Andrew Grover.

2 The proceedings against Tidswell have been separately resolved: *Australian Securities and Investments Commission v MobiSuper Pty Ltd* [2021] FCA 855.

3 ASIC no longer presses its application for relief against Mr Grover. There will be an order dismissing the originating application insofar as it relates to him.

4 Mobi and ZIB have each admitted the facts that constitute the contraventions alleged against them and they do not oppose relief in the terms now sought.

5 The contraventions arise out the promotion of a division of the Tidswell Master Superannuation Plan (Tidswell Plan) known as the MobiSuper **Fund**, of which Mobi was the promoter and Tidswell was the trustee.

Summary of outcome

6 The purpose of these reasons is to set out the factual basis upon which the relief is based and to explain why the Court has formed its own view that pecuniary penalties in the amounts agreed by the parties are appropriate.

7 There will be a declaration pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) to the effect that Mobi provided "personal advice" within the meaning of s 766B(3) of the Corporations Act, and further declarations to the effect that Mobi contravened:

(1) s 946A of the Corporations Act by failing to provide Statements of Advice (as defined below) in relation to the provision of personal advice;

(2) s 947D of the Corporations Act by failing to provide Statements of Advice in accordance with the requirements of s 947D; and

(3) s 12DB(1)(g) of the ASIC Act by making false or misleading representations with respect to the price of services.

8 As against ZIB, there will be declarations pursuant to s 21 of the FCA Act and s 1317E of the Corporations Act to the effect that ZIB contravened:

(1) s 961K(2) of the Corporations Act, by reason of it being responsible licensee for the conduct of its representatives who contravened;

(a) s 961B of the Corporations Act, by failing to act in the best interests of clients in the provision of personal advice; and

(b) s 961H of the Corporations Act, by failing to warn clients in the provision of personal advice in accordance with the requirements of s 961H of the Corporations Act;

(2) s 961L of the Corporations Act, by failing to take reasonable steps to ensure that its representatives complied with s 961B and s 961H of the Corporations Act in the provision of personal advice;

(3) s 912A(1)(a) of the Corporations Act, by failing to do all things necessary to ensure that the financial services provided by Mobi and covered by the licence were provided efficiently, honestly and fairly; and

(4) s 912A(1)(a) of the Corporations Act, specifically by reason of ZIB's contraventions of s 961K(2) and s 961L of the Corporations Act referred to above.

9 In addition, there will be orders imposing pecuniary penalties in the amount of $125,000 against each of Mobi and ZIB for their respective contraventions of s 916K and s 961L of the Corporations Act and s 12DB(1)(g) of the ASIC Act.

10 It is convenient to begin with some undisputed background facts. Additional agreed facts will be set out in the course of considering each of the alleged contraventions.

BACKGROUND

11 The parties have signed a Statement of Agreed Facts and Admissions (SAFA) for the purposes of s 191 of the *Evidence Act 1995* (Cth). The following findings and conclusions are based on the facts agreed in the SAFA and for the most part are expressed in the chosen language of the parties with no substantial alteration. In many instances the matters agreed by the parties concern mixed issues of fact and law. I am satisfied that the parties' agreed position on those issues is in accordance with the relevant statutory provisions.

The relationship between ZIB, Mobi and Tidswell

12 At relevant times ZIB was the holder of an Australian Financial Services (AFS) licence, numbered 482464 (ZIB AFS Licence). It carried on a financial services business in Australia within the meaning of Ch 7 of the Corporations Act under the ZIB AFS Licence. Under the ZIB AFS Licence, Mobi was a corporate authorised representative as defined in s 761A of the Corporations Act. It, too, carried on a financial services business as defined.

13 Mobi and ZIB are part of a shared group management structure. They are related bodies corporate within the meaning of s 50 of the Corporations Act.

14 From around November 2016 Mobi and Tidswell discussed and commenced planning the establishment of a business relationship for a proposed superannuation fund, whereby:

(1) Tidswell, as trustee, would provide professional trustee services to Mobi and would launch the fund as a division of the Tidswell Plan; and

(2) Mobi would act as promoter of the Fund.

15 On 22 November 2016, Mobi and Tidswell executed an agreement, pursuant to which Tidswell created the Fund and Mobi acted as its promotor (Promoter Agreement). Mobi's roles included:

(1) general marketing and sales for promotion of the Fund with a view to introducing members and, therefore, growing the funds under management;

(2) providing member "on-boarding" and retention services to Tidswell in relation to all matters relating to the Fund;

(3) advising Tidswell in respect of the ongoing management and public promotion of the Fund;

(4) creating and operating a marketing website for the Fund that included a function for members to join the Fund;

(5) creating and preparing communication and marketing material and operating marketing campaigns for the Fund;

(6) establishing and operating a telephone call centre for the Fund, in accordance with the "Call Centre Service Standards" (as defined in the Promoter Agreement);

(7) ensuring that any promotional, marketing or other communication material that referred to Tidswell or the Fund had been approved in writing by Tidswell;

(8) ensuring that any financial product advice it provided to members of the Fund was given in compliance with the relevant laws and any instruction notified by Tidswell;

(9) complying with the "Promoter Service Standards" (as defined in the Promoter Agreement);

(10) providing insurance administration services in relation to the Fund, including establishing appropriate group insurance policies in respect of death, total and permanent disablement and income protection;

(11) handling call centre queries from members in relation to insurance; and

(12) reporting to Tidswell as follows:

(a) prior to the launch of the Fund and thereafter annually, providing an updated detailed marketing and business plan to Tidswell;

(b) reporting to Tidswell on performance against business and marketing plan objectives;

(c) recording and acknowledging complaints received and reporting them to Tidswell for further action;

(d) providing Tidswell with a compliance declaration; and

(e) providing written reports to Tidswell in relation to:

(i) its sales and marketing activities;

(ii) the performance of the call centre and compliance with the "Call Centre Service Standards" (as defined in the Promoter Agreement);

(iii) its compliance with the "Promoter Service Standards" (as defined in the Promoter Agreement); and

(iv) its provision of financial advice to members of the Fund.

Promotion of the Fund

16 Mobi promoted the Fund from 22 November 2016.

17 In its dealings with members of the public, Mobi provided "financial services" within the meaning of Ch 7 of the Corporations Act and Pt 2 Div 2 of the ASIC Act, in the manner set out below.

18 Mobi arranged for consumers to apply for interests in the Fund. Rights and benefits attached to interests in the fund, in the nature of death, total and permanent disablement and income

protection insurance. The insurance was offered on an automatic basis to eligible members of the Fund (Fund Insurance), unless consumers opted not to receive it. Mobi's conduct in that respect constituted "dealing" by Mobi in one or more financial products, namely interests in a superannuation fund (to which rights and/or benefits in the nature of insurance attached unless consumers opted out), within the meaning of s 766C of the Corporations Act and s 12BAB of the ASIC Act.

19 In circumstances described later in these reasons, Mobi made recommendations and statements of opinion that were intended to influence consumers in making decisions in relation to interests in the Fund or could reasonably be regarded as being intended to have such an influence. In doing so, Mobi provided "financial product advice" in relation to one or more financial products (being the same products referred to above).

20 In its capacity as trustee, Tidswell issued the relevant units in the Fund, being superannuation interests. Superannuation interests are "financial products" within the meaning of the Corporations Act and the ASIC Act.

21 One of the ways in which Mobi promoted the Fund was by online marketing. By that means, Mobi offered consumers a search service to identify "lost" superannuation held in accounts operated by other superannuation providers or the Australian Taxation Office (each an Existing Fund) known as a **Lost Super Search**. This offering involved consumers entering certain personal details online. Mobi offered the Lost Super Search by a website which it established and operated (Lost Super Website).

22 From time to time, Mobi also obtained consumers' personal details through co-registration lead generation arrangements, some of which operated as follows:

(1) when consumers visited participating websites, they were offered the opportunity to win a prize;

(2) in order to take up that opportunity, consumers were required to provide certain personal details and select one or more content boxes, which contained descriptions of services offered. Until December 2017, the content box included the following text:

(a) 'Australians have over $14 Billion in Lost, Inactive & Unclaimed Super, could some of this be yours?"

(b) 'MobiSuper can help you locate and consolidate all your super into one fund. Plus we offer advice, rewards and a personal touch!'

(c) 'Click yes to get started!'

(3) a company (in this case Mobi) whose content box was selected by a consumer was then sent the personal details provided by that consumer.

Telephone advice calls

23 Mobi marketed and sold interests in the Fund (including the rights and benefits conferred by way Fund Insurance) by operating an outbound call centre. From that call centre customer service operators (known as CSOs) telephoned consumers, including those who had entered their contact details via a request for a Lost Super Search. The call centre also accepted inbound calls.

24 Between at least 12 May 2017 and 21 November 2017, CSOs took part in telephone calls with consumers in respect of the Fund and Fund Insurance (telephone advice calls). Each CSO was, when making telephone advice calls:

(1) employed by Mobi;

(2) a "representative" of ZIB within the meaning of s 910A of the Corporations Act; and

(3) engaged in conduct on behalf of Mobi and ZIB for the purposes of s 769B of the Corporations Act within the scope of their actual or apparent authority.

25 Mobi provided the CSOs with, and instructed them to use, telephone scripts (referred to as call scripts) created by Mobi and approved by ZIB. It was Mobi's usual practice that a CSO would follow a call script in conducting a conversation with a consumer. The call scripts included references to the consumer:

(1) disposing of interests in his or her Existing Fund;

(2) obtaining a beneficial interest in the Fund; and

(3) acquiring cover by way of Fund Insurance.

26 In relation to the telephone advice calls, it was the CSOs usual practice to:

(1) call, take a return call, or receive a transferred call from the consumer, including in response to the consumer's request for a Lost Super Search or an initial inquiry about superannuation;

(2) obtain or confirm some of the consumer's personal details, including some or all of the consumer's full name, date of birth, address, occupation, his or her average working pattern and working hours (both at that time and in the preceding three months) and his or her estimated annual income;

(3) ask the consumer for the reason he or she had requested the Lost Super Search or had otherwise made contact with Mobi, and confirm that they wished to proceed with the enquiry;

(4) offer to open a Fund account and, if the consumer so wished, open one on their behalf;

(5) offer to search for any Existing Funds that the consumer held;

(6) require the consumer to agree to join the Fund and to be allocated a member number in order for an immediate search to be conducted by Mobi, and for the CSO to determine whether the consumer had any accounts with Existing Funds, and for the consumer to be provided with the results at the time of the call;

(7) offer to roll over any superannuation funds held in some or all of those Existing Funds into the newly opened Fund account; and

(8) determine the types of cover through Fund Insurance for which the consumer was eligible (which depended on his or her personal details) and the premium payable, and offer the consumer such cover.

27 Sixteen of the telephone advice calls are the subject of pleas in ASIC's Second Further Amended Statement of Claim and are referred to as the "specifically pleaded calls".

28 Mobi and ZIB make admissions in the SAFA in respect of seven of the specifically pleaded calls, referred to below as the Consumer 1 call, the Consumer 4 call, the Consumer 6 call, the Consumer 8 call, the Consumer 10 call, the Consumer 11 call and the Consumer 14 call. I will refer to them as the Admitted Calls. Each consumer, the subject of the Admitted Calls will now be referred to as a **Consumer** or together as **the Consumers**.

29 The statutory provisions extracted in the pages that follow are in the terms enacted at the time that the contraventions occurred.

MOBI'S CONTRAVENTIONS

Section 766B of the Corporations Act

30 Section 766B of the Corporations Act defines the phrases "financial product advice" and "personal advice" as follows:

> **766B Meaning of financial product advice**
>
> (1) For the purposes of this Chapter, ***financial product advice*** means a recommendation or a statement of opinion, or a report of either of those things,

that:

(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being intended to have such an influence.

(1A) However, subject to subsection (1B), the provision or giving of an exempt document or statement does not constitute the provision of financial product advice.

(1B) Subsection (1A) does not apply for the purpose of determining whether a recommendation or statement of opinion made by an outside expert, or a report of such a recommendation or statement of opinion, that is included in an exempt document or statement is financial product advice provided by the outside expert.

(2) There are 2 types of financial product advice: personal advice and general advice.

(3) For the purposes of this Chapter, ***personal advice*** is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

(a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act); or

(b) a reasonable person might expect the provider to have considered one or more of those matters.

(4) For the purposes of this Chapter, ***general advice*** is financial product advice that is not personal advice.

….

31 The construction of s 766B(3)(b) was considered by the High Court in ***Westpac*** *Securities Administration Limited v Australian Securities and Investments Commission* (2021) 270 CLR 118. It is convenient to extract the analysis of Gordon J in full:

54 Section 766B(3) is to be read as a whole and given its ordinary meaning, in light of its context and purpose. It is not to be dissected into separate words or phrases, the meanings of which are then amalgamated into some composite meaning.

55 As has been observed, the gateway to s 766B(3) is 'financial product advice', relevantly defined in s 766B(1) as a recommendation or statement of opinion that is intended to influence a person in making a decision in relation to a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence. Here, the particular financial product was membership in one of the Funds. The advice was given in telephone calls. The substance of the advice included a 'recommendation'

that each member 'should roll over their external accounts into their BT account or, in other words, they should accept the rollover service'. And, it is common ground that the provider, Westpac, gave that financial product advice – the recommendation – with the intention to influence the member to accept the rollover service offered by Westpac and to roll over their external accounts into their BT account. It is also common ground that the advisers, the callers, had not in fact considered one or more of the person's objectives, financial situation and needs within s 766B(3)(a).

56 The question then is whether, for the purposes of s 766B(3)(b), the financial product advice (comprising the recommendation) was given or directed to the member in circumstances where a reasonable person *might expect* Westpac to have considered one or more of the person's objectives, financial situation and needs.

57 In answering that question, several features of s 766B(3)(b) are significant. First, it poses an objective test, assessed at the time the financial product advice was given and having regard to the circumstances in which that advice was given. It refers to a reasonable person's expectation, being a reasonable person standing in the shoes of the person receiving the advice. It falls for consideration where financial product advice, intended (or reasonably regarded as being intended) to influence a person in making a decision about a particular financial product or class of financial products, has been given or directed to a person and it is to be assessed having regard to the circumstances in which that advice was given or directed.

58 Second, s 766B(3)(b) refers to things which a reasonable person *might expect*, which has a wider meaning than things which a reasonable person *would expec*t. The standard is one of reasonable possibility, not reasonable probability.

59 Third, the phrase 'to have considered' bears its ordinary meaning. Section 766B(3)(b) picks up the meaning of 'the person's objectives, financial situation and needs' in s 766B(3)(a) by referring to 'those matters'. Section 766B(3)(b) therefore captures circumstances where a reasonable person might expect the provider to have taken into account, had regard to, or given attention to, one or more of the person's objectives, financial situation and needs.

60 It follows that Westpac's submission that the word 'considered' refers to the adviser *actually* taking the recipient's personal circumstances into account – by evaluating them for the purpose of providing the advice in question so that there is a nexus (in fact or by reasonable apprehension) between the adviser's consideration of the personal circumstances and the advice provided – must be rejected. Read in context, 'considered' cannot be given the meaning Westpac submitted.

61 Fourth, the words 'one or more of', when used in s 766B(3)(a) and (b), convey that s 766B(3) applies where an adviser has considered (or might be expected to have considered) one or more (but not necessarily all) of a person's objectives, financial situation and needs. As has been explained, the words 'one or more of' were added during the drafting process. The inclusion of 'one or more of' in s 766B(3) conveys that advisers cannot avoid the disclosure and conduct obligations which attach to the provision of personal advice simply by failing to consider one or more of the matters referred to in the provision. The contrary conclusion – that s 766B(3)(a) and (b) do not apply unless an adviser

considers all or the whole of a person's objectives, financial situation and needs – would be unworkable legally and practically. A person may fail to provide complete information to an adviser, whether by way of oversight or otherwise. That is why s 961B(2)(c) recognises that an adviser will meet the duty to act in a client's best interests when providing personal advice where, among other things, the adviser makes *reasonable inquiries* to obtain complete and accurate information.

62 Thus, Westpac's further submission that it was incapable of considering the personal objectives of each member in circumstances where, among others, the member had not provided information about the fees charged on their external superannuation accounts, or any particular management issues with those external accounts, is also rejected. It is contrary to the text and purpose of s 766B(3)(b) and unworkable.

63 Fifth, the phrase 'objectives, financial situation and needs' bears its ordinary meaning. As the primary judge held, and as has not been disputed, an objective is an end towards which efforts are directed, a situation is a state of affairs or combination of circumstances and a need is a case or instance in which some necessity or want exists. And the relevant objectives, financial situation and needs referred to must be 'the person's'. They must be personal. That follows linguistically from the words of the provision, including the fact that this kind of advice is described as 'personal advice', and it is also implicit from the obligations that arise in connection with the giving of personal advice. Those obligations would be unnecessary and nonsensical if the only relevant matters to be considered were universal or generic, and not personal.

64 As to purpose, the purpose of Ch 7 of the *Corporations Act* is, relevantly, to promote 'confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services' and 'fairness, honesty and professionalism by those who provide financial services'. Consistent with, and reinforced by, that purpose and the wider statutory context, s 766B(3) is directed to the protection of the retail client, who is often without the skills, knowledge or information to make informed decisions.

65 The specific purpose of para (b) is clear. Section 766B(3)(b) focuses on what a reasonable person would expect 'the provider' – not the retail client – to have done. It is a consumer protection provision in which the notion of 'considered' includes not only circumstances involving a certain type, level or duration of consideration (as where there is an opportunity for active, mature, intellectual reflection over time) but also where an adviser provides a prompt or immediate response. It thus ensures that advisers cannot avoid the disclosure and conduct obligations which attach to the provision of personal advice simply by failing to consider one or more of the person's objectives, financial situation and needs.

66 These conclusions deny Westpac's contention that s 766B(3) does not apply unless an adviser (in fact or by reasonable apprehension) considers what it described as the minimum irreducible personal circumstances of the member relevant to the subject matter of the advice in question. It may be accepted that a member who has told a superannuation provider only that they want to save on fees and make their superannuation more manageable would not expect their tax position, the returns and investment profile of their other accounts, their insurance position and their retirement objectives to have been taken into account. However, advice can be personal advice within the meaning of

> s 766B(3) if, for example, a person's objectives of saving on fees and making superannuation more manageable are taken into account or might be expected to be taken into account. Whether or not other aspects of their financial situation and needs were considered would not alter that conclusion.
>
> 67 Section 766B(3) is engaged if an adviser (in fact or by reasonable apprehension) considers at least an aspect of one of the three categories – namely, a person's objectives, financial situation or needs – and whether that has occurred will be a fact specific inquiry. Here, Westpac elicited aspects of the members' objectives as part of the effort to persuade them to transfer their external superannuation accounts into their BT account.
>
> (original emphasis, footnotes omitted)

32 The plurality (Kiefel CJ, Bell, Gageler and Keane JJ) clarified that for the purposes of s 766B(3) objectives can be personal despite being widely shared. Further, the section does not require the provider of advice to have a complete or comprehensive knowledge of the consumers' objectives or financial position. Their Honours said:

> 10 As to the third consideration, the circumstance that the Westpac callers at times revealed a lack of comprehensive knowledge of the members' financial affairs was not inconsistent with an expectation that the members' objectives were taken into account by Westpac in recommending acceptance of its roll-over service. Nothing in the text or context of s 766B(3) conveys any suggestion that advice is personal advice for the purposes of the regulatory scheme of the Act only if it is comprehensive of the totality of the objectives, financial situation and needs of the client. Indeed, to the contrary, s 766B(3) expressly provides that personal advice has been given where 'the provider of the advice has considered *one or more* of the person's objectives, financial situation and needs'; it does not provide that the provider must have considered *all* of those matters (emphasis added). In addition, as a matter of fact, the social proofing technique used by the Westpac callers confirmed to each member that Westpac was familiar with objectives identified by each member as a matter of conventional wisdom. In this factual context, each member might reasonably think that Westpac considered that acceptance of the roll-over service was apt to realise the objectives the member had stated, and that this justified acceptance of the offer of the roll-over service regardless of what more comprehensive consideration of his or her financial situation might reveal.
>
> 11 Westpac argued in this Court that the members' objectives identified and discussed in the phone calls were 'highly generic and ... obviously correct' and that, for that reason, financial product advice that took those objectives into account was not apt to give rise to an expectation that the advice was based on one or more of the personal objectives, financial situation and needs of any of the members. But this argument seeks impermissibly to gloss the language of the statute. Objectives do not cease to be personal objectives merely because those objectives are such as to be generally applicable to all or most persons in the position of the client as well as to the particular client. It follows that advice which is personal advice within s 766B(3)(b) does not cease to be so because the content of that advice is such as to be generally applicable to all or most persons in the position of the client as well as to the particular client.

33 On the basis of what follows, I find that in the Admitted Calls, Mobi (through the CSOs) provided recommendations and/or statements of opinion to the Consumers and encouraged them to make decisions about superannuation and insurance. I also find that in each of the Admitted Calls the financial product advice provided by the CSOs could reasonably be regarded as being intended by Mobi, through the CSOs, to influence the Consumer to dispose of interests in his or her Existing Funds, acquire a beneficial interest in the Fund and take up Fund Insurance.

34 I am satisfied that a reasonable person might expect the CSOs to have considered one or more of the Consumer's objectives, financial situation and needs. Those conclusions are based on the following admitted facts concerning the content of each of the Admitted Calls.

The Admitted Calls

35 The Admitted Calls occurred between 18 October 2017 and 21 November 2017. Each of them was placed in response to a request by the Consumer for assistance to locate lost superannuation. In most cases, the Consumer made the request via the Lost Super Website. In each case, a CSO had a telephone conversation with the Consumer. In each conversation, the CSO offered:

(1) to search for any Existing Funds the Consumer held;

(2) to open a Fund account;

(3) to roll over any superannuation funds held in some or all of those Existing Funds into a newly opened Fund account; and

(4) the provision of insurance coverage through Fund Insurance.

36 In each case, it was a consequence of the rollover that the Consumer's accounts with Existing Funds would be closed, causing him or her to lose any insurance cover associated with those Existing Funds.

37 In each case, the CSO provided one or more recommendations and/or statements of opinion to the Consumer, including:

(1) an express statement of opinion that the Consumer rolling over his or her Existing Funds into a Fund account could save him or her account fees; and

(2) the implied recommendation that the Consumer should roll over his or her Existing Funds into a Fund account.

38 The amount of the fees that could potentially be saved was expressed as a multiple of $78, depending on the number of Existing Funds to be rolled over.

39 The totality of each call, and the recommendations and/or statements of opinion made, could reasonably be regarded as being intended by the CSO to influence the Consumer into making a decision (or decisions) to open a new superannuation account with the Fund, close any accounts held with Existing Funds and/or transfer any funds in the Existing Funds into the Fund (rollover decision). In each case, the rollover decision was a decision in relation to a financial product.

40 Accordingly, each of the recommendations and/or statements of opinion made by the CSO to the Consumer in the course of each telephone advice call constituted "financial product advice" within the meaning of s 766B(1) of the Corporations Act.

The Consumers' objectives, financial situation and needs

41 The recommendations and/or statements of opinion made by the CSO to each of the Consumers were provided in circumstances where a reasonable person might expect the CSO to have considered one or more of the Consumer's objectives, financial situation and needs. In each case, Consumer's objectives included the objective to locate lost superannuation. In each case, the financial situation of the Consumer was such that upon transferring superannuation held in his or her Existing Funds to a Fund account, he or she would lose the insurance cover associated with the Existing Funds and would be left with no insurance cover associated with his or her superannuation unless he or she took up Fund Insurance.

42 The additional objectives, financial situation and needs of each of the Consumers are set out below.

43 Consumer 1:

(1) had one or more insurances attached to one of her three Existing Funds;

(2) found superannuation "confusing" and "mind-boggling";

(3) was a New Zealand citizen and an Australian permanent resident who was concerned that she was not eligible for a pension in Australia;

(4) was a single parent suffering from financial stress and job insecurity;

(5) worked as a long-haul courier and did not have time to review her superannuation decisions within the 72-hour cooling-off period;

(6) held a superannuation balance of around $1,386;

(7) was around 45 years old at the time of the call;

(8) was a self-employed person; and

(9) was not benefitting from any employer contributions to superannuation on her behalf.

44 Consumer 4:

(1) had been offered a redundancy package by her employer and had ceased working at the time of the call;

(2) had been informed by her employer that she had to change her superannuation provider on ceasing employment;

(3) held an Existing Fund forming part of a defined benefits superannuation scheme;

(4) had one or more insurances attached to two of her three Existing Funds;

(5) had a superannuation balance of around $49,278;

(6) was around 38 years old at the time of the call;

(7) had little knowledge of the relationship between superannuation and insurance;

(8) was wanting to invest in low risk investments; and

(9) having declined Fund Insurance, was left with no insurance under her superannuation.

45 Consumer 6:

(1) had "no idea" about the current balance of and current contribution towards her superannuation accounts;

(2) had apparently suffered recent personal hardship, including family violence and the loss of her home to fire, and was at the time of the call living in a refuge;

(3) had the stated objective to withdraw money from her superannuation on hardship grounds to meet her immediate needs;

(4) had one or more insurances attached to one of her three Existing Funds;

(5) had a superannuation balance of less than $15,000;

(6) was 49 years old at the time of the call;

(7) was not working at the time of the call; and

(8) had the stated objective to provide for her daughter, including through her life insurance.

46 Consumer 8:

(1) was not employed at the time of the call;

(2) had a superannuation balance of around $21,200;

(3) was around 56 years old at the time of the call; and

(4) having declined Fund Insurance, was left with no insurance under her superannuation.

47 Consumer 10:

(1) had worked a number of different jobs over the course of his career;

(2) was earning approximately $80,000 per annum at the time of the call;

(3) worked in a white collar occupation and was planning to shift to a blue collar occupation in a different industry in the months to follow;

(4) had the stated objective to place his superannuation in a fund that was appropriate for his upcoming change of industry;

(5) had the stated objective to consolidate his superannuation into one account so that he could better keep track of his superannuation;

(6) had the stated objective and need to consolidate his superannuation in a competitive fund;

(7) was sensitive to fees payable in connection with his superannuation;

(8) had one or more insurances attached to three of his four Existing Funds;

(9) had a superannuation balance of around $54,000 - $55,000;

(10) was around 31 years old at the time of the call;

(11) had the stated objective as being a person with an interest in obtaining income protection insurance; and

(12) had the implied objective and need to minimise the premium payable for his insurance.

48 Consumer 11:

(1) was a coal mine worker;

(2) earned approximately $150,000 per annum;

(3) had one or more insurances attached to four of his five Existing Funds;

(4) was unsure what coverage he had under his existing insurance, including life insurance; and

(5) had the stated objective to retain life insurance, or alternatively not to lose life insurance cover.

49 Consumer 14;

(1) was not employed at the time of the call;

(2) had at least one dependant;

(3) had the implied objective to consolidate her superannuation into one account so that she could better manage her superannuation;

(4) had one or more insurances attached to two of her three Existing Funds;

(5) had a low superannuation balance;

(6) was around 25 years old at the time of the call;

(7) had the stated objective to obtain life insurance; and

(8) had the stated objective and need to take up "the safest" superannuation investment option.

Personal advice

50 In respect of each of the telephone advice calls, it is admitted that the CSO provided the consumer with "financial product advice", and I am satisfied that admission accords with the underlying admitted facts.

51 It is also common ground that the financial product advice amounted to personal advice within the meaning of s 766B(3) of the Corporations Act because it was given in circumstances where a reasonable person might expect the CSO to have considered one or more of the Consumer's objectives, financial situation and needs. However, Mobi's admissions as to the circumstances giving rise to the requisite expectation did not encompass all of the facts and circumstances upon which ASIC relied. As expressed in ASIC's written submissions, the facts and circumstances admitted by Mobi comprise:

a. the fact that each Relevant Consumer had provided personal details to Mobi prior to the call;

b. the fact that the CSOs expressly confirmed some of that information, as well as elicited further personal details, from consumers by posing direct questions during the call;

c. the detailed nature of the personal information disclosed, including generally the consumer's date of birth, whether or not the consumer was an Australian citizen or permanent resident, whether or not the consumer was working or

looking for work, his or her average income and his or her occupation;

d. the fact that a reasonable person might consider such personal information to be capable of bearing upon a Rollover Decision (being a decision to open a new superannuation account with the Fund, close any accounts they held with Existing Funds and/or transfer any funds in the Existing Funds into the Fund);

e. the fact those questions were interspersed with comments made by the CSO that could reasonably be regarded as being intended to influence the consumer to make a Rollover Decision;

…

g. the fact that the CSO was ordinarily in a position of relative expertise vis-à-vis the consumer as to superannuation and insurance generally, and the Fund and Fund Insurance in particular, and conveyed as much to the consumer during the call.

52 ASIC submitted that two further circumstances may be added.

53 The first is that there was no opportunity during any of the calls for the Consumer to make independent inquiries. I do not consider it necessary to determine whether such a circumstance existed, principally because I consider it would add little to the circumstances that are agreed. The uncontroversial circumstances discussed in these reasons are sufficient in combination to found the contraventions alleged against both Mobi and ZIB. The expectation referred to s 766B(3) plainly arises on those admitted facts.

54 The second is that the Consumer was given specific advice about the amount he or she might save in fees, being an amount expressed as a multiple of $78. As has been mentioned, ASIC admits that the representation was made. It is the relevance of the representation that is presently in issue. In my view, this circumstance also adds little to the enquiry as to whether the requisite expectation under s 766B(3) arises and little to the conclusion that the Consumers were given personal advice.

55 In my view, the inclusion or exclusion of the two controversial circumstances would make no difference to the outcome of the proceedings, whether as to the fact of the contraventions or the determination of the appropriate penalty. I therefore decline to venture an opinion on either topic.

Mobi contravened s 946A of the Corporations Act

56 Section 946A of the Corporations Act provides:

946A Obligation to give client a Statement of Advice

(1) The providing entity must give the client a Statement of Advice in accordance

with this Subdivision and Subdivision D.

(2) The Statement of Advice may be:

(a) the means by which the advice is provided; or

(b) a separate record of the advice.

(3) This section has effect subject to sections 946AA and 946B.

57 In each of the Admitted Calls:

(1) each CSO was a "provider" for the purposes of s 961 of the Corporations Act and a "representative" of ZIB within the meaning of s 910A of the Corporations Act; and

(2) ZIB was a "responsible licensee" in respect of the CSOs contraventions of s 961B and s 961H of the Corporations Act (described below).

58 In each of the Admitted Calls the CSO:

(1) did not identify the Consumer's objectives, financial situation and needs that would reasonably be considered as relevant to the advice provided during the call;

(2) did not assess whether the CSO had the expertise required to provide the Consumer advice on the subject matter sought and, if not, did not decline to provide the advice;

(3) did not conduct a reasonable investigation into financial products that might achieve the Consumer's objectives and meet the Consumer's needs that would reasonably be considered as relevant;

(4) did not base all judgments in advising the Consumer on the "client's relevant circumstances";

(5) failed to consider the merits of the Consumer rolling their superannuation account into an Existing Fund or a superannuation product in which they did not have an account, rather than a Fund account;

(6) failed to consider or compare the respective features and benefits of the Consumer's Existing Funds and the Fund;

(7) failed to consider or compare the respective features and benefits of any insurance associated with the Consumer's Existing Funds and Fund Insurance;

(8) failed to ensure that they did not advise the Consumer to transfer his or her superannuation out of Existing Funds which were better suited to the Consumer's personal objectives, financial situation and needs than a Fund account; and

(9) failed to ensure that they did not advise the Consumer to take steps that had the effect of cancelling insurance associated with an Existing Fund which was better suited to the Consumer's personal objectives, financial situation and needs than the Fund Insurance.

59 On each occasion that a CSO provided personal advice to a Consumer, it was reasonably apparent to each CSO that the information available to them relating to the Consumer's objectives, financial situation and needs was incomplete or inaccurate, including that the CSO lacked information as to (as the case may be):

(1) the fees payable for each of the Consumer's Existing Funds;

(2) the historical rate of investment return for each of the Consumer's Existing Funds;

(3) the risk orientation of each of the Consumer's Existing Funds;

(4) the type of insurance and scope of cover the Consumer held under one or more insurances in connection with his or her Existing Funds;

(5) the premiums payable for insurance the Consumer held in connection with his or her Existing Funds;

(6) the Consumer's complete state of health, including whether or not the Consumer had any pre-existing medical conditions that might disentitle them from cover under the Fund Insurance, and in particular any that had arisen in the preceding five years; and

(7) the consequences that might follow from the Consumer's loss of insurance cover held in connection with his or her Existing Funds, or by substituting that insurance cover with cover provided by the Fund Insurance.

60 As a result of the matters referred to above, the CSO in each Admitted Call was required to warn the Consumer during the call that:

(1) by reason of one or more of the matters in [59] above, the personal advice provided on the call was based on incomplete or inaccurate information relating to the Consumer's relevant personal circumstances; and

(2) because of that, the Consumer should, before acting on the personal advice, consider the appropriateness of the advice, having regard to the Consumer's objectives, financial situation and needs.

61 In the circumstances just described, I am satisfied that Mobi did not provide advice as required by s 946A and so contravened that provision.

Section 947D

62 Section 947D of the Corporations Act provides additional requirements where advice recommends replacement of one product with another as follows:

> **947D Additional requirements when advice recommends replacement of one product with another**
>
> (1) This section applies (subject to subsection (4)) if the advice is or includes a recommendation that:
>
> (a) the client dispose of, or reduce the client's interest in, all or part of a particular financial product and instead acquire all or part of, or increase the client's interest in, another financial product; or
>
> (b) the client dispose of, or reduce the client's interest in, a MySuper product offered by a regulated superannuation fund and instead acquire an interest, or increase the client's interest, in another MySuper product or a choice product offered by the fund.
>
> (2) The following additional information must be included in the Statement of Advice:
>
> (a) information about the following, to the extent that the information is known to, or could reasonably be found out by, the providing entity:
>
> (i) any charges the client will or may incur in respect of the disposal or reduction;
>
> (ii) any charges the client will or may incur in respect of the acquisition or increase;
>
> (iii) any pecuniary or other benefits that the client will or may lose (temporarily or otherwise) as a result of taking the recommended action;
>
> (b) information about any other significant consequences for the client of taking the recommended action that the providing entity knows, or ought reasonably to know, are likely;
>
> (c) any other information required by regulations made for the purposes of this paragraph;
>
> (d) unless in accordance with the regulations, for information to be disclosed in accordance with paragraph (a), any amounts are to be stated in dollars.
>
> (3) If:
>
> (a) the providing entity knows that, or is reckless as to whether:
>
> (i) the client will or may incur charges as mentioned in subparagraph (2)(a)(i) or (ii); or
>
> (ii) the client will or may lose benefits as mentioned in subparagraph (2)(a)(iii); or
>
> (iii) there will or may be consequences for the client as mentioned in paragraph (2)(b); but

(b) the providing entity does not know, and cannot reasonably find out, what those charges, losses or consequences are or will be;

the Statement of Advice must include a statement to the effect that there will or may be such charges, losses or consequences but the providing entity does not know what they are.

(4) The regulations may provide either or both of the following:

(a) that this section does not apply in relation to a financial product or a class of financial products;

(b) that this section does not require the provision of information of a particular kind, whether generally or in relation to a particular situation, financial product or class of financial products.

(5) In this section:

MySuper product has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

63 ASIC seeks a declaration that Mobi contravened s 947D of the Corporations Act by failing to provide Statements of Advice meeting the requirements provided for in that section.

64 Mobi was the "providing entity" for the purposes of s 944A of the Corporations Act in respect of each of the Admitted Calls.

65 Mobi did not provide any Statement of Advice at all to any Consumer in respect of any personal advice provided during the relevant Admitted Call, within the meaning of Div 3 of Pt 7.7 of the Corporations Act.

66 The advice provided by Mobi (through the CSOs) during each Admitted Call was, or included, a recommendation that the Consumer dispose of, or reduce the Consumer's interest in, all or part of a particular financial product and instead acquire all or part of another financial product. In this regard, in each Admitted Call, Mobi (through the CSOs) advised the Consumer to:

(1) dispose of or reduce his or her superannuation interests (to which rights and/or benefits conferred by way of insurance may attach) in one or more of his or her Existing Funds, each such interest being a "financial product" within the meaning of the Corporations Act, and instead acquire an interest in the Fund, also being a "financial product"; and

(2) by consequence of (1) above, dispose of any rights and/or benefits conferred by way of insurance associated with one or more of their Existing Funds and instead take up Fund Insurance (being the rights and/or benefits conferred and as attached to interests in the Fund).

67 Mobi did not provide any Statement of Advice to any of the Consumers that included information to the extent Mobi knew or could reasonably have found about:

(1) any charges the Consumer would or might incur in respect of the disposal or reduction of the Consumer's interest in all or part of a particular financial product;

(2) any charges the Consumer would or might incur in respect of the acquisition of all or part of a particular financial product;

(3) any pecuniary or other benefit that the Consumer would or might lose (temporarily or otherwise) as a result of taking the recommended action; and

(4) any other significant consequence for the Consumer of taking the recommended action that the CSO (and therefore Mobi) ought reasonably to have known were likely.

68 Those facts are sufficient to establish a contravention of s 947D of the Corporations Act.

Section 12DB(1)(g) of the ASIC Act

69 ASIC seeks a further declaration that Mobi contravened s 12DB(1)(g) of the ASIC Act by making false or misleading representations with respect to the price of services. Section 12DB provides:

> **12DB False or misleading representations**
>
> (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:
>
> (a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
>
> (b) make a false or misleading representation that a particular person has agreed to acquire services; or
>
> (c) make a false or misleading representation that purports to be a testimonial by any person relating to services; or
>
> (d) make a false or misleading representation concerning:
>
> (i) a testimonial by any person; or
>
> (ii) a representation that purports to be such a testimonial;
>
> relating to services; or
>
> (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits; or
>
> (f) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

(g) make a false or misleading representation with respect to the price of services; or

(h) make a false or misleading representation concerning the need for any 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); or

(j) make a false or misleading representation concerning a requirement to pay for a contractual right that:

(i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); and

(ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

Note: Failure to comply with this subsection is an offence (see section 12GB).

(1A) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation of a kind referred to in paragraph (1)(c) or (d), the representation is taken to be misleading unless evidence is adduced to the contrary.

(1B) To avoid doubt, subsection (1A) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the representation is not misleading; or

(b) have the effect of placing on any person an onus of proving that the representation is not misleading.

(2) Conduct:

(a) that contravenes:

(i) section 670A of the Corporations Act (misleading or deceptive takeover document); or

(ii) section 728 of the Corporations Act (misleading or deceptive fundraising document); or

(b) in relation to a disclosure document or statement within the meaning of section 953A of the Corporations Act; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A of the Corporations Act;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

(3) An offence under subsection 12GB(1) relating to subsection (1) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

70 I find that in respect of each of the Admitted Calls, Mobi's conduct was:

(1) in trade or commerce; and

(2) in connection with the supply or possible supply of financial services or in connection with the promotion by any means of the supply of financial services, in that:

(a) Mobi was providing "financial product advice" within the meaning of s 12BAB(1)(a) of the ASIC Act;

(b) Mobi was "dealing" in a financial product (being a beneficial interest in a superannuation fund) within the meaning of s 12BAB(1)(b) of the ASIC Act (as referred to in [18] above); and

71 In the premises described in [72] below, Mobi made representations with respect to the price of services (the "price" being the administration and other fees charged in connection with interests in the Fund), within the meaning of s 12DB(1)(g) of the ASIC Act.

72 In each of the Admitted Calls, Mobi (via the CSO in question) made a representation to the effect that the Consumer could save fees in the relevant amount by opening an account with the Fund and consolidating or rolling over their superannuation into that Fund account (Fee Saving Representation). The express statements are set out below.

Relevant Consumer	Substance of Representation(s) (emphasis added)
Consumer 1	CSO: "We can also do a free consolidation service for you, so as we are a super fund we're able to open up a fresh new account." "…We can also do that consolidation for you, so they can get everything over for you into that new fund…" CSO: "I just need you to confirm, ah, that you agree to join MobiSuper…" "Do you agree?" Consumer: "Yeah." CSO: "**Okay, so I'll just read you out – and by, just by rolling over two funds, I'll let you know by rolling over the two into one account you can be saving about $78 per year, and that's just on fees alone because obviously your super funds do have fees with them. Um, so it's quite good.**"
Consumer 4	CSO: "so we do a free account set-up for them as well as a free consolidation service. Inside that we actually do a live search with you on the phone to find…" "…how many accounts you do have out there as well as how much you could be potentially saving." CSO: "But we can roll over your AustralianSuper and your Hostplus account. Not a problem. **And by rolling over those four, um, those two funds into your Mobisuper account, you can be potentially saving $78 per year on fees.**"
Consumer 6	CSO: "**By rolling over three funds into one MobiSuper account, you can potentially save $156 per year." "Um, that's in, yeah, in fees alone. So that's, so at least we've been able to find that for you, which is great news.**"

Consumer 8	CSO: "What we do, we can find all the supers and combine them all into one." "Into a MobiSuper account and then we tell you how much you've saved, how much is in your balance, what we see, what super you're with, what is still valid in your super..." "…all that is set up." CSO: "**So, um, so by rolling over those two funds, I'm saving you $78 per year. So how does that sound for you, is that pretty good?**" Consumer: "How Much? What was it?" CSO: "**Yeah, $78 per year**".
Consumer 10	CSO: "Once I have your tax file number, I can do a live instant online search for you. I'll be able to explain to you today all the different accounts that you have, how much money you've got left in each one of them, which one's you're paying for insurance policies out of, and potential fee savings as well." CSO: "So, we're a super fund, from our point of view, we get a new customer, from our customer's point of view they've got an easy way to be able to consolidate. So every, single super fund there's generally some type of a management fee. Um, and if you've got multiple lots of insurances as well, and that's why we've got like this little thing that shows potential savings." CSO: "**Um, just so you know, when you combine the super accounts into the one MobiSuper account, you're potentially saving $234 a year and that's just in fees. That's not even looking at the multiple insurance policies that you're paying**"
Consumer 11	CSO: "Now, firstly, the fresh start includes a free account setup, plus a free consolidation services, and inside that we actually do a live search to find how many accounts you do have out there, as well as how much you can be potentially saving. And then we roll it all over into a fresh MobiSuper account…" CSO: "**So what we'll be able to do for you is, and mind you, by rolling over these five funds into one MobiSuper account, you could be potentially saving $312 per year on fees alone.**"
Consumer 14	CSO: "So how we actually help you is we offer you a fresh start with us, so we do a free account setup, as well as a free consolidation service and inside that consolidation service we actually do a live search with you on the phone…" "…to find how many accounts you do have out there, as well as how much you can be potentially saving and then we get it all consolidated into the fresh, new MobiSuper account…" CSO: "**…by rolling over these three funds into your one MobiSuper account, you can be potentially saving $156 per year on fees alone.**" CSO: "**Like I said, you were paying, you can potentially be saving $156 per year, by just rolling it all into the one, so you, you're saving quite a bit of money there.**"

73 Each Fee Saving Representation was a representation as to a future matter within the meaning of s 12BB of the ASIC Act. The CSO (and therefore Mobi) did not have reasonable grounds upon which to make the representations, because:

(1) the CSO did not at the time of the relevant Admitted Call have information as to the fees that the Consumer's Existing Fund(s) were charging; and

(2) the figure cited:

  (a) was not calculated on the basis of any information known to Mobi as to the fees in fact charged by the Consumer's Existing Fund(s); and

  (b) was calculated on the basis of assumptions as to the fixed administration fees typically charged by superannuation funds.

74 Further, Mobi did not disclose the matters referred to above to the Consumer.

75 I am satisfied that the circumstances just described rendered the Fee Saving Representations misleading and that accordingly Mobi contravened s 12DB(1)(g) of the ASIC Act.

FINDINGS AGAINST ZIB

76 ASIC seeks declarations that by Mobi's conduct ZIB contravened:

(1) s 961K(2) of the Corporations Act by reason of ZIB being the responsible licensee in relation to the contravening conduct of certain of its representatives (being the CSOs), who contravened s 961B of the Corporations Act by failing to act in the best interests of clients in the provision of personal advice to each of the Consumers in the Admitted Calls;

(2) s 961K(2) of the Corporations Act by reason of it being the responsible licensee in relation to the contravening conduct of certain of its representatives (being the CSOs), who contravened s 961H of the Corporations Act by failing to warn clients in the provision of personal advice to each of the Consumers in the Admitted Calls (where the advice was based on incomplete or inaccurate information relating to the clients' relevant personal circumstances);

(3) s 961L of the Corporations Act by failing to take reasonable steps to ensure that certain of its representatives (being the CSOs) complied with s 961B and s 961H of the Corporations Act in the provision of personal advice to each of the Consumers in the Admitted Calls;

(4) s 912A(1)(a) of the Corporations Act, by failing to do all things necessary to ensure that the financial services covered by the ZIB AFS Licence, provided by Mobi (including by the CSOs), were provided efficiently, honestly and fairly by reason of the matters set out in [100(1)] to [100(3)] below; and

(5) s 912A(1)(a) of the Corporations Act, specifically by reason of ZIB's contraventions of s 961K(2) and s 961L of the Corporations Act set out in [99(1)] to [99(3)] below.

77 It has already been established above that Mobi and ZIB gave personal advice to each Consumer in each of the seven Admitted Calls.

78 Section 961K(2) of the Corporations Act is a civil penalty provision. It provides that a financial services licensee will contravene the section if a representative other than an authorised representative of the licensee contravenes ss 961B, 961G, 961H or 961J of the Corporations Act. Section 961K provides:

> **961K Civil penalty provision—sections 961B, 961G, 961H and 961J**
>
> (1) A financial services licensee contravenes this section if the licensee contravenes section 961B, 961G, 961H or 961J.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee contravenes section 961B, 961G, 961H or 961J; and

(b) the licensee is the, or a, responsible licensee in relation to that contravention.

Note: This subsection is a civil penalty provision (see section 1317E).

79 Section 961B of the Corporations Act requires a provider of personal advice to act in the best interests of the client in relation to the advice. The section in full reads as follows:

961B Provider must act in the best interests of the client

(1) The provider must act in the best interests of the client in relation to the advice.

(2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:

(a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

(b) identified:

(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and

(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the ***client's relevant circumstances***);

(c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;

(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;

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

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

(ii) assessed the information gathered in the investigation;

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

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

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

Advice given by Australian ADIs—best interests duty satisfied if certain steps are taken

(3) If:

(a) the provider is:

(i) an agent or employee of an Australian ADI; or

(ii) otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and

(b) the subject matter of the advice sought by the client relates only to the following:

(i) a basic banking product;

(ii) a general insurance product;

(iii) consumer credit insurance;

(iv) a combination of any of those products;

the provider satisfies the duty in subsection (1) in relation to the advice given in relation to the basic banking product and the general insurance product if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

General insurance products—best interests duty satisfied if certain steps are taken

(4) To the extent that the subject matter of the advice sought by the client is a general insurance product, the provider satisfies the duty in subsection (1) if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

Regulations

(5) The regulations may prescribe:

(a) a step, in addition to or substitution for the steps mentioned in subsection (2), that the provider must, in prescribed circumstances, prove that the provider has taken, to satisfy the duty in subsection (1); or

(b) that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1); or

(c) circumstances in which the duty in subsection (1) does not apply.

80 The obligation in s 961B(1) is concerned with the processes carried out by an adviser in relation to providing personal advice. Its concern is with the conduct of the advice provider and not the content of the advice ultimately given.

81 Justice O'Bryan considered the construction of s 961B in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170. His Honour said:

> 405 In my view, textual and contextual considerations compel a conclusion that s 961B is not concerned with the question whether the substance of the advice is in the best interests of the client and, if it was necessary to refer to it, the relevant extrinsic materials confirm that conclusion. Rather, the section is concerned with the actions taken by the provider in the formulation of the advice and the objective purpose of the provider in taking those actions and giving the advice. The following textual and contextual matters can be noted.
>
> 406 First, s 961B(1) states that the provider must act in the best interests of the client in relation to the advice; the section does not state that the advice must be in the best interests of the client. The section is directed to how the provider must 'act' in relation to the advice and stipulates that the provider must act in the best interests of the client.
>
> 407 Second, s 961B(2) states the provider satisfies the duty in subs (1) if the provider proves that he or she has done each of the following:
>
> (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
>
> (b) identified:
>
> (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
>
> (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client's relevant circumstances),
>
> (c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable enquiries to obtain complete and accurate information;
>
> (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;
>
> (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:
>
> (i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and
>
> (ii) assessed the information gathered in the investigation;
>
> (f) based all judgments in advising the client on the client's relevant circumstances; and
>
> (g) taken any other step that, at the time the advice was provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.
>
> 408 Consistently with the use of the word 'act' in subs (1), subs (2) focuses on what

the provider has 'done'. It describes actions to be taken by the provider; it does not refer to the substance of the advice given. All of the actions are directed to the pursuit of the best interests of the client and describe diligent efforts directed to that pursuit through the identification of the client's objectives, financial situation and needs; by basing judgments on those matters; and by declining to advise if the provider does not have the requisite expertise to advise. Subsection (2) states that a provider satisfies the duty in subs (1) if the provider does the things stipulated in subs (2). It is implicit in that language that the legislature considered that the obligation imposed by subs (1) requires the types of actions referred to in subs (2).

409 To the extent it is necessary to have regard to it, the Replacement Explanatory Memorandum to the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth) affirms that conclusion. Paragraph 1.23 states:

> … the requirement to act in a client's best interest is intended to be about the process of providing advice, reflecting the notion that good processes will improve the quality of the advice that is provided. The provision is not about justifying the quality of the advice by retrospective testing against financial outcomes.

82 See also *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644; 131 ACSR 484, O'Callaghan J (at [129]).

83 It has been established that, in respect of each Admitted Call, the CSO did not do the things set out at [58(1)] to [58(9)] above. Some of those matters are listed in s 961B(2) of the Corporations Act.

84 No evidence has been tendered by the defendants to establish that the CSO in each Admitted Call did each of the things that s 961B(2) requires in order for the CSO to discharge his or her duty under s 961B(1), or that they did any other thing that may discharge the duty. ZIB further admits that each CSO did not act in the best interests of the Consumer in respect of each Admitted Call in relation to the personal advice provided to that Consumer in contravention of s 961B(1). ZIB's contravention of s 961K(2) in respect of each CSOs breach is therefore established.

85 Section 961H of the Corporations Act provides:

> **961H Resulting advice still based on incomplete or inaccurate information**
>
> (1) If it is reasonably apparent that information relating to the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate, the provider must, in accordance with subsections (2) and (3), warn the client that:
>
> (a) the advice is, or may be, based on incomplete or inaccurate information relating to the client's relevant personal circumstances; and

(b) because of that, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs.

(2) The warning must be given to the client at the same time as the advice is provided and, subject to subsection (3), by the same means as the advice is provided.

(3) If a Statement of Advice is the means by which the advice is provided, or is given to the client at the same time as the advice is provided, the warning may be given by including it in the Statement of Advice.

Note: The Statement of Advice must at least contain a record of the warning (see paragraphs 947B(2)(f) and 947C(2)(g)).

(4) If 2 or more individuals provide the advice and one of those individuals provides a warning in accordance with this section, the other individuals are taken to have complied with this section.

(5) Nothing in this section affects the duty of the provider under section 961B to make reasonable inquiries to obtain complete and accurate information.

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

86 Section 961C provides that something is "reasonably apparent":

> … if it would be apparent to a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, were that person exercising care and objectively assessing the information given to the provider by the client.

87 As identified earlier in these reasons on each occasion that a CSO provided personal advice to a Consumer, it was reasonably apparent to each CSO during the relevant Admitted Call that the information available to the CSO relating to the Consumer's objectives, financial situation and needs was incomplete and inaccurate, including that the CSOs lacked information as to the particular factors listed at [59(1)] to [59(7)] above.

88 By reason of those circumstances, each CSO was required to give the warning to which s 961H(1) refers. Mobi and ZIB admit that each CSO in each Admitted Call failed to warn the Consumer during the relevant call (or at all) of the matters set out at [87] and [59(1)] to [59(7)] above, in contravention of s 961H. ZIB's contravention of s 961K(2) in respect of the CSOs breach of s 961H is therefore established.

89 Section 961L of the Corporations Act provides:

> **961L Licensees must ensure compliance**
>
> A financial services licensee must take reasonable steps to ensure that representatives of the licensee comply with sections 961B, 961G, 961H and 961J.

Note: This section is a civil penalty provision (see section 1317E).

90 In *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55, his Honour Justice Lee made three observations of s 961L:

> 105 *First*, the word 'ensure' is forward-looking. It is directed to the taking of steps to achieve compliance with certain statutory norms (including the relevant best interests obligations) before any particular instance of non-compliance has arisen. Although the seriousness of the obligation is amplified by the use of the word 'ensure' (see *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87; [2006] VSC 112 at [105] (Byrne J)), the onerousness of the standard is moderated by the requirement to take 'reasonable steps'. Such language of 'reasonable steps' is redolent of defences to liability employed in the Act (such as the safe harbour provisions in Ch 5) and other legislation, although in this case the absence of reasonable steps is itself an element of any contravention.
>
> 106 *Secondly*, the text of s 961L makes its focus the conduct of the licensee, not the representative, and whether the licensee has taken 'reasonable steps' (albeit these steps are directed at the conduct of their representatives). Critically, there is nothing in the text of s 961L that makes a contravention of the relevant best interests obligations a pre-requisite to a contravention of s 961L. Indeed, it was common ground between the parties that a contravention of s 961L may arise even if there has been no contravention of the relevant best interests obligations. This is easily imagined: a licensee could run a 'bucket shop' without taking any reasonable steps to put in place adequate safeguards but may, by luck, have conscientious representatives who do their job. This would not inoculate the licensee from liability. Of course, the converse may also be the case, and the provision does not visit liability on a conscientious licensee, who has done all that could reasonably be expected, by reason of a representative unexpectedly going rogue.
>
> 107 *Thirdly*, the relevant best interests obligations to which s 961L refers fall under separate subdivision headings and each prescribe distinct statutory norms of conduct for the providers of financial advice, broadly summarised as: (a) acting in the best interests of the client (s 961B); (b) providing advice only where it is appropriate to the client (s 961G); (c) warning clients that advice is based on incomplete or inaccurate information (s 961H, not being in issue in this case); and (d) giving priority to the client's interests when giving the advice (s 961J). Although the obligations relate to one another and breach of one may, depending upon the circumstances, amount to a breach of another, their particular content and focus differs.

91 In that case, his Honour continued:

> 121 AMPFP's submissions should be generally accepted. The statutory context in which s 961L operates supports AMPFP's approach in that s 961L can be contrasted with so-called 'look through' provisions, such as s 961K, which impose liability on a licensee where its representatives (other than authorised representatives) engage in a breach of the best interest obligations; it was open to Parliament to cast s 961L in identical terms if it intended it to have that outcome (subject to a reasonableness qualification) and the fact that it did not is a strong indication that the approach for which ASIC contends is incorrect.
>
> 122 As for the extrinsic materials, I consider them to be more or less neutral and of

> no particular assistance. There can be no doubt the motherhood statements at page 3 of the EM indicate that one of the purposes of the Future of Financial Advice (**FOFA**) reforms (of which s 961L is a part), was to build trust and confidence in the financial advice industry by requiring financial advisers to act in the best interests of their clients and to place the interests of their clients ahead of their own when providing personal advice to retail clients. It might be said that ASIC's preferred construction would further the purpose of the statute by reinforcing the new statutory obligations. But legislation rarely pursues a single purpose at all costs (*Carr v Western Australia* (2007) 232 CLR 138; 239 ALR 415; [2007] HCA 47 at [5] (Gleeson CJ)). I am not persuaded that the use of the language of 'flow through' in the relevant parts of the EM assists ASIC's construction in any meaningful way.
>
> 123 As explained above, the actual conduct to which s 961L is directed is the taking of reasonable steps by the licensee, not the provision of advice by representatives (being the conduct to which the best interests provisions are directed). It necessarily follows that the process of determining whether a contravention has occurred is assessed independently as to whether there have been particular contraventions by representatives. Properly understood, what we are concerned with is a 'failure to perform' norm.

92 Mobi and ZIB admit that, contrary to ZIB's obligations in s 961L of the Corporations Act, it did not take reasonable steps to ensure that the CSOs (as its representatives) complied with s 961B and s 961H of the Corporations Act. More specifically, they admit that:

(1) the CSOs failed to comply with their obligations under s 961B and s 961H (at [57] to [61] above);

(2) ZIB failed to take steps to ensure the CSOs took the "best interests" steps (at [58] above); and

(3) ZIB failed to take steps to ensure that the CSOs gave the warnings identified (at [57] to [61] above).

93 Those admissions fairly reflect the facts set out thus far in these reasons. I am satisfied that ZIB contravened s 961L of the Corporations Act by reason of those facts.

94 Section 912A of the Corporations Act in force relevantly provides:

> **912A General obligations**
>
> (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
>
> (aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and

(b) comply with the conditions on the licence; and

(c) comply with the financial services laws; and

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and

(d) subject to subsection (4)——have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

(e) maintain the competence to provide those financial services; and

(f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and

(g) if those financial services are provided to persons as retail clients — have a dispute resolution system complying with subsection (2); and

(h) subject to subsection (5)—have adequate risk management systems; and

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

(2) To comply with this subsection, a dispute resolution system must consist of:

(a) an internal dispute resolution procedure that:

(i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and

(ii) covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and

(b) membership of one or more external dispute resolution schemes that:

(i) is, or are, approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and

(ii) covers, or together cover, complaints (other than complaints that may be dealt with by the Superannuation Complaints Tribunal established by section 6 of the *Superannuation (Resolution of Complaints) Act 1993*) against the licensee made by retail clients in connection with the provision of all financial services covered by the licence.

(3) Regulations made for the purposes of subparagraph (2)(a)(i) may also deal with the variation or revocation of:

(a) standards or requirements made by ASIC; or

(b) approvals given by ASIC.

(4) Paragraph (1)(d):

(a) does not apply to a body regulated by APRA, unless the body is an

RSE licensee; and

(b) does not apply to an RSE licensee, unless the RSE licensee is also the responsible entity of a registered scheme.

(5) Paragraph (1)(h):

(a) does not apply to a body regulated by APRA, unless the body is an RSE licensee that is also the responsible entity of a registered scheme; and

(b) does not apply to an RSE licensee that is also the responsible entity of a registered scheme, to the extent that the risk relates solely to the operation of a regulated superannuation fund by the RSE licensee.

(6) In this section:

regulated superannuation fund has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

RSE licensee has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

95 It is convenient to adopt the survey of authorities pertaining to s 912A(1)(a) accepted by Foster J (by adopting ASIC's submissions) in *Australian Securities and Investments Commission v* ***Camelot Derivatives*** *Pty Ltd (in liq)* [2012] FCA 414; 88 ACSR 206 (at [69]):

(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; 13 ACLR 225 at 234-5. (*[126]*)

(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; [2008] AATA 707 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; [2008] AATA 707 at [237]. (*[127]*)

(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; 13 ACLR 225 at 234-5. 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; 13 ACLR 225 at 241. (*[128]*)

(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. (*[129]*)

(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; 13 ACLR 225 at 234-5. (*[130]*)

96 The financial services authorised by the ZIB AFS Licence included the provision of financial product advice in respect of superannuation and certain life products and dealing in (by applying for, acquiring, varying or disposing of) superannuation and certain life products to retail and wholesale clients.

97 Mobi was plainly a representative of ZIB within the meaning of s 910A of the Corporations Act. Mobi (including by its CSOs) provided the financial services described in these reasons, including "dealing" and providing "financial product advice" as described in [18] and [19] above. The financial services were covered by the ZIB AFS Licence.

98 ZIB, as a financial services licensee and as responsible licensee, is liable under s 961K(2) of the Corporations Act for contraventions by its representatives, namely the CSOs, of s 961B and s 961H of the Corporations Act. ZIB was required by s 961L of the Corporations Act to take all reasonable steps to ensure its representatives (namely the CSOs) complied with s 961B and s 961H of the Corporations Act. It was required by s 912A(1)(a) of the Corporations Act to do all things necessary to ensure that the financial services covered by the ZIB AFS Licence were provided efficiently, honestly and fairly.

99 Contrary to s 961L of the Corporations Act, ZIB did not take all reasonable steps to ensure that representatives of ZIB, namely the CSOs, complied with s 961B and s 961H of the Corporations Act. In this regard, in respect of the Admitted Calls:

(1) the CSOs failed to comply with s 961B and s 961H of the Corporations Act, in the manner described in [57] to [61] above;

(2) ZIB failed to take steps to ensure the CSOs took the "best interests" steps set out in [58] above; and

(3) ZIB failed to take steps to ensure the CSOs gave the warnings set out in [60] above.

100 In relation to Mobi's promotion of the Fund, the financial services covered by the ZIB AFS Licence, provided by Mobi (including through the CSOs), were not provided efficiently, honestly and fairly, as ZIB, in relation to the Admitted Calls:

(1) failed to ensure that no false or misleading representations were made by the CSOs to Consumers;

(2) failed to ensure that no personal advice was given by the CSOs to the Consumers;

(3) failed to ensure that the CSOs acted in the best interests of the Consumers in relation to the provision of personal advice, in accordance with s 961B of the Corporations Act;

(4) failed to ensure that the CSOs provided the warning required by s 961H of the Corporations Act to the Consumers; and

(5) failed to ensure that Mobi gave to the Consumers Statements of Advice in accordance with s 946A of the Corporations Act and meeting the requirements of s 947D of the Corporations Act.

101 Mobi and ZIB admit that, as a financial services licensee, ZIB was required by s 912A(1)(a) to do all things necessary to ensure that the financial services provided by Mobi (including by the CSOs) that were covered by the ZIB AFS Licence were provided efficiently, honestly and fairly. They further admit that, by reason of ZIB's conduct, the financial services provided during the Admitted Calls were not provided efficiently, honestly and fairly, as ZIB:

(1) failed to ensure that no false or misleading representations were made by the CSOs to the Consumers;

(2) failed to ensure that no personal advice was given by the CSOs to the Consumers;

(3) failed to ensure that the CSOs acted in the best interests of the Consumers in relation to the provision of personal advice, in accordance with s 961B of the Corporations Act;

(4) failed to ensure that the CSOs provided the warning required by s 961H of the Corporations Act to the Consumers; and

(5) failed to ensure that Mobi gave to the Consumers Statements of Advice in accordance with s 946A of the Corporations Act and which met the requirements of s 947D of the Corporations Act.

102 ZIB admits that it did not take reasonable steps to ensure that the CSOs complied with s 961B and s 961H of the Corporations Act. It accepts that the CSOs failure to deliver financial services in a way that was efficient, honest and fair occurred in conjunction with its independent

failure to do all things necessary to ensure that did not occur. I am satisfied that its acts and omissions fall short of the "sound ethical values and judgment" that are expected of a financial services licensee, and constitutes a "serious departure from reasonable standards of performance of advice": *Camelot Derivatives*, Foster J (at [69(b)]); *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023; 336 ALR 209, Edelman J (at [673]).

103 I find that the financial services provided by Mobi were not provided efficiently, honestly and fairly, that ZIB failed to discharge its obligation arising under s 912A(1)(a) of the Corporations Act, and that it is appropriate to make declarations of those contraventions.

DECLARATORY RELIEF

104 The Court may make binding declarations of right in relation to any matter in which it has original jurisdiction, whether or not consequential relief is or could be claimed: FCA Act, s 21. In *Sankey v Whitlam* (1978) 142 CLR 1, Gibbs ACJ (at 23) confirmed that the word "right" in the expression "declaration of right" is used in a sense that is "wide and loose". The power is very wide, limited only by the Court's discretion: *Australian Securities and Investments Commission v Allianz Australia Insurance Limited* [2021] FCA 1062; 156 ACSR 638, Allsop CJ (at [120]). It encompasses a power to make a declaration on the application of a public authority (here ASIC in its regulatory capacity) concerning a contravention of the Corporations Act and the ASIC Act. Declarations concerning contraventions of civil remedy provisions have obvious utility, by identify the contravening conduct and recording the Court's disapproval of it, and by vindicating the public interest in encouraging compliance: *Australian Securities and Investments Commission v Marco (No 6)* [2020] FCA 1781, McKerracher J (at [120]); *Australian Securities Investments Commission v TAL Life Ltd (No 2)* [2021] FCA 193; 389 ALR 128 (at [223]).

105 Section 1317E of the Corporations Act (as in force when the contravening conduct occurred) provided that if the Court "is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention."

106 As explained below, there is a particular public interest in encouraging compliance with laws affecting superannuation.

PENALTIES

107 The parties have proposed orders by consent to the effect that:

(1) Mobi pay pecuniary penalties totalling $125,000, in respect of its contraventions of s 12DB(1)(g) of the ASIC Act;

(2) ZIB pay pecuniary penalties totalling $125,000, in respect of its contraventions of s 961K and s 961L of the Corporations Act.

(3) ZIB and Mobi pay ASIC's costs of the claims against them, fixed in the sum of $50,000.

(4) each of ZIB, Mobi and Mr Grover bear their own costs, including the costs of the dismissed claims.

108 In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (*Commonwealth v DFWBII*), the High Court confirmed that in proceedings for the imposition of a civil penalty, this Court is not precluded from receiving a submission agreed between the parties concerning the penalty to be imposed and accepting the submission if it is appropriate. The majority (French CJ, Kiefel, Bell, Nettle and Gordon JJ) approved these passages of Middleton J's in *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* (2014) 234 FCR 343 his Honour there concluding (at [149] to [150]) that the public interest in certainty of outcome for regulators and wrongdoers increased the predictability of outcomes and therefore makes it more likely proceedings resolve by agreement under the supervision of the Court:

> 149 The acceptance of agreed penalty amounts (providing always that the Court undertakes its duty to fix the appropriate penalty) increases the certainty of outcome for regulators and wrongdoers. This increases the predictability of outcomes for regulators and respondents and makes it more likely that proceedings will be resolved by agreement in an appropriate way and under the supervision of the Court. This in turn improves deterrence by encouraging the implementation of corrective measures and freeing up the resources of the regulator.
>
> 150 In light of the above observations, I do not consider that the High Court intended to exclude, in a civil context, the making of submissions (joint or otherwise) by the parties as to appropriate orders to make (not just as to penalty, but also as to injunctions and disqualification orders). Without specific mention and consideration, I do not conclude that the High Court implicitly overruled the earlier Full Court decisions of *NW Frozen Foods* and *Mobil Oil*.

109 The majority went on to emphasise the important public policy involved in the predictability of the outcome of civil penalty proceedings, which encouraged respondents to acknowledge contraventions, so assisting to avoid lengthy and complex litigation. It was not, their Honours

said, "pious" to suppose that judges will do their duty, in accordance with the oath of office, and reject a penalty submission if not satisfied that the penalty agreed between the parties is appropriate (at [49]). The majority explained that, in contrast to criminal proceedings, civil proceedings presented very considerable scope for the agreement of facts and the consequences that should flow from them. Their Honours said (at [57]):

> … There is also very considerable scope for them to agree upon the appropriate remedy and for the court to be persuaded that it is *an* appropriate remedy. Accordingly, settlements of civil proceedings are commonplace and orders by consent for the payment of damages and other relief are unremarkable. … More generally, it is entirely consistent with the nature of civil proceedings for a court to make orders by consent and to approve a compromise of proceedings on terms proposed by the parties, provided the court is persuaded that what is proposed is appropriate.
>
> (emphasis in original)

110 The majority went on to say that it is the function of the relevant regulator to regulate the industry in question in order to achieve compliance. Accordingly, "it is to be expected that the regulator will be in a position to offer informed submissions as to the effects of contravention on the industry and the level of penalty necessary to achieve compliance" (at [60]).

The agreed penalties are "appropriate" in the relevant sense

111 Determining the appropriateness of a penalty is not an exact science, such that within a permissible range a particular figure may not be said to be more appropriate than another: *Commonwealth v DFWBII* at [47] to [60] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

112 The principles guiding the assessment of civil penalties were recently discussed by the High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 399 ALR 599. They may be broadly summarised as follows:

(1) unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of deterrence;

(2) the penalty is be fixed with a view to ensuring that it is not such as to be regarded by the respondent or others as an acceptable cost of doing business: see *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [62].

(3) retribution, and enunciation and rehabilitation have no part to play;

(4) there should be a "reasonable relationship between theoretical maximum and the final penalty imposed", citing *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [156]; and

(5) the factors informing the assessment of a penalty of appropriate deterrent value include those listed by French J (as his Honour then was) in *Trade Practices Commission v CSR Limited* [1990] FCA 762; ATPR 41-076 (at 52,152 – 52,153), namely:

(a) the nature and extent of the contravening conduct;

(b) the amount of loss or damage caused;

(c) the circumstances in which the conduct took place;

(d) the size of the contravening company;

(e) the degree of power it has, as evidenced by its market share and ease of entry into the market;

(f) the deliberateness of the contravention and the period over which it extended;

(g) whether the contravention arose out of the conduct of senior management or at a lower level;

(h) whether the company has a corporate culture conducive to compliance with the statute, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and

(i) whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the statute in relation to the contravention.

113 As to the "theoretical maximum", the Court is here concerned with multiple contraventions of different statutory provisions. The maximum penalties are as follows:

No.	Contravention	Maximum penalty (single contravention)	Number of Contraventions	Maximum penalty (total contraventions)
Mobi – First Defendant				
1	Fee Saving Representation s12DB(1)(g) ASIC Act	10,000 units x $210 = $2.1 million s12GBA(3) (item 2a)	7	$14.7 million
ZIB – Second Defendant				
2	Consequential best interests obligation s961B / s961K Corporations Act	$1 million s1317G(1F)(b) Corporations Act	7	$7 million

3	Consequential failure to warn s961H / s961K Corporations Act	$1 million s1317G(1F)(b) Corporations Act	7	$7 million
4	Failure to take reasonable steps (to ensure CSOs complied with each of sections 961B and 961H Corporations Act) s961L Corporations Act	$1 million s1317G(1F)(b) Corporations Act	2	$2 million

114 The Court is to consider whether the total of the penalties to be fixed for each individual contravention is appropriate having regard to the contravening conduct when viewed as a whole. As White J said in *Director of Fair Work Building Industry Inspectorate v Stephenson* (2014) 146 ALD 75 (at [151]):

> The totality principle reflects a number of slightly different considerations. Doyle CJ referred to these considerations in *R v E, AD* (2005) 93 SASR 20; [2005] SASC 332 at [37]–[38]:
>
> [37] The totality principle has been stated in terms that reflect slightly different aspects. The first aspect is that when an offender is sentenced for a number of offences, the court must ensure that 'the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved': *Postiglione v R* (1997) 189 CLR 295 at 307–308; 145 ALR 408 at 416-17 per McHugh J. The other aspect is that sometimes, although the individual terms of imprisonment imposed in respect of each of a number of offences will be appropriate, the aggregate of all of those sentences will become so 'crushing' as to call for some reduction in the aggregate: see King CJ in *R v Rossi* (1988) 142 LSJS 451, cited by McHugh J in *Postiglione* at CLR 308; ALR 417. I refer also to the remarks of Kirby J on this point in *Postiglione* at CLR 340–341; ALR 443-4. As these statements of the principle indicate, it is a general principle that requires the court to assess the overall criminality involved, and to do so by reference to the aggregate sentence to be imposed.
>
> [38] In recent times there has been at tendency for the totality principle to be invoked, almost routinely, in support of a complaint that a sentence is excessive. Ordinarily, if a judge or magistrate imposing sentence has imposed a sentence appropriate for each offence under consideration, there will be no reason to consider the totality principle. The sentences imposed will be the appropriate sentences for the offending conduct. In its nature the totality principle involves what might be called a final check or consideration, intended to ensure that in the course of aggregating penalties the court has not arrived at an aggregate that is disproportionate to the seriousness of the offending conduct taken as a whole, so as to impose a sentence which is, in the circumstances, so crushing as to call for intervention on the grounds of mercy. Care must be taken in using the concept of a crushing sentence. Not uncommonly, for particularly serious crimes, a sentence that is crushing in its

> effect must be imposed. The use of that term does not imply that when a very heavy sentence is called for, it is appropriate for the court to reduce it simply because to the offender the sentence may be crushing. At the end of the day if that is what is called for, that is the sentence that must be imposed.

115 Both aspects of the totality principle have been applied in the context of civil penalty regimes to ensure that the penalty is proportionate and appropriate to the contraventions before the Court: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 (at [54]); see also at [23] and at [102]; and *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FCAFC 150; 204 IR 142 (at [62]).

116 Even having regard to those principles, the wide gulf between the maximum penalties that might theoretically be imposed and the amounts arrived at by the parties' agreement is very wide indeed. It is the parties' joint submission that the agreed penalties are nonetheless appropriate. They rely on the following:

(1) ASIC does not contend that any of the Consumers suffered actual loss or damage as a result of Mobi and ZIB's conduct;

(2) the contravening conduct took place during a relatively short period of time;

(3) neither Mobi nor ZIB have previously been found by a court to have engaged in conduct similar to the contravening conduct;

(4) the number of contraventions is relatively small;

(5) ASIC does not contend that the contravening conduct was deliberate or reckless;

(6) Mobi and ZIB have cooperated with ASIC by admitting to the contraventions to the extent recorded in the SAFA;

(7) in its 2018 Annual Report, the Fund (of which Mobi is the sole promoter) reported total assets of $221,998,000. By way of example, in its 2018 Annual Report, Australian Super reported that it held approximately $140 billion of assets. Total superannuation assets reported by the Australian Prudential Regulation Authority for the financial year ended 30 June 2018 was $2,718.4 billion. Accordingly, at the relevant time of the contravening conduct, the Fund held a relatively small portion of the total superannuation assets in the Australian superannuation system and was a small superannuation fund relative to other superannuation funds.

117 I consider the penalties agreed between the parties to be at the very lowest end of the permissible range of penalties that might be imposed having regard to all of the circumstances

recorded in these reasons. Being within that permissible range, it is "appropriate" to make the orders sought, notwithstanding that in the absence of the parties' agreement, I would have imposed penalties in higher amounts.

118 It is appropriate to identify three aspects of the parties' submissions that I do not accept.

119 First, it is said that there is no evidence before the Court (whether in the form of an agreed statement the purposes of s 191 of the Evidence Act or otherwise) that any of the Consumers suffered financial loss or damage as a consequence of the contravening conduct. However, to my mind, that is hardly a compelling circumstance in the context of the present case. The seriousness of the contravening conduct lies in what I consider to be a failure on the part of Mobi and ZIB to ensure compliance so as to guard against the risk that loss or damage might ensue. Upon the Consumer making a decision to consolidate his or her superannuation, the risk necessarily arose that they may lose the benefit of insurance cover attached to their Existing Funds. Whether or not loss or damage might thereafter be suffered as a consequence of the loss of insurance cover seems to me to be a matter of happenstance, and one that may not play out until some time has passed. I do not consider that the absence of evidence concerning financial loss or damage is a matter that should operate as a mitigating factor in any significant degree. At most, it is a neutral circumstance.

120 To the extent that the Court is invited to make a positive finding that no loss or damage flowed from the contravening conduct, I decline to do so. Such an assertion would be difficult to reconcile against the agreed facts concerning the Consumers' needs and circumstances and the observations in the preceding paragraph. I have particular regard to the personal circumstances of Consumers 4 and 8 and remind myself that, on the admitted facts, they lost insurance cover previously provided under Existing Funds upon their consolidation in the Fund.

121 The provisions contravened by Mobi and ZIB are framed in terms that impose positive obligations on sector participants so as to ensure that affected consumers are fully informed about decisions concerning their superannuation. In the present case, the nature of the offending conduct is such as to create a real risk that consumers may suffer loss and damage that may be very significant indeed, particularly (but not exclusively) by losing the benefit of income protection insurance cover attaching to Existing Funds and covering pre-existing ailments. As Gordon J observed in *Westpac* at [73], "the consolidation of multiple superannuation accounts" is "a significant financial decision". There is, as ASIC correctly submits, a strong public interest in the clear and effective regulation of superannuation products

and associated insurance. To have effective deterrent value, it seems to me that the penalty must be such as to keep firmly in the front of mind of industry participants the positive steps that must be taken to ensure compliance with the statutory regime.

122 It is plain on the facts agreed in the SAFA that the consequence of the contravening conduct is that the Consumers were not provided with the advice Mobi and ZIB were obliged to provide. The very purpose of the provisions contravened by Mobi and ZIB is to guard against the risk that decisions will be made by consumers that are not fully informed. That particular risk transpired on the facts. The circumstance that ASIC has not contended that the Consumers suffered actual loss or damage is not a compelling one.

123 Second, I am not at all moved by the circumstance that amounts held in the Fund comprise only a small proportion of the very significant amounts of money held in superannuation funds across Australia generally. It is difficult to comprehend how that factor bears at all the Court's assessment of the seriousness of the contravening conduct or the deterrence effect of the proposed penalties. It is of course relevant to consider the affordability of penalties from the perspective of the contravening party, that being a matter that properly informs the deterrent value of the penalty under consideration.

124 At the time of the hearing, there was no direct evidence before the Court as to the financial position of either Mobi or ZIB. Inferentially, the circumstance that the money in the Fund totals nearly $222 million suggests that the fees charged by Mobi or ZIB as the case may be are not insignificant. The amount held in the Fund fairly indicates that the Court does not have before it a small business of limited resources.

125 Toward the conclusion of the hearing, I ventured the opinion that the absence of additional material relevant to the financial position of Mobi and ZIB made the Court's task in assessing the deterrent value of the penalty (and hence the appropriateness of the parties' joint position) particularly difficult. In those circumstances I permitted the parties to adduce additional evidence after the conclusion of the hearing as they may be advised. The Court subsequently received two further documents from Mobi and ZIB with ASIC's consent. They are now marked Exhibit D1 and Exhibit D2.

126 Exhibit D1 includes Mobi's draft financial statements for the financial year ending 30 June 2021, attached to a covering letter from an accountant to Mr Andrew Grover. The financial statements are not in their final form, nor have they been declared by a director. I do not

consider them to be particularly reliable for that reason. They include a balance sheet indicating that Mobi does not have significant assets. An "income statement" shows a single line for income, a single line for expenses and a single line for net profit/loss. The income is recorded as $2,394,213 and the net profit as $406,255. In and of itself, the net profit figure does not inform the Court as to the benefits paid to human actors within the business, including its proponents.

127 Exhibit D2 is an audited profit and loss statement and balance sheet for ZIB for the financial year ending 30 June 2021. It records total revenue of $116,376 (comprising commissions and service fees) and a net profit of just $181. Whilst the audited financial statements are reliable, they invite more questions than they answer. The statements relate to ZIB as an individual entity. Its expenses are comprised almost wholly of insurance, interest and audit fees. There is no expense in the nature of payments to suppliers and employees, and yet these are recorded as in the Statement of Cash Flows.

128 The paucity and quality of the evidence is such that it is difficult to guard against the consequence that Mobi and ZIB will consider the agreed penalty to be an acceptable cost of doing business. It appears that ASIC, as the relevant regulator, had originally made a forensic decision not to adduce evidence concerning the financial position of either of Mobi or ZIB in advance of the hearing. That is to be discouraged given the nature of the Court's task. The Court's expectation is that a regulator in ASIC's position will make its own enquiries in respect of the financial position of respondent parties so as to enable the Court to have some confidence that ASIC has itself considered the question of deterrence in its proper commercial context.

129 Whilst I have some misgivings about this aspect of the case, the issue is one concerned with a gap in the evidence that the Court cannot fill. I have had regard to that circumstance in determining whether it is appropriate to accept the parties' submissions about the appropriateness of the agreed penalty.

130 Third, the submission that the defendants' business was characterised by a "culture of compliance" is of course relevant. However, the phrase "culture of compliance" is capable of assuming all manner of meanings. It is an unhelpful phase if detached from any inquiry concerning the systems that were in place to prevent the contraventions and the reason why they failed. There may be cases in which it might be shown that a contravention is an aberration, particularly where a lower level employee fails to comply with clearly stated systemic requirements within a business designed to guard against contravention. But I do not

consider this to be a case of that kind. It is plain that the CSOs were not the authors of the call scripts. It is reasonable to infer that the call scripts were prepared by more senior personnel to whom the CSOs were answerable. The things said by the CSOs in the Admitted Calls with the Consumers were neither unguarded nor idiosyncratic. Rather, it seems to me that the CSOs said and did the very things that Mobi and ZIB directed them to do.

131 Moreover, it is reasonable to infer that the conduct of the Admitted Calls with the Consumers was the principal means by which Consumers were to be induced to consolidate their Existing Funds into the Fund. I consider them to have been a central activity of Mobi and ZIB. A great level of care was required to ensure that adherence to the call scripts would not present an occasion for contraventions to occur.

132 The SAFA records that during the period the call centre operated, Mobi and ZIB took the following steps in relation to the conduct of CSOs on the telephone advice calls:

(1) the call scripts were developed "following legal advice" from Mobi and ZIB's solicitors. The call scripts had also been approved by Tidswell and by TAL Life Ltd (which provided insurance to members of the Fund);

(2) all CSOs were provided with training when they joined Mobi, including as to the difference between factual information, general advice, and personal advice, prior to commencing calls with consumers;

(3) CSOs were also given ongoing, ad hoc, training from time to time, including on compliance issues;

(4) CSOs were specifically trained not to give personal advice (though, personal advice was in given in the Admitted Calls);

(5) all calls made by CSOs in which a consumer agreed to join the Fund were reviewed by a member of Mobi's compliance team, including with a view to determining whether compulsory parts of the call scripts had been read out, and whether personal advice or misleading information had been given to Consumers;

(6) it was the role of the compliance team to identify what were, from Mobi's perspective, compliance issues arising from the calls; and

(7) a Consumer's funds were not rolled over into the Fund until the compliance team had listened to the call and the Consumer's application had been considered and finally approved by Mobi.

133 The matters just described demonstrate that some systems were in place to guard against non-compliance. The flaw in the system is that those responsible for reviewing the CSOs conduct for non-compliance plainly misapprehended the facts or the law. Compliance review processes are of little utility if the content of the review does not align with the requirements for compliance.

134 Finally on the topic of the asserted "compliance culture", it was also submitted that there was a minimum 72 hour cooling-off period following the admission of a Consumer as a member of the Fund, pursuant to which Consumers could elect not to proceed with the roll-over of their Existing Funds into the Fund and/or cancel their membership of the Fund. I do not consider that circumstance to weigh in favour of a lesser penalty. The cooling-off period is a right conferred by the relevant statute and not an invention of either of the defendants. Moreover, the purposes that might be served by the cooling-off period are undermined when the Consumer could not know that they have received misleading advice or that they have not otherwise received the information required to be provided under the statute.

135 As to the states of mind accompanying the contraventions, ASIC does not seek a finding that the defendants' conduct was deliberate or reckless (as opposed to negligent). To say that the contraventions were negligent is hardly informative. Given the role played by call scripts in the Admitted Calls (and hence in the contravening conduct), it is reasonable to infer that the call scripts were prepared with a view to soliciting the custom of Consumers who had expressed an interest in locating their lost super. On the question of their state of mind, I place significant weight on the circumstance that the call scripts were developed "following legal advice". Whilst that agreed fact does not reveal the content of the advice, and whilst it does not state that the content of the call scripts was the subject of legal review, it nonetheless supports a conclusion that the Mobi and ZIB did not have a defiant attitude toward their compliance with the law.

136 Also weighing in favour of the very low penalty is the circumstance that neither Mobi nor ZIB have previously had findings of contravention made against them. I place great weight on their willingness to admit facts.

137 In the result, whilst I have not embraced the whole of the parties' submissions, I have concluded that my disagreement with some parts of the argument presented by the parties is not such as to warrant a departure from the figures put forward by them. In making orders in the terms sought I have placed significant store in the role of ASIC as the regulator, the manner in which

it has chosen to present its case, and its opinion as to the monetary penalty necessary to advance the purpose of specific and general deterrence.

138 Orders will be made substantially in the terms sought jointly by ASIC, Mobi, ZIB and Mr Grover.

I certify that the preceding one hundred and thirty-eight (138) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Charlesworth.

Associate:

Dated: 26 August 2022

SCHEDULE OF PARTIES

SAD 237 of 2019

Defendants

Fourth Defendant:	ANDREW RICHARD GROVER