FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Daly (Liability Hearing) [2023] FCA 290

File number:	QUD 269 of 2020
Judgment of:	**CHEESEMAN J**
Date of judgment:	3 April 2023
Catchwords:	**CORPORATIONS** — civil penalty proceedings — liability phase — duties of officers of responsible entity of a registered managed investment scheme — whether first respondent is an "officer" of the responsible entity for the purposes of the *Corporations **Act** 2001* (Cth) — whether officers of responsible entity breached duties owed pursuant to s 601FD(1) of the Act — Held: contravention established. **PRACTICE AND PROCEDURE** — pleadings — where proceedings based on an originating process, amended concise statement and amended statement of claim — where first respondent alleges claims against him not sufficiently pleaded — whether procedural unfairness occasioned — Held: ASIC's claim against first respondent adequately disclosed, no procedural unfairness occasioned. **EVIDENCE** — where none of the respondents gave evidence — application of rule in *Jones v Dunkel* in civil penalty proceedings — Held: appropriate to draw *Jones v Dunkel* inferences in respect of issues on which respondents did not give evidence. **EVIDENCE** — where Australian Securities and Investments Commission (**ASIC**) did not call a witness who could have given relevant evidence — whether evidence from other sources should be discounted by reason of ASIC not calling the witness — Held: no procedural unfairness. No basis to discount other evidence.
Legislation:	*Corporations Act 2001* (Cth) ss 9, 601FD(1), 601FD(3), *Evidence Act 1995* (Cth) s 140(2) *Federal Court Rules 2011* (Cth) r 16.02(1)
Cases cited:	*Adams v Director of Fair Work Building Industry Inspectorate* [2017]; FCAFC 228; 258 FCR 257

Adler v Australian Securities and Investments Commission [2003] NSWCA 131; 179 FLR 1

Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788 [2021] FCAFC 121; 287 FCR 388

Australian Building and Construction Commissioner v Hall [2018] FCAFC 83; 261 FCR 347

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited [2019] FCA 1284

Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2) [2005] NSWSC 267; 53 ACSR 305

Australian Securities and Investment Commission v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq) (Controllers apptd) (No 3) [2013] FCA 1342

Australian Securities and Investments Commission v Avestra Asset Management [2017] FCA 497; 348 ALR 525

Australian Securities and Investments Commission v Getswift [2021] FCA 1384

Australian Securities and Investments Commission v Healey [2011] FCA 717; 196 FCR 291

Australian Securities and Investments Commission v Hellicar [2012] HCA 17; 247 CLR 345

Australian Securities and Investments Commission v King [2020] HCA 4; 270 CLR 1

Australian Securities and Investments Commission v Lewski [2018] HCA 63; 266 CLR 173

Australian Securities and Investments Commission v Linchpin Capital Group Ltd [2018] FCA 1104

Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 2) [2019] FCA 398

Australian Securities and Investment Commission v Westpac Securities Administration Limited [2019] FCAFC 187; 272 FCR 170

Australian Securities Commission v AS Nominees Limited [1995] FCA 1663; 62 FCR 504

Banque Commerciale SA, En liquidation v Akhil Holdings Ltd [1990] HCA 11; 169 CLR 279

Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336

Commissioner for Corporate Affairs v Bracht [1989] VR 821

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission [2007] FCAFC 132; 162 FCR 466

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2015] FCAFC 25; 230 FCR 298

Fair Work Ombudsman v Maritime Union of Australia [2017] FCA 1363

Hancock v Rinehart [2015] NSWSC 646; 106 ACSR 207

Heiko Constructions T/A Heiko Constructions Pty Ltd v Tyson [2020] FCAFC 208; 282 FCR 297

Jones v Dunkel [1959] HCA 9; 101 CLR 298

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; 243 CLR 361

LM Investment Management Ltd (receiver apptd) (in liq) v Drake & Ors [2019] QSC 281

Morley v Australian Securities and Investments Commission [2010] NSWCA 331; 274 ALR 205

MLC Limited v Crickitt (No 2) [2017] FCA 937

Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland [2020] FCA 1353

Oztech Pty Ltd v Public Trustee of Queensland [2019] FCAFC 102; 269 FCR 349

R v Byrnes [1995] HCA 1; 183 CLR 501

Sabapathy v Jetstar Airways [2021] FCAFC 25

Sullivan v Trilogy Funds Management Limited [2017] FCAFC 153

Trilogy Funds Management Ltd (as the responsible entity for the Pacific First Mortgage Fund) v Sullivan (No 2) [2015] FCA 1452; 331 ALR 185

United Petroleum Australia Pty Ltd v Herbert Smith Freehills [2018] VSC 347; 128 ACSR 324

Waters v Mercedes Holdings Pty Limited [2012] FCAFC 80; 203 FCR 218

Whitehorn v The Queen [1983] HCA 42; 152 CLR 657

Windbox Pty Ltd v Daguragu Aboriginal Land Trust (No 3) [2020] NTSC 21

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Date of last submissions:	1 March 2022
Date of hearing:	7 March 2022 – 11 March 2022
Counsel for the Applicant	Ms M H Hindman QC, Mr L Clark and Mr E Robinson
Solicitor for the Applicant	Gadens Lawyers
Counsel for the First Respondent	Mr G Coveney and Mr D Freeman
Solicitor for the First Respondent	Assembly Law
Counsel for the Second Respondent	Mr P K O'Higgins
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Counsel for the Third Respondent	Mr C A Johnstone
Solicitor for the Third Respondent	Cowen Schwarz Marschke
Counsel for the Fourth Respondent	Mr P J McCafferty QC
Solicitor for the Fourth Respondent	Bartley Cohen

ORDERS

QUD 269 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**PETER DALY** First Respondent
	PAUL NIELSEN Second Respondent
	PAUL ANTHONY RAFTERY (and another named in the Schedule) Third Respondent

ORDER MADE BY: **CHEESEMAN J**

DATE OF ORDER: **3 APRIL 2023**

THE COURT ORDERS THAT:

1. By 17 April 2023, the parties are to confer and propose short minutes setting out timetabling orders for the preparation of the hearing concerning relief and provide a copy to the Associate to Cheeseman J.
2. Costs be reserved.

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

REASONS FOR JUDGMENT

CHEESEMAN J

INTRODUCTION

1 In these civil penalty proceedings, the Australian Securities and Investments Commission (**ASIC**) seeks declaratory relief, pecuniary penalties and disqualification orders in relation to the alleged contravention of ss 601FD(1)(b), (c), (e), (f) and 601FD(3) of the *Corporations **Act** 2001* (Cth) by four respondents in relation to their conduct as officers of **Endeavour** Securities (Australia) Ltd (in liquidation) (ACN 079 988 819), the responsible entity of the Investport Income Opportunity Fund, a registered managed investment scheme. These reasons are addressed to the issue of liability only.

2 The proceeding arises in the context of two managed investment schemes. Both bore the same name – the Investport Income Opportunity Fund – and were referred to by the same acronym – IIOF. The earlier of the two schemes was an unregistered managed investment scheme for which **Linchpin** Capital Group Ltd (ACN 163 992 961) was responsible. The other scheme was registered. To distinguish between the two, I will refer to them as the **Unregistered Scheme** and the **Registered Scheme**.

3 The Registered Scheme is necessarily the focus of the allegations of contravention of ss 601FD(1) and (3) of the Act, which impose duties on the officers of responsible entities of registered schemes.

4 Endeavour raised about $17.3 million in the Registered Scheme from 131 investors pursuant to three product disclosure statements (**PDS**), issued on 27 April 2015, 1 October 2015 and 24 June 2016, the **First PDS**, **Second PDS** and **Third PDS** respectively. About 95% of the funds raised in the Registered Scheme were transferred to Linchpin as trustee of the Unregistered Scheme.

5 Unless context otherwise dictates, all references to Endeavour are to Endeavour acting in its capacity as the responsible entity for the Registered Scheme. Linchpin was described as the responsible entity and acted as the trustee of the Unregistered Scheme. I will refer to Linchpin as the trustee of the Unregistered Scheme. Again, unless context otherwise dictates, all references to Linchpin are to Linchpin acting in this capacity with respect to the Unregistered Scheme.

6 On 7 August 2018, Mr Jason Mark Tracy and Mr David Orr of Deloitte were appointed as interim **Receivers** of the property of: Linchpin; the Unregistered Scheme; and the Registered

Scheme: *Australian Securities and Investments Commission v Linchpin Capital Group Ltd* [2018] FCA 1104 (***ASIC v Linchpin***).

7 After obtaining interlocutory relief, ASIC brought proceedings against Linchpin and Endeavour which were, to the extent possible, resolved by agreement, and by orders entered on 15 March 2019: *Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 2)* [2019] FCA 398 (***ASIC v Linchpin (No 2)***). The respondents to the present proceeding were not parties to the proceedings against Linchpin and Endeavour.

8 In *ASIC v Linchpin (No 2)* declarations were made in respect of Endeavour's contravention of s 208 (as modified by s 601LC) — engaging in related party transactions without member approval; s 601FC(1)(b) — failing to exercise reasonable care and skill as responsible entity of the Registered Scheme; s 601FC(1)(c) — failing to act in the best interests of the members of the Registered Scheme; s 601FC(1)(h) — failing to comply with its compliance plan; s 601FC(1)(j) — failing to ensure that the property of the Registered Scheme was valued at regular intervals; s 601FC(1)(k) — failing to ensure that payments were made out of scheme property in accordance with the Act; s 912A(1)(a) — failing to ensure that the financial services it provided in respect of the Registered Scheme were provided efficiently and fairly; s 912A(1)(aa) — failing to have in place adequate arrangements for the management of conflicts of interest; ss 1013D(1)(f) and 1013E — failing to identify, in the Second PDS and the Third PDS, the nature of the related party transactions which had been entered into prior to issuing those PDS; and s 1017B(1) — failing to identify to the Registered Scheme members the nature and extent of the related party transactions that were entered into following the issue of the First, Second and Third PDS. Declarations were also made in respect of Linchpin's contraventions of the Act including, *inter alia,* contravention of s 601ED(5) — failure to register the Unregistered Scheme and 601ED(5) of the Act — operating an unregistered managed investment scheme.

9 On 15 March 2019, Mr Tracy and Mr Orr were appointed as the joint and several liquidators of Linchpin and Endeavour (pursuant to s 461(1)(k)) and as the responsible persons for winding up the funds of the Registered Scheme (pursuant to s 601ND(1)(a)) and the Unregistered Scheme (pursuant to s 601EE(2) of the Act).

10 Endeavour was acquired by Linchpin in December 2014. All four respondents were directors of Linchpin throughout the whole of the relevant period. A structural diagram of Linchpin and

its relevant related entities (collectively, the **Linchpin Group**), and the Registered Scheme and Unregistered Scheme is included as **Schedule A** to these reasons.

11 Mr Paul Nielsen, Mr Paul Raftery and Mr Ian Williams, the second, third and fourth respondents respectively, were directors of Endeavour during the whole of the **relevant period**, 1 April 2015 to 7 August 2018. Mr Nielsen and Mr Williams acted as joint chief executive officers and managing directors of Endeavour for the whole of the relevant period.

12 Mr Peter Daly, the first respondent, was not appointed as a director of Endeavour. ASIC contends that Mr Daly was relevantly an officer of Endeavour within the meaning of para (b)(i) and (ii) of the definition of "officer" in s 9 of the Act because he was a person who made, or participated in, making decisions that affected the whole, or a substantial part, of the business of Endeavour, or had the capacity to significantly affect Endeavour's financial standing.

13 At the commencement of the liability hearing, Mr Nielsen, Mr Raftery and Mr Williams by their respective counsel confirmed that they did not contest ASIC's entitlement to declaratory relief on the basis that the evidence led by ASIC established to the requisite standard of proof that they each had contravened s 601FD(1) of the Act as alleged.

14 Mr Daly was legally represented at the hearing. He was the only respondent who took an active part in the liability hearing. In his defence, Mr Daly denied that he was an officer of Endeavour. He also sought to defend the allegations against him on the basis of his contention that ASIC's claim against him was inadequately pleaded and that ASIC had not established a causative link between his conduct and the relevant contraventions of the Act. At the conclusion of ASIC's case, Mr Daly elected to exercise his privilege against exposure to a penalty. Accordingly, he did not go into evidence.

CONCLUSION IN SUMMARY FORM

15 Conscious of the consequences that follow in the context of these civil penalty proceedings, I am satisfied on the balance of probabilities that ASIC has established that the respondents contravened ss 601FD(1)(b), (c), (e), (f) and 601FD(3) of the Act, in the manner set out within.

16 In finding against Mr Daly, and again, conscious of the consequence of doing so in the present context, I am satisfied on the balance of probabilities that ASIC has established that Mr Daly was an officer of Endeavour from at least 1 April 2015 to 7 August 2018.

17 I will hear from the parties on the relief that should follow as a consequence of my findings on liability.

LEGISLATIVE FRAMEWORK

18 Before moving to the facts, it is useful to first address the legislative framework for the regulation of managed investment schemes.

19 Section 9 of the Act defines "managed investment scheme" as follows:

> (a) a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
>
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
>
> (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)…

20 Chapter 5C of the Act contains provisions relating to the registration and operation of managed investment schemes. To register a managed investment scheme, a person must lodge an application with ASIC together with, relevantly, a copy of the scheme's constitution and compliance plan: s 601EA. ASIC must register the scheme within 14 days of lodgement of the application, unless it appears to ASIC, *inter alia*, that the constitution and compliance plan do not meet the requirements specified in the Act: s 601EB.

21 The requirements for a scheme's constitution are set out in Part 5C.3 of the Act. Section 601GA(1) provides that the constitution of a registered scheme must make adequate provision for, *inter alia*, the powers of the responsible entity in relation to making investments of, or otherwise dealing with, the scheme property. The constitution of a registered scheme must be contained in a document that is legally enforceable as between the members and the responsible entity: s 601GB.

22 The requirements of the scheme's compliance plan are in Part 5C.4 of the Act. The compliance plan must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with the Act and the scheme's constitution: s 601HA(1).

Compliance with the plan must be audited by a registered company auditor, an audit firm or an authorised audit company: s 601HG.

23 A registered managed investment scheme must have a responsible entity, which in turn must be a public company that holds an Australian Financial Services Licence (**AFSL**) authorising it to operate a managed investment scheme: s 601FA. The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and the Act: s 601FB(1). The responsible entity holds scheme property on trust for scheme members: s 601FC(2). In effect, the responsible entity is tasked with acting as a professional trustee in relation to the scheme property.

24 The duties of a responsible entity are prescribed by s 601FC(1). The duties imposed directly on the responsible entity by s 601FC(1) are mirrored in s 601FD(1), which imposes duties on officers of a responsible entity. This is the critical provision in issue in this proceeding.

25 The duties imposed by s 601FD(1) that ASIC alleges that each of the respondents contravened in various ways are:

> **Duties of officers of responsible entity**
>
> (1) An officer of the responsible entity of a registered scheme must:
>
> …
>
> (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
>
> (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
>
> …
>
> (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
>
> (f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:
>
> (i) this Act; and
>
> (ii) any conditions imposed on the responsible entity's Australian financial services licence; and
>
> (iii) the scheme's constitution; and
>
> (iv) the scheme's compliance plan.

26 In the context of the obligations imposed by s 601FD(1)(f), it is relevant to note that the Act imposes obligations in respect of PDS issued in respect of financial products. The obligation to issue a PDS in respect of financial products is imposed by s 1012A. Relevantly, a PDS must contain such information about the following matters as a person would reasonably require for the purpose of making a decision, as a retail client, as to whether to acquire the relevant financial product:

(a) any significant risks associated with holding the product: s 1013D(1)(c);

(b) the cost of the product, any amounts that will or may be payable by a holder of the product in respect of the product after its acquisition, and – if the amounts paid in respect of the financial product and the amounts paid in respect of other financial products are paid into a common fund – any amounts that will or may be deducted from the fund by way of fees, expenses, or charges: s 1013D(1)(d);

(c) any other significant characteristics or features of the product, or of the rights, terms, conditions and obligations attaching to the product: s 1013D(1)(f); and

(d) any other matter that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product: s 1013E.

27 Issuers of financial products must notify the holders of their products of any material change to a matter, or any significant event that affects a matter, being a matter that would have been required to be specified in a PDS for the financial product prepared on the day before the change or event occurs, and certain changes, events and matters as may be specified in the regulations: s 1017B(1A)(a), (b). A notice given pursuant to s 1017B(1) must contain all the information that is reasonably necessary for the holder to understand the nature and effect of the relevant changes or events: s 1017B(4).

28 A duty of an officer of the responsible entity under s 601FD(1) overrides any conflicting duty the officer has under Part 2D.1 of the Act, which prescribes the duties and powers of directors and other officers and employees of corporations generally: s 601FD(2).

29 Section 601FD(3) provides that a contravention of s 601FD(1) is also a contravention of s 601FD(3), which is a civil penalty provision: s 1317E.

SOURCES OF EVIDENCE

30 The evidence tendered at the liability hearing was voluminous, comprising approximately 15 volumes of documentary material. Broadly, it was drawn from the following sources.

31 ASIC's affidavit evidence was comprised of:

(e) Three affidavits of Ms Anne Elizabeth Gubbins, solicitor at ASIC, dated 30 April 2021, 29 November 2021, and 11 February 2022;

(f) Two affidavits of Mr Tracy in his capacity as Receiver and liquidator, described above, dated 30 April 2021 and 22 February 2022; and

(g) Two affidavits of Ms Tegan Harris, director, formerly senior associate, at Gadens Lawyers, solicitors for ASIC, dated 30 April 2021 and 29 November 2021.

32 In January 2018, ASIC commenced a formal investigation into suspected contraventions of the Act by Linchpin, Endeavour, other entities related to Linchpin, and the officers, employees, agents and associated entities of those companies. Ms Gubbins deposes to and puts into evidence the results of various searches conducted by ASIC in the course of its investigation and the responses received by ASIC to compulsory notices issued by it under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). In her third affidavit, Ms Gubbins clarifies, *inter alia*, certain matters in respect of the responses ASIC received to compulsory notices issued by it. Ms Gubbins was briefly cross-examined by Mr Daly's counsel at the liability hearing.

33 Mr Tracy's first affidavit, *inter alia*, annexes a joint report prepared by him and Mr Orr, in their capacities as the Receivers, for the purpose of the receivership and winding up proceedings, (**Receivers' Report**). In that report, Mr Tracy and Mr Orr identify the way in which funds invested in both the Registered and Unregistered Schemes were applied. Mr Tracy described the key foundation of the Receivers' Report as being a full reconciliation of the bank accounts of both the schemes. In order to fulfil the scope of the report as dictated by the orders of the Court, Mr Tracy considered it necessary to look at the source of all funds within each of the schemes and the use to which those funds had been put. In his second affidavit, Mr Tracy provides some further explanation of the process he undertook in reaching certain conclusions in the Receivers' Report and exhibits additional key documents relied upon by him in preparing that report. Mr Tracy was briefly cross-examined by Mr Daly's counsel at the liability hearing.

34 Ms Harris' evidence went to the processes undertaken by ASIC's solicitors to identify and distil documents relevant to the proceeding, including by conducting and supervising key word searches across the documents obtained by ASIC under various compulsory notices. ASIC relies on her evidence in support of an inference that certain things which ASIC contends should have been done were not done because no documents were produced in answer to notices directed to those things. Ms Harris was not cross-examined.

35 A feature of the evidence was that, notwithstanding an extensive investigation by ASIC, which included the administration of statutory notices to many varied entities, there were clear deficiencies in the documentary record relating to both schemes and the way in which they were managed. The nature of many of the deficiencies, in combination with the responses to statutory notices, causes me to infer that the record-keeping for both schemes was inadequate. There was, at the very least, a blurring of the proper demarcation between the two schemes in the way in which such records as were kept, were maintained. Particular deficiencies in the record-keeping of the schemes are addressed where relevant below.

FACT-FINDING – APPLICABLE PRINCIPLES

36 Before turning to consider the evidence, it is convenient to address the principles applicable to fact finding in the present context.

Standard of satisfaction on balance of probabilities

37 In proceedings such as these, involving civil penalty, for ASIC to succeed, I must reach a state of satisfaction or actual persuasion, on the balance of probabilities, while taking into account the seriousness of the allegations and the consequences which will follow if the contraventions are established. Section 140(2) of the ***Evidence Act*** *1995* (Cth), which is the statutory expression of the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336, provides:

> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged.

38 The application of s 140(2) of the Evidence Act and the principles applicable to inferential fact-finding, were canvassed by Lee J in a civil penalty context in *Australian Securities and Investments Commission v Getswift* [2021] FCA 1384 at [118] to [122] and at [1897] to [1899].

It is not necessary for me to reproduce his Honour's detailed analysis. I draw the following principles from it:

(1) The Court must reach a state of actual persuasion of the occurrence of an alleged contravention;

(2) The specific factual allegations are paramount when considering the gravity of the matters alleged, not the examination of any cause of action or issues in the abstract;

(3) Where there is no direct evidence of a fact alleged, the Court need not have entire satisfaction as to the true state of affairs — a case may be advanced on the basis of circumstantial evidence which, taken in combination with other directly proven facts, may form an adequate basis for making the ultimate factual finding;

(4) Circumstances raising a more probable inference in favour of the facts alleged may satisfy the civil standard of proof, notwithstanding that the conclusion may fall short of certainty; and

(5) Whether an inference is open to be drawn invites consideration of the combined weight or force of circumstantial facts, rather than a discrete consideration of each fact.

39 I adopt and apply those principles here.

Are *Jones v Dunkel* inferences available against the respondents?

40 Having reserved his position until the close of ASIC's case, Mr Daly ultimately elected not to give evidence. ASIC contends that, in the context of civil penalty proceedings, and in circumstances where Mr Daly has not waived his privilege against self-exposure to a penalty, the rule in ***Jones v Dunkel*** (1959) 101 CLR 298 applies. ASIC submits that the Court can, and should, draw *Jones v Dunkel* inferences against Mr Daly on a number of factual matters upon which he did not give evidence but would be expected to have knowledge. The inference for which ASIC contends is that Mr Daly's evidence on certain matters, on which he could have, but did not, give evidence, would not have assisted his defence. Mr Daly did not make submissions on this issue. ASIC did not address submissions on this issue to the position of the other respondents. The same issue arises in relation to them as well as Mr Daly.

41 In *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361, Heydon, Crennan and Bell JJ said at [63] to [64] (footnotes omitted):

> The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence

> would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn. These principles have been extended from instances where a witness has not been called at all to instances where a witness has been called but not questioned on particular topics. Where counsel for a party has refrained from asking a witness whom that party has called particular questions on an issue, the court will be less likely to draw inferences favourable to that party from other evidence in relation to that issue. That problem did not arise here. The plaintiff's counsel did ask the plaintiff relevant questions.
>
> The rule in *Jones v Dunkel* permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party...

42 The drawing of *Jones v Dunkel* inferences, if appropriate, in civil penalty proceedings where there is an available claim for penalty privilege has been confirmed by the Full Court: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* [2007] FCAFC 132; 162 FCR 466 at [74] to [76]; *Adams v Director of Fair Work Building Industry Inspectorate* [2017] FCAFC 228; 258 FCR 257 at [147].

43 I will address the particular inferences which I consider it appropriate to draw against each of the respondents in considering the substantive issues to which they relate.

FACTS

44 On the basis of the body of evidence outlined above, and applying the approach to fact-finding outlined above, I make the following findings of fact.

Overview

The relevant period

45 As noted above, the relevant period is from 1 April 2015 to 7 August 2018.

46 The significance of 1 April 2015 is that it is the date of a circular resolution of a committee that ASIC contends set the overarching investment strategy of the Registered Scheme. The committee was variously referred to as the "Credit Committee", the "Lending Committee" and / or the "Investment Committee". For reasons which I will develop, I find that these names were used interchangeably and there was in fact only one committee, which was referred to variously by each or a combination of these names. Mr Daly conceded that the terms "Credit Committee", "Investment Committee" and "Lending Committee" each referred to the same committee notwithstanding the use of different names. I will refer to this committee as the

Investment Committee. In doing so, I note that nothing turns on the name by which the committee was known. The central contest for the purpose of Mr Daly's defence is whether, from about 1 April 2015, the committee operated with respect to the Registered Scheme as well as the Unregistered Scheme.

47 The end of the relevant period is marked by the appointment of the Receivers.

The pre-Endeavour period

48 The structure and operations of the Linchpin Group prior to 1 April 2015 provides necessary context to what occurred during the relevant period. It is useful to begin by examining the period before the acquisition by Linchpin of Endeavour in about December 2014, before moving to the relevant period.

49 A feature of the pre-Endeavour period is the operation of the Unregistered Scheme within the Linchpin Group. On about 22 January 2014, Linchpin issued an Information Memorandum (**IM**), offering units in the Unregistered Scheme to investors. Excluding the amount received from the Registered Scheme, the total amount invested in the Unregistered Scheme was about $5.4 million, which was received from 46 investors between January 2014 and June 2015. There were three redemptions from the Unregistered Scheme resulting in net investor funds of about $5.2 million. During this period, Linchpin as trustee of the Unregistered Scheme commenced making loans using the pooled funds administered in the Unregistered Scheme.

The post-Endeavour period

50 The second period follows the acquisition of Endeavour by Linchpin in around December 2014. Prior to Endeavour being acquired by Linchpin, Endeavour was already the responsible entity for the Registered Scheme, then known by another name. The Registered Scheme was inactive at the time of the acquisition by Linchpin. The evidence in relation to the Registered Scheme in the pre-Linchpin period is sparse. It was named the "Endeavour Hi-Yield Fund". The Registered Scheme is referred to as having had "a limited operating history" in all the PDS issued after Linchpin acquired Endeavour. The "Minutes of a Compliance Committee Meeting" of 15 April 2015 record that the directors of Endeavour had resolved to "activate" the Registered Scheme, using the same name as that used for the Unregistered Scheme. The Endeavour Compliance Committee is addressed in detail below.

Funds raised in the Registered Scheme

51 As mentioned above, during the period after it was acquired by Linchpin, Endeavour raised about $17.3 million in the Registered Scheme from 131 investors pursuant to the three PDS it issued.

52 The vast majority of investors in the Registered Scheme acquired units as retail clients. Only four investors contributed over $500,000 and accordingly were not retail investors within the meaning of s 761G(7)(a) of the Act and reg 7.1.18(2) of the *Corporations Regulations 2001* (Cth). Based on the presumption in the Act that a person to whom a financial product or service is provided as a retail client, is taken to acquire that product or service as a retail client, the remaining 127 investors acquired the relevant financial products as retail clients: s 761G(1).

Investment mandate – diversified, secured, income-producing

53 A key feature of the descriptions included in the IM in respect of the Unregistered Scheme and in each of the PDS in respect of the Registered Scheme was the emphasis on the diversification of the investment of the pooled funds administered in each scheme. Further, that loans made using the pooled funds would be secured and income producing.

Funds passed by Endeavour to Linchpin

54 The pooled funds received in the Registered Scheme were passed by Endeavour to Linchpin, as trustee of the Unregistered Scheme, or to others on behalf of Linchpin. The basis upon which funds from the Registered Scheme were provided to, or for the benefit of, Linchpin, as trustee of the Unregistered Scheme, was not adequately documented. The inadequacy of the documentation has resulted in a lack of precision as to whether the funds advanced by the Registered Scheme were invested in units in the Unregistered Scheme, or lent to Linchpin as trustee of the Unregistered Scheme, or a combination of both. This issue is addressed in greater detail below.

55 I interpolate to note that ASIC frames its case to accommodate this uncertainty. ASIC's primary position, in closing submissions, was that the funds advanced by the Registered Scheme were invested in units in the Unregistered Scheme. For the purpose of the present proceeding, nothing turns on the resolution of this uncertainty. ASIC contends that the respondents' contraventions are established on both alternatives.

The Unregistered Scheme Loans

56 Linchpin applied the funds received from Endeavour principally to making loans to itself and to others. The loans made by Linchpin as trustee of the Unregistered Scheme, including in the period before Linchpin acquired Endeavour, fell into three broad categories, each of which is addressed in more detail below. I will refer to the loans collectively as the **Unregistered Scheme Loans**.

Linchpin Entity Loans

57 The first category comprises loans to entities in the Linchpin Group (**Linchpin Entity Loans**). The total amount of Linchpin Entity Loans was approximately $14.8 million, comprising five loans to five different entities in the Linchpin Group. The findings of fact that I make in respect of each of these loans are summarised in **Schedule B** to these reasons.

58 In Schedule B, I make findings as to the identity of the borrowers for each of the Linchpin Entity Loans, the loan and security documentation executed in respect of each loan, the applicable loan limits, including, where applicable, in relation to variations thereto, and the identity of the respondents who executed the relevant documentation on behalf of Linchpin in its capacity as trustee for the Unregistered Scheme. I further make findings in relation to the date on which the relevant loans were approved by the Investment Committee by circular resolution and the identity of the respondents who signed the relevant circular resolutions.

Adviser Loans

59 The second category is loans to advisers operating as authorised representatives, individual or corporate, of AFSL holders within the Linchpin Group (**Adviser Loans**). The total amount of Adviser Loans was approximately $6.3 million, comprising 18 loans to 17 different entities. The findings of fact that I make in respect of each of the Adviser Loans are summarised in **Schedule C** to these reasons.

60 In Schedule C, I make findings as to the identity of the borrowers for each of the Adviser Loans, the loan and security documentation executed in respect of each loan, the applicable loan limits, including, where applicable, in relation to variations thereto, and the identity of the respondents who executed the relevant documentation on behalf of Linchpin in its capacity as trustee for the Unregistered Scheme. I also make findings as to the existence and extent of adviser relationships between particular borrowers and entitles in the Linchpin Group, particularly **Financiallink** Group Pty Ltd and Risk and Investment Advisers Australia Pty Ltd (**RIAA**). I

further make findings in relation to the date on which the relevant loans were approved by the Investment Committee by circular resolution and the identity of the respondents who signed the relevant circular resolutions.

Linchpin Director Loans

61 The third category comprises loans made to each of Mr Daly and Mr Raftery, both directors of Linchpin (**Linchpin Director Loans**). The Linchpin Director Loans were in the total amount of about $100,000 with about $70,000 lent to Mr Daly and about $30,000 lent to Mr Raftery. The findings of fact that I make in respect of each of the Linchpin Director Loans are summarised in **Schedule D** to these reasons.

62 In Schedule D, I make findings as to the details of each of the Linchpin Director Loans, the dates of execution of the loan and security documents and variations thereto, and the identity of the respondents who executed the relevant documentation on behalf of Linchpin in its capacity as trustee for the Unregistered Scheme. I further make findings in relation to the date on which the relevant loans were approved by the Investment Committee by circular resolution and the identity of the respondents who signed the relevant circular resolutions.

Endeavour's written policies

63 During the whole of the relevant period, Endeavour had in place written policies that purported to regulate its operations, including with respect to its role as the responsible entity of the Registered Scheme. The purpose of these policies was to ensure that Endeavour complied with the Act, including relevantly, the obligations imposed in respect of transactions involving related parties.

64 I now turn to consider the evidence in greater detail.

Structure and operation of Linchpin Group pre-Endeavour acquisition

65 Relevantly, the Linchpin Group provided a range of financial products, as well as funds management, investment advisory and consulting services. As at August 2018, it had 413 authorised representatives under s 761A of the Act, and four of its group entities held an AFSL. Linchpin itself was a corporate authorised representative under an AFSL.

66 The Linchpin Group relevantly included the following companies:

(1) Endeavour;

(2) Investport Pty Ltd (**IPL**);

(3) Beacon Financial Group Pty Ltd (**Beacon**);

(4) ISARF Pty Ltd (**ISARF**);

(5) CPG Research & Advisory Group Pty Ltd (**CPG**);

(6) RIAA; and

(7) Financiallink.

67 Linchpin was either the direct or ultimate holding company of these entities. The respondents, in varying combinations, acted as the directors of these entities during the relevant period. Each of the respondents was a director of Linchpin. As mentioned, Mr Nielsen, Mr Raftery and Mr Williams were directors of Endeavour. Mr Nielsen and Mr Williams acted as joint chief executive officers and managing directors of both Linchpin and Endeavour. Mr Daly, Mr Nielsen and Mr Williams were each directors of IPL and Beacon and, from 3 June 2015, RIAA. Mr Nielsen and Mr Williams were directors of CPG and Mr Daly and Mr Nielsen were directors of Financiallink: see Schedule A.

68 As noted, with the exception of Mr Daly, the respondents were each directors of Linchpin and Endeavour, appointed as follows and continuing for the whole of the relevant period:

(1) Paul Nielsen: Linchpin – 28 May 2013;
Endeavour – 8 December 2014;

(2) Paul Raftery: Linchpin – 28 May 2013;
Endeavour – 8 December 2014;

(3) Ian Williams: Linchpin – 28 May 2013;
Endeavour – 8 December 2014.

69 Mr Daly became a director of Linchpin on 2 October 2013 and continued as a director for the whole of the relevant period.

70 As mentioned above, a central issue in dispute between ASIC and Mr Daly is whether, notwithstanding that Mr Daly was not formally appointed as one of the directors of Endeavour, his role was such that he fell within the statutory definition of an officer during the relevant period.

The Unregistered Scheme in the period before the Endeavour acquisition

71 On about 22 January 2014, by a trust deed poll entitled the Investport Income Opportunity Fund Constitution, Linchpin established the Unregistered Scheme. Linchpin was described as the "Responsible Entity" and acted as the first trustee. IPL was appointed as the manager of the Unregistered Scheme pursuant to the provisions of a management agreement dated 22 January 2014.

The Information Memorandum

72 On about 23 January 2014, Linchpin issued the IM, offering units in the Unregistered Scheme to investors. The IM relevantly provided that:

(1) Linchpin was the responsible entity of the Unregistered Scheme and IPL was the fund's manager;

(2) up to 20 initial investors were invited to invest in the Unregistered Scheme

(3) there were three investment options: a one year option with a return rate of 8.25% per annum; a two year option with a return rate of 8.5% per annum; or a three year option with a return rate of 8.75% per annum;

(4) the minimum total subscription was $5 million with a maximum target of $10 million. Over subscriptions could be accepted if IPL received additional lending submissions that were in accordance with the fund's mandate;

(5) Linchpin would deposit and deal with the investors' funds pursuant to "this offer";

(6) distributions would be paid quarterly;

(7) each unit in the Unregistered Scheme would be initially issued by Linchpin for an application price of $1.00;

(8) the offer of units was expressed to be made pursuant to s 911A(2)(b) of the Act; and

(9) the offer of units was available only to "Wholesale / Experienced Investors" and it was stated that for this reason a PDS in accordance with Division 2 of Part 7.9 of the Act was not required.

73 In the IM, a statement was included as to an intention to issue a retail PDS once the scheme had been registered with the ASIC and after the "wholesale fund" commenced. Notwithstanding the reference to the issue of a "retail PDS", which was to be registered with ASIC, there is no evidence of any retail PDS being issued by Linchpin. The three relevant PDS were issued by Endeavour in connection with the Registered Scheme.

74 The total amount of funds invested pursuant to the IM by investors, excluding funds received from Endeavour was approximately $5.4 million received from 46 investors. If the funds received from Endeavour are treated as an investment in the Unregistered Scheme the total amount invested would increase by approximately $16.5 million.

75 In section 3 of the IM — "Fund Summary" — the "Investment Strategy" was summarised in the following terms:

> To invest funds progressively that achieves a diversified loan portfolio across property and corporate sectors on a secured basis that are income producing. The lending policy and process is outlined in the Lending Manual.
>
> The Fund also seeks to hold cash and cash equivalents to generate income and provide liquidity to the Fund.

76 The only versions of the "Lending Manual" in evidence are manuals which postdate the IM and which I infer comprise what, from at least March 2016, became a composite **Lending Manual** in respect of both the Unregistered Scheme and Registered Scheme. That there was a version of the Lending Manual which was issued in around February 2014, proximate to the issue of the IM, is evident from the version logs maintained in the later versions of the manual. There is no copy of the February 2014 version of the Lending Manual in evidence. None was produced to ASIC in answer to compulsory notices, the terms of which covered the February 2014 version of the manual. The facts I have found in relation to the Lending Manual are addressed in detail below.

77 Section 3 of the IM also included a summary description of section 5 —"Investment Universe":

> The Fund invests in the full spectrum of direct property and corporate loans that includes, but not limited to:
>
> - Construction and development and sub-division of residential, commercial, industrial and retail property
> - Purchase of residential / retail / commercial / industrial premises that are primarily serviced by rental income generated.
> - Short term funding for businesses supported by appropriate real property security or security interest.
> - Lease finance arrangements for business equipment
> - Corporate debt
> - Business acquisition finance Excess funds can be invested in Government & corporate rated bonds, bank bills, commercial paper, fixed interest managed investments and mortgaged backed and asset backed securities.

The Fund may also invest in derivatives for investment & hedging purposes.

78 Section 5 of the IM detailed the investment strategy of the Unregistered Scheme in the following terms:

> The Fund is an Unregistered Managed Investment Scheme that pools investors' monies together.
>
> The Fund will lend part or all of those pooled monies to qualified and approved borrowers that fulfil the Funds investment criteria.
>
> The Manager is assisted in its selection and managerial duties by its Credit Committee. This committee comprises a team of qualified and experienced experts, which utilise their pooled knowledge and expertise to review the prospects of the likelihood of the financial success of the typical and preferred projects such as:
>
> - Construction and development and sub-division of residential, commercial, industrial and retail property
> - Purchase of residential / retail / commercial / industrial premises that are primarily serviced by rental income generated by the property.
> - Short term funding for businesses supported by appropriate real property security or security interest.
> - Lease finance arrangements for business equipment
> - Corporate debt
> - Business acquisition finance
> - Managed Investments
> - Corporate lending,
> - Margin lending, and
> - Leasing.
>
> The Fund will invest in a range of diversified assets. The Fund will invest in predominantly mortgages in particular commercial and development loans, secured by registered mortgages, commercial and corporate loans secured by registered fixed and floating charges and / all economic contractual interests. The Fund may also make loans to or invest in similar Managed Investment Schemes and in cash held on deposit with Banks or other financial institutions.
>
> Those loans will be:
>
> - Secured by either registered mortgages and / or security interest and,
> - Any other additional securities required by the Credit Committee. Those additional securities may be in the nature of floating and / or fixed debenture charges, guarantees and / or the provision of collateral securities.
> - Invested in cash.

79 Clause 9.6 of the IM provided "[w]e may invest in both listed, unlisted, registered and unregistered, managed investment schemes". The content of, at least, the versions of the

Lending Manual from March 2016 were more proscriptive in relation to investment in unregistered managed investment schemes – see paragraphs [135] to [146] below.

Loans by Unregistered Scheme (pre-Endeavour acquisition)

80 Linchpin made some of the Unregistered Scheme Loans before it acquired Endeavour and before the Registered Scheme was activated, including certain of the Linchpin Entity Loans (then with a combined total limit of $6 million) and one of the Adviser Loans (then with a limit of $220,000).

81 By circular resolution dated 10 February 2014, signed by Mr Daly, Mr Nielsen and Mr Williams, the Investment Committee approved a loan facility of $3 million for each of Beacon and Linchpin, respectively, the **Beacon Loan** and **Linchpin Loan**. The loan deeds were executed by Mr Nielsen and Mr Williams on behalf of Linchpin as lender and, in the case of the Linchpin Loan, as borrower as well. As noted, Mr Daly, Mr Nielsen and Mr Williams were directors of Linchpin and Beacon and members of the Investment Committee, which at this time, assisted IPL in the management of the Unregistered Scheme. Both loans were progressively drawn down. Between 4 February 2014 and 1 April 2015, advances were made from the Unregistered Scheme to or on behalf of Beacon and Linchpin, pursuant to the respective loan agreements. These advances were approved by circular resolution of the Investment Committee. Mr Daly signed many of these circular resolutions in this period.

82 The Linchpin Loan and the Beacon Loan were both subject to variations. The limits of the Linchpin Loan was ultimately increased to $6 million. The limit of the Beacon Loan was ultimately increased to $5 million. The details of the variations of these loans are set out in Schedule B.

83 By circular resolution of the Investment Committee dated 10 December 2014, Mr Daly, Mr Nielsen and Mr Williams approved the first of the Adviser Loans to **Alps Network** Pty Ltd, Mr Peter Larkin and Mr Lance Miekle in the sum of $220,000. The loan deed is undated. It was executed by Mr Nielsen and Mr Williams on behalf of Linchpin. The loan was drawn down on about 24 December 2014.

84 This loan was subject to variations which ultimately increased the limit to $760,000. The details of this loan are set out in Schedule C.

85 The aggregate amount of these three loan facilities at the time they were entered into was about $6.2 million. The amount Linchpin had agreed to advance under these loans exceeded the total

amount invested in Unregistered Scheme at the time Linchpin committed to the loans, which was about $5.4 million.

Beacon Loan

86 The **Beacon Loan Deed** was entered into on or around 10 February 2014. It recorded that the purpose of the Beacon Loan was for Beacon "to finance the acquisition of additional books of financial planning clients and the general expansion of its business".

87 The Beacon Loan was ostensibly secured pursuant to the Specific Security Agreement (Shares) dated 10 February 2014 (the **Beacon SSA**). As with the Beacon Loan Deed, Mr Nielsen and Mr Williams executed the Beacon SSA on behalf of both parties, in their capacities as directors of Beacon and Linchpin. The Beacon SSA relevantly provided that Beacon granted to Linchpin a security interest over "Share Assets", identified as shares held by Beacon in itself, Financiallink, CCS Operations Pty Ltd, Interactive Mortgage & Finance Pty Ltd, and B Property Group Pty Ltd.

88 The purported security was not perfected by timely registration on the Personal Property Securities Register (**PPSR**). The Beacon SSA was executed on about 10 February 2014 but no security was registered on the PPSR in respect of the Beacon Loan Deed until 26 September 2016. On that date, a PPSR registration was created identifying Beacon as the grantor of security. The PPSR registration was scheduled to lapse on 30 June 2017 regardless of whether the secured moneys had been repaid. The PPSR registration did in fact lapse on this date.

89 At the time the Beacon Loan was approved, and the relevant documents were executed, Beacon did not own shares in itself, and was likely precluded from doing so under s 259A of the Act. Beacon could not grant a meaningful security interest over shares it purported to hold in itself, notwithstanding the terms of the Beacon SSA. Linchpin did not obtain a valuation in respect of the value of the remaining shares offered as security under the Beacon SSA and did not obtain any form of security over the business assets the acquisition of which was said to be the purpose of the loan.

Linchpin Loan

90 The **Linchpin Loan Deed** was entered into on about 1 August 2014. Linchpin executed the Linchpin Loan Deed as lender, in its capacity as trustee of the Unregistered Scheme, and as

borrower, on behalf of itself. The Linchpin Loan Deed records the purpose of the loan as being for Linchpin "to fund the expansion of its business".

91 Like the Beacon Loan, the Linchpin Loan was ostensibly secured via a separate agreement – the Specific Security Agreement (Shares) (the **Linchpin SSA**). Mr Nielsen and Mr Williams executed the Linchpin SSA on behalf of Linchpin in its respective capacities as grantor in its own right, and as secured party in its capacity as trustee of the Registered Scheme.

92 As with the Beacon SSA, the Linchpin SSA relevantly provided that Linchpin in its capacity as "Grantor" granted itself in its capacity as the "Secured Party" a security interest over shares held by Linchpin in itself, as well as a fixed and floating charge over all shares held by Linchpin in its subsidiaries.

93 The problems identified above in respect of the Beacon SSA are also evident in relation to purported security given under the Linchpin SSA, including in relation to the late PPSR registration and the lapsing of the registration.

Acquisition of Endeavour

94 In around December 2014, Linchpin acquired Endeavour. Mr Nielsen, Mr Raftery and Mr Williams were appointed as its directors. As mentioned, at the time of the acquisition, Endeavour was the responsible entity of a registered managed investment scheme named the "Endeavour Hi-Yield Fund".

Registered Scheme renamed

95 On or about 25 March 2015, the name of the Endeavour Hi-Yield Fund was changed to "Investport Income Opportunity Fund", which was the same name as that of the Unregistered Scheme. That is how the Registered Scheme and the Unregistered Scheme came to have the same name. The Unregistered Scheme was referred to in some of the contemporaneous documents as the "old IIOF" fund, whereas the Registered Scheme was referred to as the "new IIOF" fund.

96 Endeavour continued as the responsible entity of the Registered Scheme, and Linchpin continued as the responsible entity and trustee of the Unregistered Scheme. Australian Executor Trustees Limited (**AET**), a company outside the Linchpin Group, was the custodian for the purposes of the Registered Scheme.

Single Investment Committee

97 An important component of ASIC's case is the allegation that, from about 1 April 2015, there was a single investment committee that made decisions as to the use of the pooled funds in both the Registered Scheme and the Unregistered Scheme. As noted above, the relevant committee was variously referred to as the "Credit Committee", the "Lending Committee" and or the "Investment Committee". These names were used interchangeably but there was in fact only one committee.

98 Mr Daly submitted that he was a member of the Investment Committee of the Unregistered Scheme only. Further, that ASIC bore the onus of establishing that this committee acted as a single committee in respect of the use of the pooled funds in both the schemes and not, as he contends, as a decision-maker only in relation to the Unregistered Scheme. The principal submission advanced by Mr Daly was that ASIC had not established, to the requisite standard, that the Investment Committee acted as the decision making body in respect of the use of the funds in both schemes.

99 I am satisfied on the evidence that ASIC is correct in its contention that the Investment Committee, which had operated as the relevant committee for the Unregistered Scheme, operated from 1 April 2015 as the committee responsible for making decisions in relation to the use of funds in both the Registered Scheme and the Unregistered Scheme.

100 I am further satisfied that each of the respondents was a member of the Investment Committee in the relevant period. Mr Daly and Mr Williams were each members from at least around 1 April 2015 until around 7 August 2018. Mr Nielsen was a member from at least around 1 April 2015 until around December 2016. Mr Raftery is also alleged by ASIC to have been a member of the Investment Committee from at least around 1 April 2015 until around 7 August 2018. He did not admit that allegation in his defence. He has not sought to be heard on that allegation in the liability hearing because of the stance he took on the first day of the hearing. Even so, I am not satisfied that ASIC has established that Mr Raftery was a member of the Investment Committee from at least April 2015. ASIC did not identify any documents which supported its contention that Mr Raftery was a member of the Investment Committee from April 2015. On the evidence before me, Mr Raftery first signed circular resolutions of the Investment Committee in January 2017. He signed the balance of the circular resolutions that are in evidence. Accordingly, I find that Mr Raftery was a member of the Investment Committee from at least about January 2017. It appears that he replaced Mr Nielsen on the

Investment Committee. In making these findings, on the basis of the evidence in these proceedings, and taking into account the gravity of the consequences in the present context, I feel an actual persuasion that these findings are correct for the reasons which I will develop.

101 In addition to the respondents, Mr Andrew Blanchette was also a member of the Investment Committee, or at least attended meetings of the Investment Committee, in the period 10 February 2014 to 31 July 2015. Mr Blanchette was a director of Beacon from 31 May 2013 to 25 July 2013, and was Beacon's chief operating officer as at July 2015. Mr Blanchette appears to have been employed by Beacon until at least around 26 November 2016 as "Head of Endeavour Super". I infer from the evidence that Mr Blanchette resigned from this role around 26 November 2016, but was expected for a period thereafter to continue "communicating professionally with advisers directly approached". He was not called as a witness in the proceedings. In cross-examination, Ms Gubbins confirmed that ASIC had not interviewed or issued notices to Mr Blanchette. Mr Daly contends that ASIC's failure to call Mr Blanchette is significant. I will return to this submission below.

102 In order to explain why I have concluded that during the relevant period the Investment Committee made the investment decisions for both the Unregistered Scheme and the Registered Scheme, it is necessary to first set out my findings in relation to the activation and operation of the Registered Scheme.

The Circular Resolution of 1 April 2015

103 In anticipation of the issue of the First PDS, the Investment Committee approved an overarching investment strategy by circular resolution dated 1 April 2015 in relation to both the Unregistered Scheme and the Registered Scheme (the **1 April 2015 Resolution**). The strategy which was approved provided for Endeavour to transfer the funds invested in the Registered Scheme to the Unregistered Scheme, and that Linchpin, as trustee of the Unregistered Scheme, would in turn lend those funds in accordance with the investment mandate of the Registered Scheme. The 1 April 2015 Resolution was addressed to and signed by each of Mr Daly, Mr Nielsen, Mr Williams and Mr Blanchette. It was in the following terms:

> The Lending Committee is requested by Circular Resolution to note and approve the following:
>
> (1) With the launch of the new IIOF PDS the committee notes the following loan facilities are in place with IIOF (old)

(a) Loan Facility to Beacon of $3M

(b) Loan Facility to [Linchpin] of $3M

(2) These funds are being drawn progressively.

(3) As AET does not ~~be~~ provide loans, loans will continue to be undertaken through IIOF (old).

(4) IIOF (new) will invest in IIOF (old). These funds will be lent by old in accordance with the investment mandate of the IIOF (new).

104 The reference to "IIOF (old)" in the above extract is a reference to the Unregistered Scheme and the reference to "IIOF (new)" is a reference to the Registered Scheme.

105 Consistent with there being a single Investment Committee for both the Registered Scheme and the Unregistered Scheme, the 1 April 2015 Resolution identified a strategy for the joint future operation of the two funds.

106 The Investment Committee commenced functioning as a decision maker in respect of the strategy to be employed with respect to both schemes prior to the formal establishment of the Registered Scheme and in anticipation of the Registered Scheme receiving an influx of funds pursuant to the First PDS. The Investment Committee continued to function in this way in relation to the funds received pursuant to the Second and Third PDS until the Receivers were appointed.

107 The terms of the 1 April 2015 Resolution make it plain that the Investment Committee was considering the present operation of the Unregistered Scheme and the future operation of both schemes. Pursuant to this strategy, funds were raised through the Registered Scheme and then "invested" in the Unregistered Scheme before being loaned out by Linchpin as trustee of the Unregistered Scheme. The strategy described in the 1 April 2015 Resolution was directed to the funds being lent by the Unregistered Scheme in accordance with the investment mandate of the Registered Scheme, which was subsequently published in the PDS which incorporated Endeavour's written policies. Mr Daly was provided with the final version of the First PDS on 27 April 2015, the day it was issued. The investment strategy across the two schemes appears on the face of the 1 April 2015 Resolution to be directed to circumventing the constraint identified in respect of AET.

108 In practice, and consistently with the overarching strategy promulgated in the 1 April 2015 Resolution, the funds passed from Endeavour and the Registered Scheme to Linchpin and the Unregistered Scheme and were then lent by Linchpin by way of the Unregistered Scheme

Loans. On occasion the funds flowed directly from Endeavour to an Unregistered Scheme Loan borrower. That the funds were transferred on behalf of Linchpin is evident in the fact that the corresponding loan agreements were between the Unregistered Scheme Loan borrower and Linchpin, not Endeavour.

109 The documentary trail in respect of the 1 April 2015 Resolution does not disclose any paper submitted to the Investment Committee, by way of analysis or recommendation, which supported the approval of the proposed resolution. The 1 April 2015 Resolution does not on its face record any consideration by the Investment Committee as to whether investment by the Registered Scheme in the Unregistered Scheme was considered to be in accordance with the investment mandate of the Registered Scheme; or in the best interests of unit holders in the Registered Scheme. Similarly, in the circular resolutions of the Investment Committee approving Linchpin making or increasing the limit of the Unregistered Scheme Loans, there is no evidence that the Investment Committee considered whether the loans accorded with the mandate of the Registered Scheme as per the strategy approved by the 1 April 2015 Resolution.

110 As noted, none of the respondents on the Investment Committee at this time gave evidence. I infer that the evidence that Mr Daly, Mr Williams and Mr Nielsen could have given on this issue as members of the Investment Committee would not have assisted their respective defences. I further note that Mr Nielsen, Mr Williams and Mr Raftery do not contest liability in circumstances where the 1 April 2015 Resolution is a central tenet of ASIC's case. I further infer that any evidence that Mr Williams, Mr Nielsen and Mr Raftery could have given on this issue as directors of Endeavour would not have assisted them. Mr Blanchette was not called as a witness by either ASIC or Mr Daly.

111 To further explain my reasons for reaching the conclusion that from 1 April 2015 the Investment Committee was responsible for making investment decisions in relation to both schemes, it is next relevant to address in more detail the evidence in relation to the Registered Scheme.

The Registered Scheme

112 As noted above, Endeavour issued three PDS in respect of the Registered Scheme between April 2015 and June 2016. Endeavour was the responsible entity, IPL was the investment manager and AET was the custodian.

113 Each PDS refers to Endeavour being the responsible entity pursuant to the Registered Scheme's constitution dated 4 October 2006, as amended, and to IPL being appointed as the investment manager pursuant to a management agreement dated 30 March 2015, as amended. A summary of the constitution and the management agreement was included in each PDS.

Constitution

114 ASIC received a notification of change to the constitution on 10 March 2015, which made minor amendments to the constitution. On 1 May 2015, ASIC received a notification of Endeavour's intention to replace the constitution. The constitution as it applied from 1 May 2015 was in evidence.

Management agreement

115 The management agreement in evidence is dated 2 April 2015. It provided that Endeavour appoints and authorises IPL and its authorised representatives (if any) to issue, vary and dispose of interests in the unit trust and that Endeavour would issue, vary or dispose of interests accordingly. IPL was required to maintain an AFSL that covered its activities in this regard.

The PDS

116 The three PDS are similar, but not identical, in many respects to the IM issued in respect of the Unregistered Scheme. Like the IM, the PDS emphasised that the relevant investments would be diversified, secured and income-producing. For example, in the IM it was stated that "[t]he Fund will invest in a range of diversified assets" and in each PDS, it was stated that "[t]he Fund will invest in a diversified range of loans". The investment strategy was described in the IM as being to "invest funds progressively that achieves a diversified loan portfolio across property and corporate sectors on a secured basis that are income producing. The lending policy and process is outlined in the Lending Manual". Each PDS described the investment strategy as being to "invest funds progressively that achieves a diversified loan portfolio across property and corporate sectors on a secured basis that are income producing" and further stated that such "loans may be held directly by the Fund or held through another fund in which the Fund has invested."

117 Like the IM, each PDS included a statement to the effect that Endeavour, as the responsible entity of the Registered Scheme, "may invest in both listed, unlisted, registered and unregistered managed investment schemes", notwithstanding that, from at least March 2016, the Lending Manual was more proscriptive in this regard. The Lending Manual provided that

"[u]nder the Compliance Plan of [Endeavour] the Manager has the ability to invest funds in another Managed Investment Scheme, provided that the other scheme is registered under Chapter 5C of the Corporations Law". The first step in the procedure for investing funds in another managed investment scheme required that "[Endeavour] must be satisfied that the proposed Managed Investment Scheme is registered under Chapter 5C of the [Act]".

First PDS

118 The First PDS was issued on 27 April 2015.

119 The price and terms of the investment offered in the First PDS were the same as those for the Unregistered Scheme, as set out above.

120 In section 3 of the First PDS, the question, "Who can invest?" is posed and answered in the following terms "Wholesale Investors and other investors who meet the minimum investment criteria".

121 Similarly to the IM, the First PDS included statements to the effect that the strategy of the Registered Scheme would be to invest in a range of diversified assets on a secured basis. The scheme's "Investment Strategy" was described as follows:

> To invest funds progressively that achieves a diversified loan portfolio across property and corporate sectors on a secured basis that are income producing. These loans may be held directly by the Fund or held through another fund in which the Fund has invested.
>
> The Fund also seeks to hold cash and cash equivalents to generate income and provide liquidity to the Fund.

122 Section 3 of the First PDS states that Endeavour will lend invested monies to "Primary Target Borrowers" amongst others:

> [Endeavour] and [IPL] will amongst other types of lending target loans to assist financial planners to buy client books to expand their businesses. These planners will always be part of the Linchpin Capital / Beacon Financial dealer universe when we approve a loan and must remain with the Group during the term of the loan.
>
> We will take security over the client books of the planner's existing business as well as the new client book alongside usual Director's guarantees and corporate fixed and floating charges.
>
> A borrower will be required to remain part of the dealer group while the loan is outstanding. This gives the lender direct access to the adviser's revenue as all planner revenue passes through the dealer group.
>
> Loans will be subject to interest rates approximating overdraft rates and this should allow the returns from the Fund to be stronger than traditional mortgage funds.

123 Clauses 5.3 and 5.4 of the First PDS relevantly provided:

> 5.1 The Fund is a Registered Managed Investment Scheme (ARSN 121 875 009) that pools investors' monies together.
>
> 5.2 The Fund will lend part or all of those pooled monies to qualified and approved borrowers that fulfil the Fund's investment criteria.
>
> 5.3 The RE is assisted in its investment selection and managerial duties by the Investment Manager and its Credit Committee. This Committee comprises a team of qualified and experienced lending professionals, which utilise their pooled knowledge and expertise to review the prospects of the financial success of a typical and preferred project such as:
>
> - Short term funding for businesses supported by appropriate real property security or security interest,
> - Lease finance arrangements for business equipment,
> - Corporate debt,
> - Business acquisition finance,
> - Managed investments,
> - Corporate lending,
> - Construction and development and sub-division of residential, commercial, Industrial and retail property,
> - Purchase of residential / retail / commercial / industrial premises that are primarily serviced by rental income generated by the property,
> - Margin lending; and
> - Leasing.
>
> The Fund will invest in a diversified range of loans. The Fund will invest in predominantly commercial and corporate loans able to be secured by registered fixed and floating charges, non-residential mortgages such as commercial and development loans, secured by registered mortgages; and other types of economic contractual interests. The Fund may also make loans to, or invest in similar Managed Investment Schemes and in cash held on deposit with Banks or other financial institutions.
>
> 5.4 Those loans will be:
>
> - Capable of being secured by either registered mortgages or registered security interests, and any other additional securities required by the Credit Committee. Those additional securities may be in the nature of fixed and floating charges, debenture charges, business, director and personal guarantees and the provision of collateral securities.
> - Invested in cash, cash equivalents, bank and term deposits, bonds.

124 The First PDS relevantly stated under the heading "Related Party Transactions and Conflict of Interest Risk" (in cl 10.2):

> All transactions with the [Linchpin Group of companies] (including the Investment Manager) will be conducted on arm's length terms and will only be entered where the Investment Manager (or such other LPCG entity) has demonstrated to the Responsible Entity that the transactions are based on arm's length terms…
>
> Any related party transaction or other transaction giving rise to a conflict will be undertaken in accordance with the Responsible Entity's related party and conflict of interest policies (see Section 13.10 for further details).

125 The additional information relating to conflicts of interest and related party transactions is in fact contained in cl 13.8 (second appearing), not cl 13.10:

> Endeavour may and will have related party relationship with the Fund Manager, its agents and potentially borrowers from the Fund. In the unlikely event that any such conflict may arise in principal then Endeavour would so advise the Credit Committee of such relationship prior to its considering any application where a related party relationship exists.
>
> Subject to the Corporations Act, Endeavour and its associates may:
>
> - Hold Units in the Fund;
> - Deal with the assets of the Fund;
> - Enter into any contract or transaction with the Fund, or any Unit Holder, and retain for its own benefit any profits or other benefits derived from such contract or transaction; and
> - From time to time, act as Responsible Entity in relation to any other Fund.
>
> From time to time the Fund may invest in, or lend to, investment schemes managed by Endeavour or its Related Parties, or invest in other Authorised Investments issued or managed by Endeavour or its Related Parties, in this regard, Endeavour adopts an 'arms length' approach to the assessment of transactions on commercial terms whether they are related party transactions or not.
>
> Endeavour has a Conflicts of Interest and Related Party Transactions Policy which sets out procedures for reporting and managing, conflicts and related party transactions. The procedures include:
>
> - Identifying conflicts and related party transactions
> - Avoiding conflicts and related party transactions where possible
> - Disclosure of conflicts and related party transactions
> - Managing conflicts and related party transactions.
>
> All conflict of interests and related-party transactions are recorded in the Conflicts of Interest and Related Party Transaction register.

126 The First PDS expressly identified that the directors of Endeavour (being Mr Nielsen, Mr Raftery and Mr Williams) had consented to and authorised the issue of the First PDS.

Second PDS

127 On or around 1 October 2015, Endeavour issued a Second PDS in materially the same terms as the First PDS. The description of "Who can invest?" in section 3, was changed to "experienced investors who meet the minimum investment criteria", instead of what had been included in the First PDS – "wholesale investors and other investors who meet the minimum investment criteria". The Second PDS was otherwise in terms materially similar to the terms outlined above in respect of the First PDS.

128 The Second PDS also expressly identified that the directors of Endeavour had consented to and authorised the issue of the Second PDS.

Third PDS

129 On or around 24 June 2016, Endeavour issued the Third PDS, which was materially in the same terms as the First and Second PDS. The description of "Who can invest?" in section 3 was again changed, this time to "experienced *and retail* investors who meet the minimum investment criteria" (emphasis added). The description of "Primary Target Borrowers" in section 3 was amended to read:

> From time to time, the offer to borrow for business purposes, subject to all relevant securities, guarantees and external audit assessment, may extend to qualified Authorised Representatives of [FinancialLink], or [RIAA];

130 Clause 5.3, which in each PDS provided information in relation to the Registered Scheme's typical and preferred projects, was amended to add:

> The [sic] Endeavour as the Responsible Entity (RE) is assisted in its investment selection and managerial duties by the Investport Pty Ltd as Investment Manager and the Credit Committee. This Committee comprises a team of qualified and experienced finance professionals, which utilise their pooled knowledge and expertise to review the prospects of the financial success of a typical and preferred projects and borrowers such as:
>
> - Borrowers that meet the terms and conditions as assessed by the Credit Committee and clearly defined in the Lending Manual, Borrowers from time to time may include Industry related applicants, Financial Services professionals such as, Financial Planners, Finance Brokers, Accountants, Real Estate Agents…

131 There were otherwise no material changes to cll 5.1 to 5.6 in the Third PDS.

132 The Third PDS also expressly identified that the directors of Endeavour had consented to and authorised the issue of the Third PDS.

133 The Third PDS was also approved by Mr Daly, in an email exchange with Mr Williams, Mr Nielsen and Mr Raftery on 28 June 2016.

134 I now turn to consider the evidence in relation to Endeavour's written policies.

Endeavour policies

Lending Manual

135 Endeavour had a Lending Manual that applied in respect of investments made by the Registered Scheme. The Lending Manual defined the "core policies and procedures constituting the minimum basis for assessing and managing the risk inherent in property development and property finance loans, corporate loans, capital equipment finance, margin lending and leasing transactions and other secured lending transactions". The Lending Manual and its appendixes formed part of "the overall framework of [Endeavour's] credit standard". Any deviation from the Lending Manual required prior approval from the "Credit Committee" or its delegate. As already noted, the reference to the "Credit Committee" in the Lending Manual are properly understood as a reference to the Investment Committee, which performed the function of the "Credit Committee". The Lending Manual was to be read with other corporate manuals issued from time to time.

136 As noted above, the Third PDS provided that borrowers were required to meet the terms and conditions as assessed by the Credit Committee and as defined in the Lending Manual. The First and Second PDS do not refer to the Lending Manual, but make reference to Endeavour and IPL applying "lending criteria and security requirements for corporate loans".

137 There are three versions of the Lending Manual in evidence. All three of the manuals have a front sheet with the title:

> Endeavour Securities (Australia) Limited
>
> Investport Income Opportunity Fund
>
> LENDING MANUAL

138 Two of the manuals are identical and have a version log on the front page with three dates: February 2014, March 2016 and March 2017. I will refer to this version as the version issued in March 2017. The third version appears to be an earlier iteration of the manual. It has a version log with the dates February 2014 and March 2016. I will refer to this version as the version issued in March 2016.

139 A copy of the version issued in March 2017 was produced by Endeavour in response to an ASIC notice, which required production of Endeavour's lending manual as updated in the period 1 July 2015 to 5 December 2017.

140 Another copy of this same version was produced by Linchpin in answer to an ASIC notice that required production of the lending manual for the Unregistered Scheme in the period 1 January 2014 to 2 May 2018.

141 As mentioned, the date of February 2014, which is the first date in the version logs on each of the Lending Manuals that are in evidence, is proximate to the time Linchpin published the IM. There is, however, no copy of the Lending Manual as it stood at February 2014 in evidence. The earliest version of the Lending Manual in evidence is the version issued in March 2016.

142 On the evidence before me, it is not possible to determine what changes were made to the Lending Manual between the version in February 2014 and the version issued in March 2016 save in one minor respect. Given that Endeavour was not acquired by Linchpin until about December 2014, I infer that the February 2014 version of the Lending Manual would not have included the name of Endeavour on the front sheet.

143 Based on the above, having particular regard to the fact that Linchpin produced the Lending Manual in answer to a notice calling for the lending manual for the Unregistered Scheme in the period 1 January 2014 to 2 May 2018, and that there was a version issued proximate to the date of issue of the IM, I infer that the Lending Manual for the Unregistered Scheme was the progenitor of the Lending Manual for the Registered Scheme. I further infer that over time the Lending Manual became a composite manual that applied to both the Unregistered Scheme and the Registered Scheme. On this basis, I find that the three Lending Manuals in evidence each applied in the context of both the Registered Scheme and the Unregistered Scheme after March 2016.

144 Relevantly, each of the Lending Manuals in evidence included policies in relation to investment in other managed investment schemes. Both the March 2016 and the March 2017 versions of the Lending Manual provided:

> **8. Investment in Other Managed Investment Schemes**
>
> Under the Compliance Plan of [Endeavour] the Manager has the ability to invest in another Managed Investment Scheme, provided that the other scheme is registered under Chapter 5C of the Corporations Law. It is at the discretion of [Endeavour] how it wishes to invest the funds received from investors, so to this end, if it is seen fit to invest funds with another registered scheme the following requirements must be

satisfied.

8.1 Procedure for Investing Funds in another Managed Investment Scheme

The following procedure is to be followed:

1. [Endeavour] must be satisfied that the proposed Managed Investment Scheme is registered under Chapter 5C of the Corporations Law.

2. [Endeavour] must satisfy itself that the scheme is a Mortgage Investment Scheme dealing only in first mortgages over property of the nature detailed in [Endeavour's] disclosure document.

3. The term of any investment in the other Scheme must not exceed two years.

4. [Endeavour] must obtain a copy of the Scheme disclosure document and complete the required application form which must be accepted by the Manager of that Scheme.

5. [Endeavour] Credit Committee will minute the decision stating that the investment is in the best interests of investors.

…

8.3 Related Parties

[Endeavour] may lend Fund money to provide loans to, or make investments in, any related party subject to normal banking covenants and full disclosure in the Conflicts of Interest Register.

145 Clause 8.3 of the Lending Manual issued in March 2017 was expanded to include the following text at the end of the clause:

Financial Planners and mortgage brokers

- Assessment and approvals of financial planners acquiring other financial planning books of Beacon planners / Brokers are an interactive process.

Assessment & review of Beacon Group Financial Planners encompasses accessing electronic files maintained for AFSL / ACL licencing and statutory purposes, and the engagement of key Beacon staff:

1) Compliance check and discussions with the State Managers / Business Development Managers

2) Commission department confirm income. This verifies the multiple agreed between the vendor & purchaser

3) Review of the sale contracts

4) Discussion with all parties on the management of the change-over process.

[Endeavour] is in a unique position as it can access real time market data on the performance of Beacon Group client advisers. [Endeavour] is therefore proactive rather than reactive in the management of its client book, which in contrast a bank cannot be as they can only rely on historic data to manage lending.

Approvals are also noted in the compliance minutes & Board minutes

Where financial planning books are acquired outside the Beacon Group, the planner will additionally have either / and the following:

1) independent valuation / assessment

2) Compliance sign off from the previous dealer group

3) Personal warranties & progressive payment with adjustment clauses within the sale contracts

146 Each of the PDS included a statement as to how managed investment schemes were selected for investment purposes:

9.2 How we select Managed Investment Schemes

If [Endeavour] and [IPL] decide to invest in another managed investment scheme, [Endeavour] and [IPL's] primary goal is to invest in schemes that provide stable income returns and capital stability. We employ strict guidelines for selecting managed investment schemes.

These guidelines focus on:

- Demonstrated management experience in the sector within which they invest.
- A strong track record in investment management in their particular asset class.
- Vigorous investment processes and guidelines.

We may invest in both listed, unlisted, registered and unregistered managed investment schemes.

Compliance Plan

147 On 5 October 2006, Endeavour lodged a **Compliance Plan** with ASIC in respect of the Registered Scheme, pursuant to Part 5C.4 of the Act. On 27 April 2015, Endeavour lodged an amendment to the Compliance Plan. A further version of the Compliance Plan is in evidence which is marked as being last updated on 22 September 2016. The Compliance Plan expressly recorded that its purpose was "to outline the framework of the [Endeavour] Compliance Program including the policies and procedures in place for ongoing compliance monitoring and review". This is consistent with s 601HA(1) of the Act, which, as noted above, provides that a compliance plan for a registered scheme must set out measures that the responsible entity is to apply in operating the scheme to ensure compliance with the Act and the scheme's constitution. The Compliance Plan also included an express statement that it was designed "to ensure that unitholders' interests are protected, that major compliance risks for investors have been identified and that potential for losses arising from non-compliance with the Act, the Constitution and the Licence are mitigated": cll 2.1 and 2.3.

148 The Compliance Plan also provided that Endeavour was required to have a **Compliance Committee** in accordance with s 601JA of the Act. The Compliance Committee's relevant functions included to monitor the extent to which Endeavour complied with the Compliance Plan, report any breaches of the Act or the Registered Scheme's constitution to the board or, if necessary, to ASIC, and make recommendations to the board about changes to the Compliance Plan it considered appropriate. The Compliance Committee was to have at least three "suitably qualified" members, the majority of which were to be "external members as defined by" the Act.

149 Clause 16 of the Compliance Plan relevantly provides in respect of related party transactions:

> *Objective: To set out the arrangements [Endeavour] is to apply to ensure compliance with the prohibition on the provision of financial benefits to related parties contained in the Corporations Act.*

OUTCOME	**COMMENT**	**COMPLIANCE MEASURE**	**MONITORING REPORTING**
Transactions are entered into on arm's length basis in accordance with the [Act].		[Endeavour] has a conflict of interest strategy in place to ensure any related party transactions are entered into on an arm's length basis. All contracts are reviewed by the Scheme's legal advisers and Company Secretary prior to execution. Where appropriate, independent advice is sought and received from experts to ensure consideration for the service or transaction is considered acceptable in normal market conditions. The Board approves all related party transactions. External audit review of accounts.	Any issue which gives rise to a potential conflict of interest is reported to the Board.

Conflict of Interest Policy

150 Endeavour also had a "Conflict of Interest and Related Party Transactions Policy" (**Conflict Policy**) in place in respect of investments made by the Registered Scheme. Clause 5.4 of the Conflict Policy relevantly provided:

5.4 PROCEDURES FOR DEALING WITH RELATED PARTY TRANSACTIONS

If an ENDEAVOUR company proposes to enter into a transaction which may be a "related party transaction" the following procedure applies:

(a) The manager or executive proposing the transaction must:

- Discuss the matter in detail with the Compliance Officer, Investment and Financial Controller and Chief Executive; Obtain legal and other advice as necessary on the requirements for proper management of the matter; and
- Prepare a detailed report on the proposed transactions for the Chief Executive and the Board, including the reasons for it, advantages and disadvantages for all affected parties, financial analysis, recommendations for appropriate management of conflicts of interest and recommendations for compliance with legal requirements.

(b) The Board will then consider the information provided in order to determine whether and how to proceed with the proposed transaction, taking into account all relevant legal and other advice.

(c) If the Board determines that the proposed transaction may be carried out without reference to the related party requirements of the Corporations Act, it may be conducted in the normal manner (including having regard to requirements in relation to the management of conflicts of interest as set out in this policy).

(d) If the Board determines that the proposed transaction is to proceed, but requires compliance with the Corporations Act requirements, Compliance Officer and the Company Secretary will be responsible for ensuring all relevant requirements are met. This may include calling a meeting of members to approve the related party transaction in accordance with all applicable laws, rules and the constitution of the relevant entity/scheme…

151 There is limited evidence as to who acted as the compliance officer during the relevant period. Based on evidence available, I infer that Mr Nielsen, who was also Endeavour's company secretary, acted as the compliance officer in the relevant period. He is described as the "Compliance Officer [Endeavour]" in the signature block of an unsigned template letterhead that bears the heading:

ENDEAVOUR SECURITIES (AUSTRALIA) LIMITED

COMPLIANCE COMMITTEE

CONFIRMATION OF COMPLIANCE WITH AFSL REQUIREMENTS

152 The letter includes a sentence "[i]n order to provide the compliance committee with assurance that Endeavour has complied with its obligations for the year ended 30 June 2015, management provide the following confirmations…". In the version of the Compliance Plan which bears the notation "last updated 22 September 2016", Mr Nielsen's initials are against the "2.1" version

amendments in the version control table. He and Mr Williams are listed as being responsible in various periods up to and including 22 September 2016 for "Authorisation and Sign-off". In September 2017, Mr Nielsen was engaged in email correspondence and at least one meeting with representatives of Grant Thornton in relation to the AFSL audit that was then in train. The Compliance Manual and Compliance Committee minutes were among the materials he was asked to submit to the auditor. It appears Mr Nielsen supplied these documents shortly after the auditor's request. Mr Nielsen is recorded as an attendee in the minutes of the Compliance Committee meetings from 22 December 2014 to 15 July 2016. He is described in the minutes, some of which he signed, as the "Responsible Manager, Director & Company Secretary". I infer from this evidence that Mr Nielsen commenced acting as Endeavour's compliance officer at some point during the financial year ending 30 June 2015 before the First PDS was issued on 27 April 2015.

Funds passed by Endeavour from Registered Scheme to Linchpin for Unregistered Scheme

153 In the period commencing on 4 June 2015 and ending 31 July 2018 (being the end of the period analysed in the Receivers' Report), Endeavour as the responsible entity for the Registered Scheme received a total of about $17.2 million from 131 investors. Of this amount, a net total of about $16.5 million was ultimately transferred to Linchpin for the Unregistered Scheme, or to third parties on behalf of Linchpin as trustee for the Unregistered Scheme for the purpose of the Unregistered Scheme Loans. As mentioned, the details of the Unregistered Scheme Loans are set out in Schedules B to D.

154 The Receivers' Report identifies the funds transferred from the Registered Scheme to, or on behalf of, the Unregistered Scheme. A total of about $11.1 million was by direct transfer. A total of about $3 million was paid directly to Unregistered Scheme Loan borrowers. About $2.4 million was recorded as being interest on Endeavour's interest in the Unregistered Scheme said to be reinvested in the Unregistered Scheme. With respect to this "reinvestment" of interest, there are no documents that record Endeavour's election to reinvest or that set out the process applicable to such reinvestment. The Receivers have identified various other transactions between Endeavour and Linchpin which result in a net balance of about $86,000 in favour of Endeavour. This results in the net total of about $16.5 million, being the sum "invested" by Endeavour using funds from the Registered Scheme in the Unregistered Scheme.

155 It appears that the funds that were passed from Endeavour to Linchpin were *intended* to be investments in units in the Unregistered Scheme. That is consistent with the 1 April 2015 Resolution, which expressly states that "IIOF (new) [Registered Scheme] will invest in IIOF (old) [Unregistered Scheme]". It is also consistent with some of the accounting records analysed in the Receiver's Report.

156 However, based on the evidence before me, it appears that notwithstanding this intention, no formal steps were taken whereby Endeavour applied for units in the Unregistered Scheme. Further, that Endeavour was not issued with unit certificates and more importantly, was not entered into the Unregistered Scheme's register of unitholders / investors.

157 The constitution of the Unregistered Scheme, dated 22 January 2014, provided for an application process for units: cl 6. An application for units was required to be in "any form [Endeavour] may for the time being require or approve" and that any applicant "must, at the time of lodging an application for Units or at such later time as [Endeavour] allows, pay to [Endeavour] (or its agent) their Application Money". In the constitution, "Application Money" is defined as "any form of valuable consideration received by [Endeavour] for a Unit, but excluding any amount the Applicant directs [Endeavour] to pay on account of commissions, service fees or other fees associated with the acquisition of Units".

158 The IM included an application form that new and existing investors were required to complete and submit in order to subscribe for units in the Unregistered Scheme. Applicants for units were required to specify a dollar value in respect of each of the three available investment options in the investment details section of the application form.

159 Following the application process, the constitution provided that:

> **7.2 Date Units issued**
>
> Units are issued as soon as is practicable after the later of:
>
> (a) the day on which [Endeavour] accepts the application for Units or exercise of option to units, and
>
> (b) the day on which [Endeavour] receives the Application Money in clear funds, or the property against which Units are to be issued is vested in [Endeavour] (or its agents).
>
> However, if the Units are issued following a reinvestment pursuant to clause 7.6, then the Units are issued on the day after the end of the Distribution Period in which an application in respect of those Units is deemed to have been received.
>
> …

7.4 Number of Units issued

The number of Units issued to an Applicant is calculated as follows;

> (Application Money which forms part of the Trust Assets) [divided by] (Issue Price of a Unit)

7.5 Issue Price of a Unit

The Issue Price of a single Unit is the Issue Price calculated as follows:

(a) For the first issue of Units the Issue Price of a single Unit is $1.00.

(b) At all other times the issue Price will be calculated as follows:

> (Net Asset Value * (1 + Transaction Costs)) [divided by] (Units In Issue)

subject to [Endeavour] determining another price for a Unit in accordance with clause 7.6, clause 7.7 or as otherwise permitted under the Act.

…

7.7 Issue of Units at an individually negotiated price

Subject to the Act and any conditions imposed by the Act, [Endeavour] may set the issue Price for Units at a price other than a price determined under clause 7.5 where all of the following apply:

(a) [Endeavour] and a person who is a Wholesale Client within the meaning of the Act agree on an Issue Price that is equal to a price at which Units or Options over Units would be issued under this Constitution, in the absence of this clause 7.7, less a reduction (a fee reduction) in the fees that are payable to [Endeavour] for the issue of Units or Options.

(b) [Endeavour] has given all Unitholders a statement that fees may be individually negotiated with Wholesale Clients on or before the first date when [Endeavour] sends communication to all Unitholders after a fee reduction is first offered.

(c) [Endeavour] ensures that if fees may be individually negotiated with wholesale clients, then a statement of that fact is disclosed in any Disclosure Document used for an offer of Units.

(d) The fee reduction does not adversely affect the fees that are paid or to be paid by any other Unitholder who does not have the benefit of the fee reduction.

7.8 Time to calculate Issue Price

Subject to this Constitution [Endeavour] must determine the Issue Price at least as frequently as the next Valuation Date after the later of:

(a) the day on which [Endeavour] receives a valid application for Units, and

(b) the day on which [Endeavour] receives the Application Money or property against which Units are to be issued; and

(c) the Pricing Time.

160 Under the constitution, Linchpin, as trustee for the Unregistered Scheme, was required to:

> … keep and maintain or cause to be kept and maintained an up-to-date Register of Unitholders. The Register will be in a form and contain particulars as required by the Act or any declaration, exemption or ruling granted under the Act. The Register may include other particulars, as the Responsible Entity may from time to time consider appropriate.

Further, Linchpin was "entitled to regard the Register as conclusive proof as to who is a Unitholder at any given time".

161 Notwithstanding the framework specified in the constitution and the IM, the evidence does not reveal any application by Endeavour for units in the Unregistered Scheme in accordance with the process outlined in the constitution and the IM, or at all. Further, there is no evidence that any steps were taken to assess the price at which such units would be issued, if issued. There are no documents in evidence that demonstrate that the machinery specified in the constitution in respect of the determination of the price at which units would be issued was engaged in relation to the funds that derived from Endeavour and the Registered Scheme. Based on their analysis of the accounting records and bank records the Receivers in their report note that:

> At all times the value of the units in each scheme was assumed by the directors and management to be $1.00 per unit. There was no assessment of the actual value of the units in each scheme at the time of the transaction and corresponding adjustment, despite the IM and PDS' stating that the value of the units in each scheme could increase or decrease. In our opinion, the value of the units may not have been $1.00 per unit throughout the operation of the Schemes. Consequently, we have not been able to determine a final position in respect to the actual number of units held by the Original Investors or the Registered Scheme, at 31 July 2018.

162 Further, there is no evidence to suggest that Endeavour was recorded as a unit holder in the unit register of the Unregistered Scheme at a time contemporaneous to the fund transfers from Endeavour to Linchpin, or at all. Versions of the unit register for the Unregistered Scheme were put in evidence by Mr Tracy. They comprise an extract from the books and records of Linchpin and composite documents which include additional information collated by the Receivers and their staff. The primary records do not include any entry in the Unregistered Scheme's register which records Endeavour as a unit holder.

163 The Receivers' Report identified instances where the accounting records in relation to Endeavour's unit holding in the Unregistered Scheme were adjusted to accommodate various intercompany transactions between Endeavour and Linchpin, but there is no evidence of any applications for units, unit certificates or entries in the unit register to support a finding that units were in fact issued to Endeavour.

164 In responding to statutory notices, Endeavour asserted that the Registered Scheme obtained "10.5% $1 units" in the Unregistered Scheme. Endeavour produced a balance sheet for the Registered Scheme as at November 2017 to ASIC that included an asset described as "10.5% Units in IIOF – OLD" with a value of about $15.9 million. As noted, there are no documents in evidence which evidence Endeavour applying for, or being issued with, any such units in the Unregistered Scheme. Moreover, the IM does not make provision for "10.5% units" – the only three investment options in the IM are for: one year at 8.25%; two years at 8.5%; and three years at 8.75%. I note that by curious coincidence, the Linchpin Entity Loans were subject to an interest rate of 10.5%.

165 Each of the respondents was in a position to, but did not, give evidence on whether Endeavour applied for and obtained units in the Unregistered Scheme or alternatively entered into an intercompany arrangement or loan agreement supported by security in respect of the funds advanced by Endeavour to Linchpin. I infer that the evidence that the respondents could have given on this issue would not have assisted them.

166 Based on the evidence available to me, I am not satisfied that Endeavour applied for or obtained units in the Unregistered Scheme.

167 There is no evidence of any intercompany arrangement or loan agreement that supplied the terms on which Endeavour provided to Linchpin the substantial proportion of the funds raised in the Registered Scheme.

Security in respect of funds transferred by Endeavour to Linchpin as trustee of the Unregistered Scheme

168 Just as there is no evidence of any instrument of loan between Endeavour and Linchpin in respect of the funds transferred by Endeavour to Linchpin, there is no evidence of any security being given in favour of Endeavour to secure the repayment of the funds advanced.

Unregistered Scheme Loans

169 In their report, the Receivers identified that the Unregistered Scheme had advanced a total of about $19 million in loans to various parties as at 31 July 2018.

170 As mentioned above, the Unregistered Scheme Loans fell into three main categories, namely the Linchpin Entity Loans, the Adviser Loans and the Linchpin Director Loans. All of these loans were approved by circular resolution of the Investment Committee. The details of these

loans are set out in Schedules B, C and D to these reasons. I now turn to examine each category of the Unregistered Scheme Loans in more detail.

Linchpin Entity Loans

171 Between around July 2015 and August 2018, the respondents caused Linchpin to make a series of new loans, and to increase the value of certain existing loans, to various entities in the Linchpin Group. The purpose of the loans was to provide working capital and to fund the expansion of businesses and acquisitions in the Linchpin Group.

172 The Linchpin Entity Loans made in this period comprised:

(1) an increase to the Linchpin Loan from $3 million to $6 million on or around 1 July 2015 (the **Linchpin Loan Deed Variation**);

(2) an increase to the Beacon Loan from $3 million to $4 million on or around 20 April 2016 (the **Beacon Loan Deed Variation**);

(3) an increase to a pre-existing loan made to RIAA before the issue of the First PDS, from about $2.5 million to $2.75 million on or around 1 July 2016 (the **RIAA Loan Deed Variation**);

(4) a further increase to the Beacon Loan from $4 million to $5 million on or around 30 September 2016 (the **Beacon Second Loan Deed Variation**);

(5) a loan to CPG in the sum of $500,000 on or around 21 November 2016 (the **CPG Loan Deed**); and

(6) a loan to ISARF in the sum of $407,700 on or around 30 June 2017 (the **ISARF Loan Deed**).

173 The Receivers' Report identifies that, in total, about $11.2 million was advanced pursuant to the Linchpin Entity Loans. Of this amount, about $1.8 million was advanced directly by Endeavour from the Registered Scheme to borrowers, and about $9.4 million was advanced directly from Linchpin to borrowers. As at July 2018, the Unregistered Scheme had received $392,482 in repayments, representing about 4.2% of the principal, and the Registered Scheme had received $40,000 in repayments. The combined total amount outstanding in respect of the Linchpin Entity Loans is about $10.8 million, exclusive of interest.

Adviser Loans

174 During the relevant period, Financiallink and RIAA engaged a number of financial advisers to act as authorised representatives under their respective AFSL. Between July 2015 and August 2018, the respondents through their participation on the Investment Committee, caused Linchpin, as trustee of the Unregistered Scheme, to make a series of new loans, and to increase the value of existing loans, to a number of these advisers. The opportunity for advisers to obtain these loans as a means to expand their financial planning businesses was part of the way in which the Registered Scheme was promoted to advisers. The First and Second PDS expressly stated that Endeavour and IPL would, amongst other types of lending, target loans to assist financial advisers to buy client books to expand their businesses. This statement was changed in the Third PDS, which provided that "[f]rom time to time, the offer to borrow for business purposes, subject to all relevant securities, guarantees and external audit assessment, may extend to qualified Authorised Representatives" of Financiallink or RIAA. Further, that from 27 April 2015, when the First PDS was issued, until 24 June 2016, when the Third PDS was issued, there was an express statement that advisers to whom loans were made would "always be part of the Linchpin Capital / Beacon Financial dealer universe" when loans were approved and had to remain with the Linchpin Group during the term of such loans.

175 The purpose of the majority of the Adviser Loans was to allow the relevant adviser to expand their financial planning business and / or to acquire the client books of other financial advisers. The Adviser Loans were typically extended to both individual authorised representatives and to the corporate entities connected with them. In some, but not all, cases the corporate entity listed as a joint borrower on the loan deed was also a corporate authorised representative of Financiallink or RIAA in its own right.

176 The Receivers have identified that, in total, about $7.6 million of the funds advanced as Adviser Loans came from the Unregistered Scheme and the Registered Scheme. Of this amount, about $1.2 million was advanced directly from Endeavour to borrowers, none of which has been repaid. The balance of about $6.4 million came from Linchpin, about $2.1 million of which was repaid. As at 31 July 2018, the total outstanding balance of the Adviser Loans, exclusive of interest, had been reduced to about $5.5 million.

177 The Receivers engaged lawyers to provide a security and **PPSR review** report in relation to the Linchpin Group, which identifies numerous PPSR issues, execution defects in relevant loan documents, issues with stamp duty, potential non-compliance with the National Credit Code,

unsecured loans, missing loan or facility documents, undated documents and insolvent borrowers. The PPSR review found only one instance of a security interest given in support of an Adviser Loan being perfected by registration — Mr Larkin over "all his shares in [Alps Network] and proceeds": see item 1 of Schedule C. All other security interests held by Linchpin pursuant to the various Specific Security Agreement (Shares) (**SSA**) were not perfected by registration on the PPSR register.

178 In addition to the problems caused by non-registration, in other instances the form of security for loans was inutile, including where security was given by entities in respect of shares that the entities purported to hold in themselves.

Linchpin Director Loans

179 Between around September 2015 and July 2017, Linchpin used the Unregistered Scheme to extend loan facilities to Mr Daly and Mr Raftery for their personal use.

180 The Linchpin Director Loans comprised:

(1) an initial loan to Mr Daly, dated 14 September 2015, in the sum of $20,000 (the **Daly Loan**), that was subsequently increased to $55,000 on or around 11 November 2015;

(2) a loan to Mr Raftery, dated 1 April 2016, in the sum of $30,000 (the **Raftery Loan**), that was subsequently increased to $40,000 on or around 1 December 2016; and

(3) a further loan to Mr Daly, dated 5 January 2017, in the sum of $35,000 (the **Further Daly Loan**), that was subsequently increased to $75,000 on or around 25 July 2017.

181 Both the Daly Loan and the Raftery Loan initially had a one-year term from the date of the initial loan advance.

182 The Daly Loan and the Raftery Loan were made on the express basis that the funds advanced would be used for the personal purposes of Mr Daly and Mr Raftery, and not for the purposes consistent with the offer documents in relation to the Registered Scheme or the Unregistered Scheme. In their respective loan applications, Mr Daly and Mr Raftery each expressly stated that the purpose of the loans was to alleviate financial difficulty.

183 Mr Daly's application was in the following terms:

> I am embarrassed to request your consideration of a personal line of credit to support my family and I through some financial difficulties we are experiencing.
>
> We have and are cutting family expenditure to manage the position, but need some

> respite to deal with immediate costs and future planned expenses.
>
> As collateral I am prepared to put up all my shares in Linchpin, plus will repay the loan ASAP from any dividends or bonus received.
>
> Should I leave Beacon for any reason, the outstanding balance will be repaid from my severance pay.
>
> I am not comfortable in making this request, but having been one of the founders of Beacon and I believe, crucial to present development and future success, a small line of credit will allow me to address our financial difficulties and remain focussed on the company.
>
> I look forward to your positive response.

184 In his application, Mr Raftery adverted to the fact that he was a director of Linchpin, and after referring to financial difficulties in relation to: his relocation from Brisbane to Sydney; costs associated with his aging mother's fall; his need for a replacement car; a property settlement with ex-wife; and the cost of his wedding to his new wife, he said:

> This is a cash flow hurdle which I need to overcome and once life returns to normal I will be able to use my salary, bonuses and future inheritance to settle this loan.

185 In relation to the Further Daly Loan, there is no executed version of the original loan deed dated 5 January 2017 in evidence. I infer that Mr Daly did not execute the deed at or about the date which it bears. On 3 July 2017, Mr Nielsen emailed Mr Daly an unexecuted loan deed dated 5 January 2017 and asked Mr Daly to sign and return it so that the deed was in place "for our IIOF audit this week". An executed version of the "loan deed variation (further draw down)" dated 25 July 2017 in relation to the Further Daly Loan is in evidence. On 10 January 2018, Mr Nielsen emailed Mr Daly a proposed loan deed variation dated 25 July 2017 under cover of an email with the subject line "housekeeping" that stated, in part:

> Peter
>
> Your last draw down required a loan variation to document the increased limit.
>
> Please sign and return.
>
> I need to lodge this with the other ASIC stuff

186 I infer that the loan deed variation was not signed on or about 25 July 2017. After receiving Mr Nielsen's email, Mr Daly executed the loan deed variation bearing the date of 25 July 2017. The loan deed variation was only signed after ASIC had commenced its investigation in January 2018.

187 The Receivers identify that, in total, $195,580 from the Unregistered Scheme and the Registered Scheme was advanced as Linchpin Director Loans. Of this amount, $25,655 was

advanced directly from the Registered Scheme, none of which was repaid. The balance of $169,925 came from the Unregistered Scheme, $105,191 of which was repaid. As at 31 July 2018, the total outstanding balance of the Linchpin Director Loans, exclusive of interest, had been reduced to $90,389.

188 The Linchpin Director Loans were unsecured.

Operation of the two schemes

189 Against that background, I return to the evidence relating to the operation of the two schemes and the role of the Investment Committee.

190 The evidence demonstrates that the two schemes were in fact conducted under the management of the Investment Committee, broadly as envisaged in the 1 April 2015 Resolution, except that the investments were not in accordance with the investment mandate of the Registered Scheme as described in the PDS. Endeavour represented in the PDS that the Registered Scheme presented an opportunity to invest where investors' contributions would be pooled and used to invest in a diversified range of loans. The evidence demonstrates that Endeavour did not use pooled funds to invest in a diversified range of loans. Instead, Endeavour transferred the majority of the pooled funds to Linchpin. Linchpin then applied the pooled funds in the Unregistered Scheme, including the funds received from Endeavour, to fund the Linchpin Entity Loans, the Adviser Loans and the Linchpin Director Loans.

191 The Receivers identified transactions between the two schemes that demonstrated that they were operated in such a way that the affairs of each scheme were co-mingled. For example, each of the schemes on occasion met redemptions, loan advances or expenses from the bank accounts of the other scheme. Funds were transferred into one scheme's bank account when they were in fact due to the other scheme. On occasion, investors' investments in one scheme were rolled into the other scheme. In some instances, adjustments were made to the amount of the Registered Scheme's investment in the Unregistered Scheme to accommodate transactions of this kind. Those adjustments were made on the basis of an assumption that each scheme had a constant unit value of $1.00 per unit at the time of each transaction. There is no evidence of any valuation being undertaken in support of that assumption.

192 The similarity between the IM and the PDS is such that I infer that the IM was used as the basis for the PDS. In practical terms, the distinction between the two schemes was further blurred as a result of the Registered Scheme being renamed after Linchpin acquired Endeavour. Both

were thereafter referred to by the acronym IIOF. As mentioned, a designation of "old" or "new" was sometimes applied, but not consistently.

193 As already mentioned, the IM for the Unregistered Scheme described the operation of the scheme in the following terms: "[t]he Fund is an Unregistered Managed Investment Scheme that pools investors' monies together"; "[t]he Fund will lend part or all of those pooled monies to qualified and approved borrowers that fulfil the Fund's investment criteria"; and "[t]he Manager is assisted in its selection and managerial duties by its Credit Committee. This committee comprises a team of qualified and experienced experts, which utilise their pooled knowledge and expertise to review the prospects of the likelihood of the financial success of the typical and preferred projects…". Statements to substantively the same effect were included in each of the PDS issued by Endeavour in respect of the Registered Scheme. The reference to the Credit Committee in both the IM and the PDS is a reference to the Investment Committee. That this committee was a single committee that made decisions in relation to both schemes is further demonstrated by the following evidence.

194 In response to a statutory notice dated 5 December 2017 to produce "[a]ll books recording the assessment, approval and review by the Credit Committee for the [Registered Scheme] of the assets and investments of the [Registered Scheme] during the Relevant Period [1 July 2015 to 5 December 2017]" the only document that Endeavour produced was the 1 April 2015 Resolution. Endeavour, in producing the 1 April 2015 Resolution in answer to this notice, clearly recognised the document as a document of the committee making decisions in relation to the Registered Scheme.

195 In response to a statutory notice to Linchpin dated 7 March 2018 to produce, *inter alia*, "[a]ll agendas and minutes of any meeting of the investment committee and/or lending committee for the Investport Income Opportunity Fund held during the period 1 January 2014 to [7 March 2018]", Linchpin produced the 1 April 2015 Resolution, amongst other documents. Again, in producing this document, Linchpin clearly recognised the document as a document of the committee making decisions in relation to the Unregistered Scheme.

196 It will be recalled that the 1 April 2015 Resolution on its face is a document of the "Lending Committee" – it is sent to "Lending Committee Members" including Mr Daly, Mr Nielsen and Mr Williams and that the Investment Committee was referred to variously as the Lending Committee or the Lending/Investment Committee in the contemporaneous documents.

197 In an email dated 20 September 2018 sent by Mr Williams to Mr Musker of Deloitte and, *inter alia,* to the each of the respondents in their capacity as directors of Linchpin, the following information was provided in relation to the "Lending/Investment Committee":

> Originally the Lending/Investment Committee was Paul Nielsen, Ian Williams, Paul Raftery, Peter Daly, Andrew Blanchette. Andrew departed from the Committee because of other duties. In any conflict situation, a Member would abstain and not sign the resolution giving the appearance of a changing committee. The resolutions were always unanimous of those able to vote.

As noted, Mr Daly conceded that the terms "credit committee", "investment committee" and "lending committee" were interchangeable — referring to the same committee but using different nomenclature.

198 Whether there was a single committee performing this function is a matter upon which Mr Daly could have given evidence. He was on notice that this issue was at the core of ASIC's case against him. He elected not to give evidence. I am satisfied that it is appropriate to draw a *Jones v Dunkel* inference against Mr Daly in this respect. Accordingly, I infer that any evidence that Mr Daly may have given on this issue would not have assisted him. I draw the same inference in relation to any evidence that the other respondents may have given on this issue.

199 A related matter upon which Mr Daly and the other respondents could have given evidence, but did not, was whether certain steps were taken before the Unregistered Scheme Loans were approved and executed, including, *inter alia,* taking steps to comply with the Act and Endeavour's written policies in respect of related party transactions, and obtaining independent valuations and legal advice in relation to the loans and such security as was proffered in support of the loans. I infer that any evidence that the respondents may have given on these matters would not have assisted them.

200 Mr Daly submitted that ASIC's decision not to call Mr Blanchette as a witness is a factor I should take into account when deciding if ASIC's case is proven on the balance of probabilities. Mr Daly submits that Mr Blanchette was involved in approving the 1 April 2015 Resolution and had involvement in other resolutions of the Investment Committee both prior to and following 1 April 2015. Mr Daly submits that Mr Blanchette could have given evidence about the discussions which led to the passing of the 1 April 2015 Resolution, and to the role of the Investment Committee generally. Mr Daly relied on the decision of *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331; 274 ALR 205 at [753] as

authority for the proposition that not calling a witness might reduce the cogency of the evidence in fact called by a party.

201 Having considered the absence of Mr Blanchette as a witness, I reject Mr Daly's submission in respect of the consequences that should follow from the fact that ASIC did not call Mr Blanchette for the following reasons.

202 As the High Court observed in *Australian Securities and Investment Commission v Hellicar* [2012] HCA 17; 247 CLR 345 (***ASIC v Hellicar***) at [140], in proceedings for a civil penalty, the Court applies the rules of evidence and procedure governing civil matters. It follows that the duty which a prosecutor has in a criminal trial to call material witnesses, as identified by the High Court in *Whitehorn v The Queen* [1983] HCA 42; 152 CLR 657, has no direct application in these proceedings. Rather, the duty which befalls ASIC is limited to one of fairness – that is, a duty to act fairly with respect to the conduct of the proceedings: *ASIC v Hellicar* at [147] and [152].

203 Mr Daly has not particularised any basis upon which it is alleged that ASIC's failure to call Mr Blanchette, if it be a failure, was unfair. Even if Mr Daly had done so, I would have struggled to conclude that ASIC had conducted itself unfairly in the present proceedings because it did not call Mr Blanchette. The 1 April 2015 Resolution is clear on its face. It is not apparent why there would be any utility in Mr Blanchette giving evidence on the 1 April 2015 Resolution itself. If there were other matters which somehow relevantly changed the meaning of the resolution, or went to the manner in which the committee conducted itself or the scope of the committee's remit in the relevant period, Mr Daly could, himself, have given evidence on those topics.

204 The High Court expressly recognised that, even if there has been a failure to call a witness, and even if that failure amounts to a breach of the duty of fairness, this does not and cannot have the result that the cogency of other evidence is to be discounted: *ASIC v Hellicar* at [153] to [155] (emphasis added):

> … it would be expected that the remedy for breach of the duty [of fairness] would lie either in concluding that the primary judge could prevent the unfairness by directing ASIC to call the witness or staying proceedings until ASIC agreed to do so or, if the trial went to verdict, in concluding that the appellate court should consider whether there was a miscarriage of justice that necessitated a retrial. **But no solution to the hypothesised unfairness could be found by requiring that the primary judge or an appellate court apply some indeterminate discount to the cogency of whatever evidence was called in proof of ASIC's case**.

205 In similar vein, the High Court observed that "[d]isputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led": at [165]. ASIC is not obliged to call every witness that *might* be in a position to give relevant evidence. Further, there is no basis to infer, and I do not infer, that Mr Blanchette would have given evidence adverse to ASIC's case.

206 Accordingly, I reject the submissions advanced by Mr Daly in relation to the absence of Mr Blanchette as a witness.

207 In conclusion on the issue of the operation of the Investment Committee, based on my review of the whole of the evidence touching on this issue, and cognisant of the gravity of the consequence in making the finding, I am satisfied that the Credit Committee, the Lending Committee and the Investment Committee were one and the same. Further, and critically, I am satisfied that this committee operated as a single committee which made decisions in relation to the use of the pooled investor funds in both schemes. Mr Daly, although not a director of Endeavour, was a member of this committee from about 10 February 2014 when it commenced approving loans made using funds invested in the Unregistered Scheme and at the time of the 1 April 2015 Resolution and at all relevant times thereafter.

Recoveries

208 Mr Tracy's evidence, in his capacity as one of the Receivers of the two schemes and as one of the liquidators of Linchpin and Endeavour, demonstrates that investors in the Registered Scheme are unlikely to recoup their investment in whole or in part. The total amount of recoveries from the Registered Scheme is approximately $113,000 whereas the debt to investors, who are the most significant creditors of the Registered Scheme, is in excess of $16 million.

CONSIDERATION

209 As noted, ASIC alleges that the respondents, by their conduct as officers of Endeavour, contravened s 601FD(1)(b), (c), (e), (f) and 601FD(3) of the Act. The way in which ASIC frames the allegations of contravention against each respondent is summarised in **Schedule E** to these reasons. The contraventions are grouped by reference to the Unregistered Scheme Loans made in three periods, which are delineated by reference to the successive date of issue of each of the PDS: 1 July 2015 (date of first loan or loan variation after the issue of the First PDS) to 1 October 2015 (date of issue of the Second PDS); 1 October 2015 to 24 June 2016

(date of issue of the Third PDS); and 24 June 2016 to 7 August 2018 (date on which Receivers appointed). In Schedule E, ASIC's allegations in respect of each of the respondents are particularised by identifying the particular provision which ASIC alleges was contravened, the respondents involved in each contravention and the conduct which is alleged to give rise to the contravention.

210 The allegations of contravention of s 601FD(1)(f) of the Act are, in part, based on the claim that the PDS did not comply with the requirements of ss 1013D(1)(c), (d) and (f) and 1013E and, in addition, that the Second and Third PDS did not comply with s 1017B(1) of the Act.

211 The way in which ASIC frames these subsidiary allegations is summarised in **Schedule F** to these reasons by reference to the information that should have been disclosed in each PDS but was not and the particular provision pursuant to which disclosure was required.

Preliminary issues

212 Before considering the particular contraventions for which ASIC contends, there are three preliminary issues which I will address. The first is whether Mr Daly was an officer of Endeavour. The second is whether the transfer of funds by Endeavour from the Registered Scheme to or on behalf of Linchpin as trustee of the Unregistered Scheme, for the purpose of funding the Unregistered Scheme Loans were related party transactions that triggered the member approval requirement under the Act, and to which the Conflict Policy and the Compliance Plan applied. The third preliminary issue is whether the PDS issued by Endeavour complied with the requirements of the Act.

Was Mr Daly an "officer" of Endeavour?

213 Mr Nielsen, Mr Raftery and Mr Williams were each directors of Endeavour at all material times. Endeavour was the responsible entity for the Registered Scheme. There is no dispute that each was an officer of Endeavour and subject to the duties imposed by s 601FD(1) of the Act.

214 Mr Daly was not a director of Endeavour. ASIC contends that Mr Daly was an "officer" of Endeavour during the relevant period notwithstanding that he was not formally appointed as a director. Mr Daly denies that he was an officer of Endeavour.

Legal Principles

215 Section 9 of the Act relevantly defines the term "officer" to include a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation ((b)(i)); or who has the capacity to affect significantly the corporation's financial standing ((b)(ii)).

216 The statutory definition of "officer" is not limited to those formally appointed to a named office within a corporation or a recognised position with rights and duties attached to it: *Australian Securities and Investments Commission v King* [2020] HCA 4; 270 CLR 1 (***ASIC v King***) at [24], [58] (Kiefel CJ, Gageler and Keane JJ), [87], [97], [185] (Nettle and Gordon JJ). The definition captures an officer of a holding company as an officer of a subsidiary, if, as a matter of fact, that individual has the capacity to significantly affect the financial standing of the subsidiary: [24], [47] and [54]. In *ASIC v King*, Nettle and Gordon JJ observed at [73]:

> … [N]o issue about whether a person is an officer of a corporation arises in a vacuum. The issue will always relate to some act or omission (or a number of acts or omissions) concerning one or more companies. In a case where the relevant acts or omissions relate to one or more companies in a group, placing too much emphasis on the phrase "of a corporation" tends to suggest, wrongly, that attention is to be paid only to what the person did or did not do in respect of the relevant company or companies, ignoring the overall position of influence the person may have had in the group's affairs. …

217 The definition does not extend to individuals acting in a purely advisory capacity, even where the advice given, if implemented, could significantly affect the financial standing of the corporation. The definition of "officer" will capture only those persons involved in the management of the corporation and determining whether advice will be acted upon: *ASIC v King* at [42] to [43] (Kiefel CJ, Gageler and Keane JJ).

218 In *ASIC v King*, Nettle and Gordon JJ observed at [89] (citations added, and footnotes incorporated):

> ***Shafron*** [*v Australian Securities and Investments Commission* (2012) 247 CLR 465] was concerned with para (b)(i) of the definition of "officer" and is instructive. Six members of the Court stated that determining whether a person falls under para (b)(i) of the definition requires consideration of the *role* the person played in the corporation [*Shafron* at 478, [23]]. The inquiry is not limited to any particular issue or act which the person was involved in, and which is said to constitute a breach of duty [at 478, [23]]. The text of para (b)(i) draws a distinction between those who make decisions and those who participate in making decisions [at 479 [26]]. The notion of participation "directs attention to the role that a person has in the ultimate act of making a decision, even if that final act is undertaken by some other person or persons" [at 479, [26]]. Consistent with that view, their Honours held that s 180(1) applies to whatever responsibilities a person has, as opposed to responsibilities which attach to a particular office [at 476, [18] to [19]].

219 In order to assess whether Mr Daly was an officer of Endeavour, it is necessary to examine the scope of his role and determine whether, as a matter of fact, he was a person who made, or participated in making, decisions that affected the whole, or a substantial part, of the business of Endeavour or who had the capacity to affect significantly Endeavour's financial standing.

Determination: Mr Daly was an officer of Endeavour

220 For the reasons which follow, I am satisfied that Mr Daly was an officer of Endeavour within the meaning of s 9 and for the purpose of s 601FD(1) of the Act during the relevant period.

221 Mr Daly's status falls to be considered in the context of his overall position of influence in the affairs of the Linchpin Group.

222 Mr Daly was appointed as a director of Beacon on 6 May 2013. In a contemporaneous document of his own, he describes himself as the founder of Beacon. Linchpin was registered on 28 May 2013 and subsequently acquired all of the shares in Beacon. From 2 October 2013, Mr Daly was a director of Linchpin, which was the ultimate holding company of the Linchpin Group.

223 Following the Beacon acquisition, Beacon operated part of the financial advisory business of the Linchpin Group. Mr Daly was group managing director of the "Beacon Group", a subgroup of the Linchpin Group comprised of Beacon and Financiallink. The financial advisory business of the Linchpin Group was also conducted by RIAA. Mr Daly was a director of both Financiallink and RIAA. In operating financial advisory businesses, Financiallink and RIAA engaged persons to provide financial services, pursuant to their respective AFSL.

224 As the group managing director of Beacon and a director of RIAA and Financiallink, Mr Daly was involved in promoting the Registered Scheme to authorised representatives of those companies in order to attract investment in the Registered Scheme. He was also involved in the approval of the Adviser Loans. The availability of loans to financial advisory businesses featured in the information provided to financial advisers in connection with the promotion of the Registered Scheme.

225 Mr Daly was a director of IPL from 11 March 2014, which was the investment manager of the Unregistered Scheme. IPL became the investment manager of the Registered Scheme following the acquisition of Endeavour. IPL was assisted in its management function in respect of both schemes by the Investment Committee, of which Mr Daly was a member throughout the relevant period.

226 Before Linchpin acquired Endeavour, and following Mr Daly's appointment as a director of Linchpin, Linchpin issued the IM for the Unregistered Scheme on about 22 January 2014.

227 In the period before Linchpin received any funds from Endeavour, Mr Daly, amongst others, as a member of the Investment Committee approved the Beacon and Linchpin Loans and one of the Adviser Loans The relevant circular resolutions are identified in Schedules B and C. The total amount of these three loans, when fully drawn, exceeded the amount invested in the Unregistered Scheme as at the date the loans were approved. In order to support the progressive advances under these loans the Unregistered Scheme required an additional injection of funds. It was in this context that the Investment Committee, including Mr Daly, approved the 1 April 2015 Resolution. That the additional injection of funds would be obtained from Endeavour and drawn from the Registered Scheme was decided before the First PDS was issued. That decision was implemented after funds were raised in the Registered Scheme. The Receivers, in their report, demonstrate that after the Registered Scheme was activated, advances were made under each of the Linchpin Entity Loans (as originally made) which were sourced from funds raised by Endeavour in the Registered Scheme and passed to, or for the benefit of, Linchpin as trustee for the Unregistered Scheme. In addition, the principal source of funds advanced pursuant to the Linchpin Entity Loans (as varied) were sourced from Endeavour and drawn from the Registered Scheme.

228 By December 2014, Linchpin had acquired Endeavour. As noted, Mr Daly was a director of Linchpin, Endeavour's parent company, at the time of the acquisition and continued as such for the balance of the relevant period.

229 Significantly, Mr Daly was a director of IPL, the investment manager of both schemes, and an active member of the Investment Committee, which approved and implemented the investment strategy for both schemes. Notwithstanding Mr Daly's submissions to the contrary, the evidence demonstrates that the Investment Committee operated as a single overarching committee with respect to both the Unregistered Scheme and the Registered Scheme from at least 1 April 2015.

230 In addition to the 1 April 2015 Resolution, Mr Daly signed numerous circular resolutions of the Investment Committee which served to implement the investment strategy approved in the 1 April 2015 Resolution for the Registered Scheme and the Unregistered Scheme in so far as it was directed to passing the funds raised by the Registered Scheme to the Unregistered Scheme to fund the Unregistered Scheme Loans. As a member of the Investment Committee,

Mr Daly signed the Investment Committee circular resolutions for four of the five Linchpin Entity Loans, all of the Adviser Loans, save for the second variation to one such loan, and the Raftery Loan.

231 I address the issue of whether these loans were in accordance with the investment mandate of the Registered Scheme below, in the context of considering the contraventions alleged by ASIC.

232 Mr Daly, as a member of the Investment Committee, approved the overarching investment strategy of the Registered Scheme and, in substance, approved the manner in which it was implemented by approving the Unregistered Scheme Loans subsequently made or varied by Linchpin, applying the funds sourced from the Registered Scheme. In doing so, Mr Daly participated in making decisions that affected at least a substantial part of the business of Endeavour. The implementation of the overarching investment strategy resulted in net terms of about $16.5 million being passed from the Registered Scheme, for which Endeavour was responsible, to the Unregistered Scheme, over which Endeavour had no formal control. The amount of funds transferred was significant, more so when seen in relative terms. The net amount transferred ($16,461,805) represented about 95% of the total amount invested in the Registered Scheme ($17,286,640). That Mr Daly was a member of the Investment Committee responsible for setting the overarching strategy and who participated in approvals that determined the manner in which the strategy was implemented weighs strongly in favour of concluding that he was a person who had the capacity to affect significantly Endeavour's financial standing. The act of participating in the approval of both the strategy and the way in which the strategy was implemented directly impacted the prospect of Endeavour recovering the funds passed to Linchpin, which as noted comprised about 95% of the funds raised in the Registered Scheme.

233 The evidence in relation to Mr Daly's role in respect of the financial affairs of Endeavour goes considerably further.

234 As a director of Linchpin, Mr Daly was involved in approving the accounts of Endeavour. The evidence shows that accounts for entities in the Linchpin Group, including Endeavour, were generally circulated to members of the Linchpin board, including Mr Daly, and that Mr Daly approved those accounts as a member of the Linchpin board. That such accounts were also approved by the board of Endeavour, of which he was not a member, does not detract from Mr Daly's involvement in the approval given by the Linchpin board.

235 The evidence establishes that Mr Daly participated in the development of the First and Third PDS issued to raise funds for the Registered Scheme. The issuance of these PDS was directed to raising, and did raise, substantial funds for which Endeavour would be, and was, responsible. Raising funds pursuant to the PDS was a clearly a substantial part of Endeavour's business. Mr Daly, together with Mr Nielsen and Mr Raftery, was asked by Mr Williams to approve the issue by Endeavour of the Third PDS dated 24 June 2016 and he did so. In an email of 28 June 2016, sent to Mr Daly amongst others, Mr Williams attached the Third PDS, noted that it contained the latest set of changes and that, whilst a circular resolution would be generated for all directors to sign, he wanted a response by email "confirming your approval of a resolution to approve and issue the PDS in this form". Notwithstanding that he was not a director of Endeavour, Mr Daly was asked to, and did, confirm his approval. He was also involved in communication with Mr Williams and Mr Nielsen in relation to the finalisation of the First PDS. I infer that any evidence that Mr Daly may have given on his role in relation to the First and Third PDS would not have assisted him.

236 Between around 26 May 2015 and 26 May 2017, Mr Daly promoted the Registered Scheme, to financial advisers and through them to their clients and or potential clients, as a term deposit alternative. On 26 May 2015, he reported to Mr Williams and Mr Nielsen by email about: his concerns about sourcing funds for the next RIAA payment; the commitments he had been given from advisers to put money into the Registered Scheme; and the fact that he was "trying to scrounge up some additional contributions". He was involved with Mr Nielsen in promoting the Registered Scheme to financial advisers on the basis that it had a broad mandate, which included an ability to fund the growth of financial planning practices – whether as a potential source of acquisition funding or succession acquisition funding "when the time is right". The finance actually provided to financial planners was in fact provided by Linchpin, using the funds passed to it by Endeavour from the Registered Scheme. I infer that the availability of finance for financial advisory businesses was used as an incentive for advisers to recommend the Registered Scheme to their clients. Some individual advisers, or their associated corporate entities, to whom the Registered Scheme was promoted in this way, obtained Adviser Loans. As a member of the Investment Committee, Mr Daly approved the making of such loans. Schedule C sets out the facts I have found in relation to these loans, including in relation to the relevant circular resolutions signed by Mr Daly, amongst others, and as to the relationship that existed between the relevant borrowers and Financiallink and RIAA.

237 Finally, Mr Daly was a director of both Linchpin and of Beacon. Both these entities were borrowers under Linchpin Entity Loans and as a member of the Investment Committee, Mr Daly participated in the approval of these loans. The limits of these loans represented a substantial proportion of the funds advanced by Endeavour to Linchpin from the Registered Scheme. The loans were advanced on the basis of inadequate security and, for reasons to which I will come, did not comply with the Act, the PDS or Endeavour's written policies. Beacon made some repayments under the Beacon Loan. Linchpin did not make any repayments under the Linchpin Loan.

238 Mr Daly advances the following further submissions in support of his contention that he was not an officer of Endeavour. He submits that the evidence shows that he played no role in the management of Endeavour. Mr Daly submits that the Endeavour board, of which he was not a member, met regularly to discuss and approve ordinary matters relating to company management, including financial accounts, fund inflows and outflows, new lending and investment, compliance and audits. Mr Daly further submits that the Endeavour board established a separate Compliance Committee of which he was not a member. Mr Daly points to a range of specific examples of managerial decisions made by Endeavour directors in which he was not involved to support the submission that he had no role in Endeavour's management. He also relies on various organisational diagrams and the like in respect of the Linchpin Group to submit that others were responsible for the management of Endeavour and that he was not.

239 The difficulty with Mr Daly's submission is that, even if the underlying premises are accepted, they do not undermine the conclusion I have reached — that Mr Daly participated in making decisions that affected the whole or a substantial part of the business of Endeavour and that had the capacity to affect significantly Endeavour's financial standing is inescapable. Mr Daly's submission that others were responsible for the management of Endeavour may be true, but it does not answer the question of whether Mr Daly was an officer of Endeavour. The evidence to which Mr Daly points does not preclude a finding that Mr Daly's role was such as to render him an officer of Endeavour for the purposes of the Act.

240 The starting point is that the documentary evidence in relation to the management of Endeavour is incomplete. While it may be accepted that the particular Endeavour management documents on which Mr Daly relies do not relevantly refer to him, the weight of the evidence demonstrates that he was, relevantly and materially, involved in the business of Endeavour in acting as the responsible entity of the Registered Scheme. As I have already addressed, as a member of the

Investment Committee, Mr Daly, amongst others, signed off on the 1 April 2015 Resolution and was responsible for deciding whether to approve, and if so on what terms, the Unregistered Scheme Loans. The Unregistered Scheme Loans were made upon approval. In some cases, the funds were advanced and the loans were then validated by retroactive approval. As a director of Linchpin, Mr Daly participated in decisions as to whether the financial accounts of Endeavour would be approved. Although the corporate records of Linchpin in evidence are incomplete, there is some evidence that Mr Daly was present at Linchpin board meetings when the board and / or the Linchpin executive committee discussed fund inflows into, and capital raising targets for, the Registered Scheme. Mr Daly's submission that he had no involvement in such matters is rejected.

241 Mr Daly's submission that he was not a member of Endeavour's Compliance Committee may be accepted. It does not, however, detract from the conclusion I have drawn as to his status as an officer of Endeavour. That Mr Daly was not a member of the Compliance Committee must be considered in the context of the provisions of the Compliance Plan in relation to the parameters for the Compliance Committee. The parameters articulated in the Compliance Plan are reflected in a contemporaneous email communication in which Mr Williams informed Mr Nielsen that Linchpin needed to establish a Compliance Committee for Endeavour that: could not be comprised of in-house staff; required a minimum of three members; and the majority of the committee needed to be "not part of Endeavour or related bodies corporate". I have assessed the significance of Mr Daly not being on the Compliance Committee in this context. The Compliance Committee only appears to have had three members, one of whom was Mr Nielsen. Given the parameters identified in the Compliance Plan and in Mr Williams' email, Mr Daly's absence from the Compliance Committee is readily explained and does not weigh against the conclusion I have drawn as to his status as an officer of Endeavour.

242 As to the range of specific examples of documented managerial actions and decisions of Endeavour, in which Mr Daly is not recorded as being involved, and the miscellany of Linchpin organisational and management documents to which Mr Daly points, I do not regard these documents as outweighing the evidence that informs my conclusion that Mr Daly was an officer of Endeavour. Many of the documents relied upon in this regard are ambiguous. In some cases, it is unclear whether the documents are drafts or final versions. Some are of uncertain provenance in terms of the timing and purpose for which they were prepared. Importantly, Mr Daly was in a position to give evidence on this topic but did not do so. I, again, infer that his evidence would not have assisted his position on this issue.

243 The gravamen of Mr Daly's entire submission on this issue is that, because he did not have a designated management role in Endeavour, he could not and did not "make decisions that affect the whole or a substantial part of the business of Endeavour nor have the capacity to affect significantly Endeavour's financial standing". I reject that submission. To accept it would be to impermissibly limit the statutory definition, in effect, to officer holders and unduly derogate from a natural reading of the terms of para (b)(i) and (ii) of the definition. It is dependent upon the role of the Investment Committee being confined to the administration of the investments of the Unregistered Scheme and not of the Registered Scheme as well. I have rejected Mr Daly's submissions on that issue. Mr Daly was in a position to give evidence to support his submission as to the demarcation in the committee's role which limited the scope of its decision-making to the Unregistered Scheme only. I readily infer that Mr Daly's evidence on this issue would not have assisted his defence. It is clear from the Receivers' Report that after around mid-2015, the only inflow of funds into the Unregistered Scheme were the funds invested by the Registered Scheme. There is very little evidence of consideration being given by the Endeavour board or its executive committee to the Unregistered Scheme Loans. The weight of the evidence amply demonstrates that the Investment Committee was the decision-making body that approved the way in which these funds were applied. As a member of the Investment Committee, it is clear that Mr Daly was a person who had the capacity to affect at least a substantial and discrete part of the business of Endeavour, namely its function in acting as the responsible entity for the Registered Scheme, and to affect significantly Endeavour's financial standing. Endeavour's capacity to recover the funds it advanced to the Unregistered Scheme was affected by the manner in which the Unregistered Scheme applied those funds.

244 That brings me to Mr Daly's submission that sought to distinguish the decision in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; 168 FLR 253 (***ASIC v Adler***) and *ASIC v King*. ASIC accepts, as it must, that each case turns on its own facts. Nevertheless, ASIC submits that an application of the principles established in *ASIC v Adler* and *ASIC v King* to the facts of the present case leads to the conclusion that Mr Daly was an officer of Endeavour at all material times. I agree.

245 Notwithstanding Mr Daly's submissions to the contrary, Mr Daly as a director of Linchpin and a member of the Investment Committee is sufficiently analogous, even if not coextensive, to the position of Mr Adler in *ASIC v Adler*. Mr Adler was found to be an officer of HIH Casualty & General Insurance Co Ltd (**HIHC**), a wholly owned subsidiary of **HIH** Insurance Ltd, within the meaning of s 9 of the Act because he was both on the board of HIH and also a member of

the investment committee that was, subject to the direction and control of the HIH board, responsible for making decisions concerning investments by companies in the HIH Group. Mr Daly's submissions that seek to distinguish *ASIC v Adler* are premised on him making good his contention as to the limited role of the Investment Committee, which I have rejected. I am satisfied, for the reasons given, that the Investment Committee made the overarching policy decision in relation to investment of the pooled funds raised in the Registered Scheme into the Unregistered Scheme, and thereafter, the decisions in relation to loan approvals that determined the way in which the policy was implemented. Consistently with the analysis in *ASIC v Adler*, I consider Mr Daly's influence as a result of his involvement as both a director of Linchpin and a member of the Investment Committee is sufficient to establish that he was an officer of Endeavour pursuant to both limbs of the definition of "officer" in s 9 of the Act.

246 As outlined above, the High Court recognised in *ASIC v King* that whether a person is an "officer" for the purposes of s 9(b) will depend upon "the facts of the relationship between an individual and a corporation in relation to the affairs of the corporation" or the "stipulated quality of a person's actions or capacity and their effects": [24] (Kiefel CJ, Gageler and Keane JJ) and [88] (Nettle and Gordon JJ). One factor which is relevant in this regard is whether the person is involved in the "management of the corporation", in the sense that they are "involved in policy making and decisions that affect the whole or a substantial part of the business of the corporation": *ASIC v King* at [88] (Nettle and Gordon JJ). The Court held that, taken together, the facts and circumstances of the case compelled the conclusion that the respondent, Mr King, was an officer within the meaning of s 9(b)(ii) because, notwithstanding the fact that he did not formally hold an office, he had a degree of influence over the general conduct of the company which had the capacity to affect significantly its financial standing.

247 Mr Daly sought to distinguish the facts of the present case from *ASIC v King* on the basis that he was not involved in the "management of the corporation" in the requisite sense. In *ASIC v King,* the Court found that Mr King was involved in activities beyond the scope of those that could be characterised as the "day-to-day" operations of the company. Mr Daly submits that the evidence establishes that the management of Endeavour was being undertaken by its joint managing directors, Mr Nielsen and Mr Williams, with any tasks performed by Mr Daly being more aptly characterised as part of Endeavour's day-to-day business.

248 In support of this proposition, Mr Daly relied upon ***Windbox*** *Pty Ltd v Daguragu Aboriginal Land Trust (No 3)* [2020] NTSC 21. In *Windbox*, after considering the relevant authorities and

ASIC v King, Hiley J concluded that the respondent was not an "officer of a corporation" within the meaning of the Act. In reference to the High Court's reasoning in *ASIC v King,* the Court observed that:

> …the "management of the corporation" is distinct from the day-to-day running of the business of a corporation. The "management of the corporation" relates to the formation of policy and decision-making which has a substantial effect upon the business of the corporation. It does not pertain to the day-to-day running of the business of the corporation (such as a restaurant manager).

249 His Honour then cited some observations of Ormiston J in *Commissioner for Corporate Affairs v* ***Bracht*** [1989] VR 821 at 830 (which were cited with approval in *ASIC v King* at [44]) to the effect that:

> It may be difficult to draw the line in particular cases, but in my opinion the concept of "management" for present purposes comprehends with activities which involve policy and decision making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs.

250 Against this background, Hiley J concluded that the respondent, a station manager of a cattle farm in the Northern Territory, was not an officer of a corporation for the purposes of s 9(b) of the Act.

251 I do not accept that the decision in *Windbox* bears on the question of whether, on the facts of this case, Mr Daly was an officer of Endeavour within the meaning of s 9(b)(i) or (ii). Contrary to his submission, Mr Daly *was* centrally involved in a substantial and discrete part of the management of Endeavour. He was a member of the Investment Committee which, from 1 April 2015, was the decision-making body that approved the way in which the funds raised in the Registered Scheme were passed to the Unregistered Scheme and thereafter approved the way in which the Unregistered Scheme utilised those funds by making the Unregistered Scheme Loans. I do not accept that such a function is properly to be characterised as one which concerns the "day-to-day operation" of Endeavour, as distinct from its management, particularly having regard to its function as the responsible entity of the Registered Scheme. The activities of the Investment Committee were plainly of a kind which cohere with the definition in s 9(b)(i) and (ii) and Ormiston J's observations in *Bracht*: the decision to invest funds raised in the Registered Scheme in the Unregistered Scheme and thereafter to approve loans was one which had a significant bearing on the financial standing of Endeavour and the conduct of its affairs. That Mr Nielsen and Mr Williams were also involved in Endeavour's

management, including as managing directors, does not detract from my conclusion that Mr Daly was an officer of Endeavour.

252 As I have outlined above, Mr Daly contended in closing submissions that ASIC's failure to call Mr Blanchette as a witness in these proceedings is significant. For the reasons identified above, I do not accept Mr Daly's contention that ASIC's failure to call Mr Blanchette, if it be a failure, undermines the findings I have made with respect to the role of the Investment Committee and the significance of Mr Daly's membership of that committee.

253 ASIC submits, and I am satisfied, that Mr Daly had the capacity, by virtue of his position of influence, to affect at least a substantial part of the business of Endeavour and to affect significantly the financial standing of Endeavour. The evidence demonstrates that his role extended to attracting funds to the Registered Scheme and to causing the Unregistered Scheme Loans to be made notwithstanding those loans did not accord with the investment mandate of the Registered Scheme. By exercising his capacity in respect of the affairs of Endeavour to the detriment of the unit holders in the Registered Scheme, Mr Daly could adversely affect the financial standing of Endeavour as responsible entity of the Registered Scheme. His conduct as a member of the Investment Committee in approving the Linchpin Entity Loans, the Adviser Loans, the Raftery Loan and obtaining loans for his personal use, significantly affected the financial standing of Endeavour and the Registered Scheme for the reason that the loans were made otherwise than in accordance with the related party transaction requirements in the Act and Endeavour's own written policies; the investment mandate of the Registered Scheme (notwithstanding the terms of the 1 April 2015 Resolution); and on the basis of inutile or otherwise inadequate security.

254 In closing submissions, Mr Daly also sought to defend the allegation that he was an officer of Endeavour by taking issue with the adequacy of the claim pleaded against him. Before addressing Mr Daly's submission, it is instructive to have regard to the purpose which pleadings serve.

255 It is well established that, where a case proceeds upon pleadings, the function of the pleadings is to state with sufficient clarity the case that must be met; to ensure that a party has the opportunity to meet that case; and also to define the issues for determination: *Banque Commerciale SA, En liquidation v Akhil Holdings Ltd* [1990] HCA 11; 169 CLR 279 at 286. In these proceedings the ordinary rules of civil procedure apply. Rule 16.02(1) provides:

(1) A pleading must:

(a) be divided into consecutively numbered paragraphs, each, as far as practicable, dealing with a separate matter; and

(b) be as brief as the nature of the case permits; and

(c) identify the issues that the party wants the Court to resolve; and

(d) state the material facts on which a party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial, but not the evidence by which the material facts are to be proved; and

(e) state the provisions of any statute relied on; and

(f) state the specific relief sought or claimed.

256 In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25; 230 FCR 298, the Full Court observed at [63] to [65]:

> 63 Even so, a civil suit for the recovery of a pecuniary penalty is a proceeding of a penal nature: *Naismith v McGovern* (1953) 90 CLR 336 at 341. In this class of case, it is especially important that those accused of a contravention know with some precision the case to be made against them. Procedural fairness demands no less...
>
> 64 Litigation is not a free for all. The overarching purpose of the civil practice and procedure provisions that apply in this Court is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (*Federal Court of Australia Act 1976* (Cth) ("FCA Act"), s 37M). It would not be just to decide a case on a different basis than the way it was conducted. Nor would it be just to permit an applicant to change the nature of its case after the evidence has closed and its weaknesses pointed out, at least not without a formal application and the grant of leave, on terms if necessary.
>
> 65 The long and the short of it, then, is that, in a civil proceeding of a penal nature, a statement of claim must allege a contravention known to law and with a sufficient statement of material facts to alert a respondent to the case to be met. Nevertheless, where an applicant's pleading is ambiguous but a respondent has nonetheless meaningfully engaged with it in its defence, that engagement and the manner in which an applicant's case is consequentially opened and the trial conducted and defended can and ought to be considered in deciding whether a respondent has suffered any procedural unfairness. That is so even if there has been no formal application to amend the pleading. The obligations imposed on the Court and the parties by Pt VB of the FCA Act do not lead to any different conclusion.

See also *Adler v ASIC* at [138]; *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83; 261 FCR 347 at [49] to [50]; *Sabapathy v Jetstar Airways* [2021] FCAFC 25 at [39] to [41].

257 In *Oztech Pty Ltd v Public Trustee of Queensland* [2019] FCAFC 102; 269 FCR 349 at [28] to [30], the Full Court observed:

> 28 The question of whether a pleading adequately raises a claim or defence is not concerned with the expression of the pleading as a matter of style, or of phrasing, or the structure of the pleading. Neither is it concerned with the formality of the process by which the issues in the proceeding are identified; be it a statement of claim, statement of contentions, concise statement, points of claim or points of defence. The verbal formulation of the allegations of fact, or the contentions of law, need not conform to a particular style guide or to any pro forma template.
>
> 29 The sole objective of a pleading is to clearly identify matters in dispute and difference by and between the parties to the dispute. This objective necessarily involves expressing the factual basis of each claim or defence. It is necessary that the legal elements of each cause of action or defence are expressed by reference to allegations of fact required to establish each element. It is not necessary to plead the legal conclusions that follow from the facts, but it is often convenient to do so. These are trite propositions but nevertheless vital to ensuring that the pleading serves its purpose.
>
> 30 There should be no doubt about whether any particular cause of action is relied upon. At a minimum, the pleading should be pellucidly clear about the causes of action, or claims, relied upon by the applicant, including any claims made upon an alternative hypothesis. The explicit clarity with which a claim is expressed should ensure that there be no need for the opposite party to closely scrutinise the pleading in a process of textual construction to determine whether a particular fact is relied upon, or the purpose for which it is alleged, much less to decide whether a particular cause of action is raised. The same basic requirement applies to any defence raised in answer to a claim.

258 At the commencement of the hearing, ASIC moved on the originating application filed 25 August 2020, the amended concise statement filed 11 February 2022, and the amended statement of claim filed 11 February 2022. The adequacy of the pleadings in this proceeding in exposing the case against Mr Daly, with the requisite precision necessary in civil penalty proceedings, falls to be determined by reference to all of these documents. To the extent that, and it was not clear if the point was really pressed, Mr Daly contended that the adequacy of the pleadings was to be assessed without reference to the amended concise statement, I reject that submission. The documents are to be read together. In *Australian Securities and Investment Commission v Westpac Securities Administration Limited* [2019] FCAFC 187; 272 FCR 170 at [185], Allsop CJ said in an analogous context:

> The [amended concise statement (ACS)] was, of course, not a pleading. It is a document intended by the practice note to give a concise summary of the nature of the case alleged and the central issues involved. Its primary purpose is to facilitate effective case management and preparation for trial or mediation. Here the ACS was supported by a contemporaneous Particulars of Claim (PoC) of some 68 pages providing the detail of the case asserted. The ACS and PoC are to be read together to

ascertain the issues tendered for trial.

259 This passage was quoted with approval by the majority of the Full Court in *Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788* [2021] FCAFC 121; 287 FCR 388 at [142] (McKerracher and Colvin JJ) (reversed on appeal in *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* [2022] HCA 38, but not on this point), see also [430] (Derrington J). In addition, the majority directed attention to *MLC Limited v Crickitt (No 2)* [2017] FCA 937 at [4] (Allsop CJ); *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 1284 at [2] to [8]; *Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland* [2020] FCA 1353 at [23] to [28].

260 The complaint that Mr Daly makes as to the adequacy of the manner in which ASIC has exposed its allegation that he was an officer of Endeavour based on his role on the Investment Committee begins by mischaracterising the combined effect of the originating application, the amended concise statement, and the amended statement of claim. Mr Daly's contention, which ultimately must be a complaint about procedural fairness, cannot be accepted when one has regard to ASIC's originating documents. It is sufficient to illustrate that ASIC has clearly identified the matters on which it relies to demonstrate that Mr Daly was an officer of Endeavour during the relevant period by reference to the following extracts of the amended concise statement (emphasis in original):

> 1. …(e) Daly acted as an officer of Endeavour within the meaning of that term for the purpose of s. 601FD(1) of the *Corporations Act 2001* (Cth) (**the Act**)
>
> …
>
> 8. ***Investment Committee***: From about 1/4/15 there was one investment committee that made decisions as to whether, and on what terms, loans were to be made using the funds invested in both the registered fund and the unregistered fund (the **Investment Committee**). Nielsen was a member of the Investment Committee from about 1/4/15 to 12/16. Daly, Raftery and Williams were members of the Investment Committee from about 1/4/15 to 7/8/18.
>
> 9. About 1/4/15, Daly, Nielsen and Williams approved a circular resolution (**1 April 2015 resolution**) that provided: (a) existing loan facilities with Beacon and Linchpin would be drawn progressively following the "launch" by Endeavour of the registered fund; (b) following the launch: "IIOF (new) will invest in IIOF (old). These funds will be lent by old in accordance with the investment mandate of the IIOF (new)". From about 1/4/15 each of Daly, Nielsen, Raftery and Williams treated the registered fund and the unregistered fund as though the two funds were one fund.
>
> …
>
> 15. ***Loans approved and entered***: In the period from about 3/7/15 to 7/8/18:

> (a) Nielsen and Williams, as members of the Investment Committee, approved the transfer by Endeavour of funds from the registered fund to Linchpin (as trustee of the unregistered fund), so that those funds could be used by Linchpin for the purpose of advancing loans, and then caused those monies to be loaned by executing loan agreements on behalf of Linchpin (as trustee of the unregistered fund) with: (i) related entities of Endeavour: Linchpin, RIAA, ISARF, CPG and Beacon (**related entity loans**); (ii) financial advisers, including AR of Financiallink and RIAA **(adviser loans**); (iii) Daly and Raftery (for personal use) (**director loans**); (b) Daly, as a member of the Investment Committee, approved the transfer by Endeavour of funds from the registered fund to Linchpin (as trustee of the unregistered fund), so that those funds could be used by Linchpin for the purpose of advancing loans to: (i) Linchpin, Beacon and CPG; (ii) AR of Financiallink and RIAA; (iii) Raftery (for personal use); (c) Raftery, as a member of the Investment Committee, approved the transfer by Endeavour of funds from the registered fund to Linchpin (as trustee of the unregistered fund), so that those funds could be used by Linchpin for the purpose of advancing loans to financial advisers including AR of Financiallink and RIAA.

261 Mr Daly did not point to any steps he had taken to obtain particulars on the way in which ASIC framed this part of its case. That is perhaps unsurprising given the detailed disclosure of ASIC's case in ASIC's originating documents taken collectively. In civil proceedings in this Court, including civil penalty proceedings, it was incumbent on Mr Daly and his representatives to conduct the proceedings in a way that is consistent with the overarching purpose: s 37N(1), (2) of the *Federal Court of Australia Act 1976* (Cth). In the present case, if Mr Daly did not understand the case he had to meet in respect of ASIC's contention that he was an officer of Endeavour, it was incumbent on him to seek particulars or clarification, not to lie in wait and take a pleading point in closing submissions. I am not persuaded that the way in which ASIC has proceeded on this issue gives rise to any procedural unfairness. To the extent that Mr Daly advanced such a submission, I reject it.

262 In conclusion on this issue, I am satisfied that, Mr Daly was an officer of the company notwithstanding that he was not appointed as a director of Endeavour. I reject Mr Daly's submission that on the evidence, he was so far removed from the management of Endeavour, that he was not an officer of Endeavour. To the contrary, I am persuaded that by virtue of his role, he made, or participated in making, decisions that affected, or had the capacity to affect, the whole, or a substantial part, of the business of Endeavour. He had the capacity to affect significantly the financial standing of Endeavour. As such he was an officer of Endeavour and required to comply with the duties imposed by s 601FD(1) of the Act.

Were the requirements for related party transactions engaged?

263 The next preliminary issue is whether the transfer of funds by Endeavour from the Registered Scheme to Linchpin, or, in some cases, directly to borrowers on behalf of Linchpin, for the purposes of each of the Unregistered Scheme Loans were related party transactions that required member approval under the Act, and to which cl 5.4 of the Conflict Policy and section 16 of the Compliance Plan applied.

264 This issue is relevant to ASIC's allegations that each of the respondents repeatedly contravened s 601FD(1) of the Act by failing to:

(1) obtain independent legal advice in accordance with the requirements of the Compliance Plan and Conflict Policy as to whether the transfer of funds from the Registered Scheme to the Unregistered Scheme for the purpose of funding the Unregistered Scheme Loans were related party transactions within the meaning of the Act;

(2) consider whether the Unregistered Scheme Loans were related party transactions that required member approval under the Act, and, if so, to obtain the requisite approval; and

(3) comply with the requirements of cl 5.4 of the Conflict Policy and section 16 of the Compliance Plan in relation to related party transactions.

Legal principles

265 The applicable principles were not in dispute. Mr Daly did not make submissions as to the legal principles to be applied in relation to related party transactions under the Act.

266 Chapter 2E of the Act addresses related party transactions. It applies to registered schemes as modified by Part 5C.7: s 601LA. Member approval is required pursuant to s 208 of the Act, as modified by ss 601LA and 601LC, where relevantly:

(1) the responsible entity of a registered scheme intends to give a financial benefit;

(2) the financial benefit is to be given out of scheme property or could endanger scheme property;

(3) the financial benefit is to be given to a related party of the responsible entity; and

(4) an exception does not apply.

267 The purpose of the requirement for member approval is to protect the interests of the scheme's members as a whole: ss 207, 601LB.

268 There is a relevant exception which provides that no member approval is required if the financial benefit is given on arm's length terms: s 210(a) of the Act. The arm's length exception was reflected in Endeavour's policies, which required that related party transactions only be entered into "on an arm's length basis".

269 Clause 16 of the Compliance Plan was directed to ensuring "compliance with the prohibition on the provision of financial benefits to related parties contained in the Corporations Act". Clause 5.4 of the Conflict Policy stipulated the procedure for dealing with related party transactions and relevantly required that, if a related party transaction was to proceed, all relevant requirements of the Act had to be met.

270 The term "related party" is defined in s 228 of the Act, as modified by s 601LA, as follows (asterisk denote the modifications mandated by s 601LA):

> **Related parties**
>
> *Controlling entities*
>
> (1) An entity that controls *the responsible entity of the registered scheme is a related party of *the responsible entity of the registered scheme.
>
> *Directors and their spouses*
>
> (2) The following persons are related parties of *the responsible entity of the registered scheme:
>
> (a) directors of *the responsible entity of the registered scheme;
>
> (b) directors (if any) of an entity that controls *the responsible entity of the registered scheme;
>
> (c) if *the responsible entity of the registered scheme is controlled by an entity that is not a body corporate—each of the persons making up the controlling entity;
>
> (d) spouses of the persons referred to in paragraphs (a), (b) and (c).
>
> *Relatives of directors and spouses*
>
> (3) The following relatives of persons referred to in subsection (2) are related parties of *the responsible entity of the registered scheme:
>
> (a) parents;
>
> (b) children.
>
> *Entities controlled by other related parties*
>
> (4) An entity controlled by a related party referred to in subsection (1), (2) or (3) is a related party of *the responsible entity of the registered scheme unless the entity is also controlled by *the responsible entity of the registered scheme.
>
> *Related party in previous 6 months*

(5) An entity is a related party of *the responsible entity of the registered scheme at a particular time if the entity was a related party of *the responsible entity of the registered scheme of a kind referred to in subsection (1), (2), (3) or (4) at any time within the previous 6 months.

Entity has reasonable grounds to believe it will become related party in future

(6) An entity is a related party of *the responsible entity of the registered scheme at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of *the responsible entity of the registered scheme of a kind referred to in subsection (1), (2), (3) or (4) at any time in the future.

Acting in concert with related party

(7) An entity is a related party of *the responsible entity of the registered scheme if the entity acts in concert with a related party of *the responsible entity of the registered scheme on the understanding that the related party will receive a financial benefit if *the responsible entity of the registered scheme gives the entity a financial benefit.

271 A parent company will ordinarily "control" a subsidiary within the meaning of s 228(1). Section 50AA(1) of the Act provides that for the purpose of the Act "an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies". In *Hancock v Rinehart* [2015] NSWSC 646; 106 ACSR 207 at [152], Brereton J observed that "[i]n the context of a company, this [control] ordinarily means the ability to carry a resolution by majority at the general meeting – and thus to determine the composition of the board of directors".

272 Section 229 of the Act provides that, in determining whether a financial benefit is given for the purposes of Chapter 2E, the Court is to: give a broad interpretation to financial benefits being given; consider the economic and commercial substance of conduct over its legal form; and is to disregard any consideration that is or may be given for the benefit, even if the consideration is adequate: s 229(1) of the Act. Section 229(2)(a) provides that "giving a financial benefit" includes "giving a financial benefit indirectly, for example, through one or more interposed entities" and s 229(3)(a) expressly identifies "giving or providing the related party finance or property" as an example of "giving a financial benefit to a related party".

273 In *ASIC v Adler*, Santow J said at [181]:

> Clearly enough, "financial benefit" is to be given the broadest of interpretation. Importantly, "economic and commercial substance of conduct is to prevail over its legal form". Any consideration for the financial benefit must be disregarded, even if adequate. The strictures of Pt 2E.1, in requiring member approval for related party benefits, requires therefore a wide meaning to "financial benefit", with s 210 [concerning financial benefits given on arm's length terms] providing the gateway out.

His Honour concluded that merely providing control over and bare legal title to certain moneys constituted giving a financial benefit at [182].

274 Finally, with respect to the arm's length exception, Palmer J in *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267; 53 ACSR 305 at [456] to [458] provided the following guidance:

> 456 In applying the test the Court assumes that the transaction is being entered into by a public company which is:
>
> - unrelated to the other party to the transaction in any way, financially or through ties of family, affection or dependence;
> - free from any undue influence or pressure;
> - through its relevant decision-makers, sufficiently knowledgeable about the circumstances of the transaction, sufficiently experienced in business and sufficiently well advised to be able to form a sound judgment as to what is in its interests;
> - concerned only to achieve the best available commercial result for itself in all of the circumstances.
>
> The terms of the transaction, as would reasonably be achieved by the hypothetical public company in this position, are the standard against which the terms of the transaction in question are measured.
>
> 457 What is a reasonable commercial result for the public company in the transaction is, of course, itself a matter of judgment upon which honest and experienced commercial minds may legitimately differ. The Court may receive expert evidence as to what would be within the range of reasonable outcomes of the transaction for the public company. Common experience or usual terms of trade in a particular market may sometimes prove a useful guide.
>
> 458 The Court is not, however, bound to rely only upon such expert evidence and to blind itself to common sense and obvious commercial prudence. A transaction may be so clearly improvident from the public company's point of view that the Court can see for itself that the transaction could never have resulted from an arm's length dealing in which the public company was able to advance and protect its own commercial interests.

275 The person seeking to rely upon an exception to liability, including the exception concerning arm's length terms, bears the onus of establishing the exception: *Waters v Mercedes Holdings Pty Limited* [2012] FCAFC 80; 203 FCR 218 at [39], [53]; approved by the Full Court of the High Court in *Australian Securities and Investments Commission v Lewski* [2018] HCA 63; 266 CLR 173 at [83] (***ASIC v Lewski***).

Determination: the relevant transactions were related party transactions

276 For the reasons which follow, I am satisfied that Endeavour and Linchpin are, relevantly, related parties within the meaning of the Act, and that the transfer of funds by Endeavour from

the Registered Scheme to, or on behalf of, Linchpin comprised the giving of a financial benefit by Endeavour to Linchpin and as such required member approval under the Act and engaged the written policies that Endeavour had in place in relation to related party transactions. I am further satisfied that the arm's length exception in s 210(a) of the Act is not engaged.

277 It is uncontroversial that at all material times Endeavour and Linchpin were related parties — Linchpin being the parent of Endeavour, and Endeavour being controlled in the requisite sense by Linchpin.

278 For the following reasons, I am satisfied that the transfer of funds by Endeavour to Linchpin, or to borrowers on behalf of Linchpin, comprised the giving of a financial benefit by Endeavour to Linchpin applying the broad interpretation of that concept as required by s 229 of the Act.

279 First, the transfer of funds increased commensurately with the size of Linchpin's funds under management and Linchpin, in its capacity as trustee of the Unregistered Scheme, gained control over the use of that increased pool of funds. That of itself was a financial benefit that Linchpin received. Even if that were not so, Linchpin received a financial benefit when it obtained control over and legal title to the funds transferred by Endeavour: *ASIC v Adler* at [181].

280 Secondly, increasing the gross value of the pool of funds under the management of Linchpin in the Unregistered Scheme increased the fees that Linchpin, and its subsidiary IPL, were entitled to charge in respect of the management of the Unregistered Scheme. This is because management fees were in part calculated as a percentage of the gross value of the fund. Clause 11 of the IM provided for the payment of fees, and relevantly provided for a "Management Expense Ratio", which was expected to be 1.5% of the gross value of the Unregistered Scheme's assets, to be calculated and paid monthly to Linchpin and IPL; and a "management fee" of 0.8% of gross assets to be paid to the IPL on a quarterly basis, after investor distributions were paid. The entitlement to charge greater fees is itself a financial benefit. Even if this was not so, the evidence demonstrates that management fees were in fact paid from the Unregistered Scheme to Linchpin in the relevant period during which funds were transferred from the Registered Scheme to the Unregistered Scheme. That part of the management fees referrable to the increase in the gross funds under management of the Unregistered Scheme derived from the funds transferred by Endeavour as responsible entity for the Registered Scheme was a financial benefit conferred on Linchpin by Endeavour.

281 There is an additional reason why I am satisfied that the transfer of the funds by Endeavour from the Registered Scheme to Linchpin for the Unregistered Scheme conferred a financial benefit on Linchpin. A substantial part of the purpose of Endeavour transferring the funds was to enable Linchpin to advance the Unregistered Scheme Loans to borrowers that were directly, or indirectly, related to it, in the requisite sense.

282 The borrowers in respect of the Linchpin Entity Loans were Linchpin, Beacon, RIAA, CPG and ISARF. Each borrower was a "related party" of Endeavour within the meaning of s 228 of the Act, as modified by s 601LA. Endeavour was a wholly owned subsidiary of Linchpin and as such Linchpin was an entity that controlled Endeavour and therefore a related party. The remaining borrowers – Beacon, RIAA, CPG, and ISARF – are controlled by Linchpin as wholly owned, direct or indirect, subsidiaries of Linchpin, who are not also controlled by Endeavour. Accordingly, they are related parties of Linchpin: s 228(4) as modified by s 601LA.

283 The borrowers in respect of the Linchpin Director Loans are, obviously enough, directors of Linchpin and, as such, are related parties of Endeavour: s 228(2)(b) as modified by s 601LA.

284 The borrowers under the Adviser Loans as a matter of fact always included at least one borrower who was part of the financial advisory network. From at least 27 April 2015, when the First PDS was issued, until 24 June 2016, when the Third PDS was issued, it was an express requirement that borrowers under Adviser Loans be and remain part of the "Linchpin Capital / Beacon Financial dealer universe" when loans were approved and during the term of the loan. In this way, the Adviser Loans functioned to reinforce the binds in place in respect of the Linchpin dealer network. This conferred a financial benefit on Linchpin as the parent of the subsidiaries through which it operated its financial advisory business, namely, Beacon, Financiallink and RIAA.

285 Where funds were paid by Endeavour directly from the Registered Scheme to a borrower in respect of a loan advanced by Linchpin, Endeavour used scheme property to give a financial benefit to both Linchpin and the related party borrower: see the example given in s 229(3)(a) of the Act.

286 Where funds were transferred by Endeavour directly to Linchpin for the purpose of funding the relevant loan facilities, Endeavour, from scheme property, gave a direct financial benefit to Linchpin and an indirect financial benefit to the borrower within the meaning of s 229(2)(a) of the Act.

287 It is next necessary to consider whether the arm's length exception in s 210(a) of the Act is engaged. I am satisfied that it is not for the following reasons.

288 The circumstances in which, and the way in which, Endeavour transferred the funds to Linchpin markedly departed from the standard that one would expect between unrelated parties, each acting in their own best interests. In short, the Endeavour transfers were uncertain, uncommercial and improvident, as were the subsequent Unregistered Scheme Loans. That the arrangements in relation to the transfer of funds from Endeavour to Linchpin did not attract the arm's length exception is readily demonstrated by the following evidence.

289 One of the compelling features of the transfer of in excess of about $16.5 million from Endeavour to Linchpin is the lack of certainty as to the basis upon which the funds were transferred. That feature of itself tells against the application of the arm's length exception. While it is certain that the funds were in fact transferred, it is not clear on what basis the transfers were made.

290 If the transfers were intended to be by way of application monies advanced for units in the Unregistered Scheme, then on the evidence before me, that intention was not carried into effect. There are no applications for units by Endeavour in evidence. There is no intercompany agreement in respect of the subscription for such units in evidence. The key relevant document in evidence is the 1 April 2015 Resolution. The reference to investment in that resolution is ambiguous as to the mechanism by which the investment was to be made. If the transfers were in support of the acquisition of units in the Unregistered Scheme, no consideration appears to have been given as to what unit price Endeavour would pay and whether the unit price reflected the relevant value at the time of the transfer. The versions of the investor register that are in evidence do not demonstrate that Endeavour was ever recorded in that register as a unit holder. It is significant that the constitution of the Unregistered Scheme affords the unit register prominence as the conclusive proof of title to units. The process by which the accounting records relating to the Unregistered Scheme were updated to account for the funds transferred from Endeavour to Linchpin as being for units in the Unregistered Scheme appears to have been ad-hoc and generated after the event. The fact that the balance sheet refers to 10.5% units (which were not an investment option under the IM) is but one illustration of this. Further, in the absence of reliable evidence, I would hesitate before concluding that the Endeavour transfers were investments by the Registered Scheme in units in the Unregistered Scheme,

when such investments were expressly contrary to Lending Manual: cl 8 of the Lending Manual.

291 If the transfers from Endeavour to Linchpin were in fact progressive drawdowns on a loan, or a series of loans, and not investments in units in the Unregistered Scheme, then the loan, or loans, were not documented and no security was given. Where direct transfers were made by Endeavour to borrowers on behalf of Linchpin, there was no binding legal agreement between Endeavour and the borrower to whom the funds were advanced. Such arrangements as were in place in respect of these advances were made by Linchpin as trustee of the Unregistered Scheme, not by Endeavour as the responsible entity of the Registered Scheme.

292 At the time the transfers were made, no security had been registered in respect of any of the extant loans made by Linchpin from the Unregistered Scheme, with the exception of one Adviser Loan. Similarly, as additional loans were made, no consideration was given to the way in which existing loans were being serviced in terms of the repayment of principal and interest.

293 Whether the transfers were made by way of loan or investment, there is no evidence of any independent legal or other expert advice sought or obtained in respect of the transactions, including as to the borrowers' capacity to repay, the efficacy and adequacy of any security in respect of the loans, and whether the transactions were related party transactions that required member approval under the Act or otherwise engaged the relevant terms of Endeavour's written policies.

294 There is no evidence of any consideration by the Investment Committee at, or proximate to, the time of each transfer from Endeavour to Linchpin as to whether the transfer of funds was consistent with the PDS issued in respect of the Registered Scheme, or in the best interests of members. Likewise, there is no evidence that Endeavour's directors gave proper consideration to whether the transfer of funds was consistent with the PDS issued in respect of the Registered Scheme, or in the best interests of members. I infer that the strategy approved in the 1 April 2015 Resolution in relation to "investing" the funds of the Registered Scheme in the Unregistered Scheme was approved by the Investment Committee and applied thereafter without that committee or any other decision-maker in Endeavour giving any separate consideration as to whether the transfer of funds was consistent with the PDS issued in respect of the Registered Scheme or in the best interests of members at the time funds were transferred.

295 For these reasons, I am satisfied that the arm's length exception does not apply to the Endeavour transfers.

296 Accordingly, I am satisfied that the Endeavour transfers and the Unregistered Scheme Loans were related party transactions that required member approval under the Act.

297 I turn now to the terms of Endeavour's written policies in relation to related party transactions. The term "related party transaction", as used in the Compliance Plan and the Conflict Policy, is properly understood as referring to transactions of the type for which member approval is required under s 208 of the Act. That reading is dictated by reading the expression in context and purposively. The purpose of a compliance plan is to set out the measures by which the responsible entity of a registered scheme intends to ensure compliance with the Act and the scheme's constitution: s 601HA(1) of the Act. That the Compliance Plan was intended to serve that purpose is made plain by cll 2.1 and 2.3 in the "Overview" section of the Compliance Plan.

298 Endeavour had to follow a prescribed procedure if it proposed to enter into a transaction which *may* be a related party transaction: cl 5.4 of the Conflict Policy. The prescribed procedure included the proposed transaction being discussed in detail with the compliance officer, financial controller and chief executive; seeking legal and other advice as necessary; the board considering the advice and other material. The board would then either make a determination that the proposed transaction be carried out with or without the need for compliance with the related party requirements of the Act. In the former scenario, the transaction was to be "conducted in the normal manner (including having regard to requirements in relation to [the Compliance Plan and Conflict Policy])". In the latter scenario, the compliance officer and company secretary were to be "responsible for ensuring that all relevant requirements [were] met" including, if necessary, "calling a meeting of members to approve the related party transaction in accordance with all applicable laws, rules and the constitution of the relevant entity/scheme". I am satisfied that the procedure dictated by cl 5.4 of the Conflict Policy applied to the transactions that I have found to be with related parties within the meaning of the Act. I am further satisfied that the procedure was not followed, either in respect of the primary transfers of funds from Endeavour to Linchpin, or in respect of the subsequent making of the Unregistered Scheme Loans, or advances thereunder.

299 Similarly, as set out at paragraphs [147] to [150] above, the Compliance Plan required certain steps to be observed in respect of related party transactions: transactions between related parties were to be effected on arm's length terms and reviewed by legal advisers and the company

secretary prior to execution; independent expert advice was to be sought as required; board approval was required for all related party transactions; and review of the relevant accounts was to be undertaken by an external auditor. I am satisfied that the steps required under the Compliance Plan should have been followed, but were not.

Did the First, Second and Third PDS comply with the Act

300 The final preliminary issue relevant to the alleged contraventions is whether each of the respondents contravened s 601FD(1) of the Act by, *inter alia*, causing Endeavour to issue the First, Second and Third PDS in circumstances where the PDS did not comply with the Act.

Legal principles

301 The matters that must be included in a PDS in respect of financial products issued in accordance with s 1013A of the Act, and the ongoing obligation of disclosure in relation thereto, are summarised above.

302 The question of what constitutes a "significant risk" for the purposes of s 1013D(1)(c) must be considered having regard to, *inter alia*, the probability of occurrence of the risk, the degree of impact upon investors, the nature of the particular product, and the profile of the investors: *Australian Securities and Investments Commission v Avestra Asset Management* [2017] FCA 497; 348 ALR 525 (***ASIC v Avestra***) at [198].

303 The disclosure requirements imposed by ss 1013D and 1013E must be read in conjunction with s 1013F(1), which provides that information "is not required to be included in a Product Disclosure Statement if it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find the information in the Statement". The matters to be taken into account in considering whether it would be reasonable for a retail client to expect certain information to be included in a product disclosure statement are set out in s 1013F(2) of the Act. These include, for example, the nature of the product, its risk profile, the extent to which the product is well understood by the kinds of person who commonly acquire products of that kind as retail clients, and the kinds of things such persons may reasonably be expected to know.

304 A retail client is taken to be "reasonably intelligent, to exercise common sense, to be reasonably diligent and reflective when deciding whether to make an investment, and to have a reasonable tolerance for risk": *ASIC v Avestra* at [200]. The financial risks associated with investments to be made out of the scheme property, in seeking to produce financial benefits for the members,

is a matter that any retail client would reasonably expect to be addressed in the PDS when making a decision about whether to invest: *ASIC v Avestra* at [201].

Determination: the PDS issued by Endeavour did not comply with the Act

305 For the reasons which follow, I am satisfied that the PDS issued by Endeavour did not comply with the disclosure obligations imposed under the Act.

306 The First PDS was issued on 27 April 2015, after the Investment Committee had approved the 1 April 2015 Resolution. Prior to the 1 April 2015 Resolution, the Investment Committee was responsible for making decisions in relation the Unregistered Scheme. By circular resolution dated 10 February 2014, the Investment Committee approved loan facilities to Beacon and Linchpin of $3 million each following the "launch of the IM for the [Unregistered Scheme]", on the basis that those funds "would be drawn progressively as per the investment mandate of the [Unregistered Scheme]".

307 The Receivers have undertaken a comprehensive analysis of the sources and uses of the funds invested in the Unregistered Scheme. Excluding the amount "invested" by Endeavour, the total amount invested in the Unregistered Scheme was about $5.4 million, received from 46 investors between January 2014 and June 2015. There were three redemptions from the Unregistered Scheme, resulting in net investor funds of about $5.2 million. Excluding the influx of funds from the Registered Scheme, the total amount invested in the Unregistered Scheme was less than the total amount which Linchpin had committed to advance from the Unregistered Scheme under the Linchpin and Beacon Loans. That is not to suggest that loans made using the funds of the Unregistered Scheme were limited to the Linchpin and Beacon Loans. They were not. Although there were other loans, the Linchpin and Beacon Loans were the most significant in quantum, and serve to illustrate the point that Linchpin required additional funds to be placed in the Unregistered Scheme in order to make the progressive advances due under the loans to which it committed, both before and after the Endeavour acquisition.

308 The Investment Committee noted and approved the 1 April 2015 Resolution in the context of Linchpin having committed to advance more funds by way of loan than were available to it in the Unregistered Scheme. The 1 April 2015 Resolution acknowledged the existence and limits of the Beacon and Linchpin Loans and that the funds available under these loans were being progressively advanced. Further, it was expressly noted that AET did not provide loans, and that "loans will continue to be undertaken through [the Unregistered Scheme]". It was further

noted and approved that the Registered Scheme "will invest" in the Unregistered Scheme and that "[t]hese funds will be lent by [the Unregistered Scheme] in accordance with the investment mandate of the [Registered Scheme]".

309 When the 1 April 2015 Resolution is considered in context, it is clear that the overarching strategy in relation to how the two schemes would be operated was a matter that should have been disclosed in each PDS. By the time the Second and Third PDS were issued, the overarching strategy was no longer prospective — the strategy was in fact being implemented. Apart from funds received from the Registered Scheme, there were no other investments in the Unregistered Scheme after mid-2015. The evidence demonstrates that the strategy of passing the funds raised in the Registered Scheme to the Unregistered Scheme was implemented in so far as funds invested in the Registered Scheme were progressively passed to the Unregistered Scheme. The Receivers' analysis demonstrates that the Registered Scheme's investment in the Unregistered Scheme was made up of a combination of cash and non-cash transactions, representing a total investment balance of about $16.5 million. Included in this total amount was approximately $11.1 million in direct funds transfers, approximately $3.1 million in funds dispersed by the Registered Scheme on behalf of the Unregistered Scheme, and approximately $2.4 million described as interest reinvestments. Of the approximate $3.1 million in funds dispersed by the Registered Scheme on behalf of the Unregistered Scheme, about $3 million was advanced by way of the Unregistered Scheme Loans.

310 Even if the overarching strategy had been implemented in such a way that the funds transferred from the Registered Scheme to the Unregistered Scheme were in fact lent by Linchpin, as trustee of the Unregistered Scheme, in accordance with the investment mandate of the Registered Scheme, the fact that the substantial amount of funds raised in the Registered Scheme were put under the control of Linchpin introduced structural and integrity risks that were not subject to formal controls. As it was, the position was materially worse. The manner in which the Investment Committee implemented the strategy approved in the 1 April 2015 Resolution was to make loans which, for the reasons already given, did not accord with the investment mandate of the Registered Scheme.

311 In the circumstances, I am satisfied that each of the three PDS were required to disclose, but did not disclose that:

(1) as at the date of the issue of each of the PDS, the Unregistered Scheme was undersubscribed and committed to loans that exceeded the funds otherwise invested in

the Unregistered Scheme, excluding reliance on fund inflows expected from the Registered Scheme;

(2) by the 1 April 2015 Resolution, the Investment Committee had determined to pass the funds raised in the Registered Scheme to Linchpin, and that Linchpin would thereafter invest those funds including by making the Unregistered Scheme Loans;

(3) as at the date of issue of each PDS, no security interest in respect of the Beacon and Linchpin Loans had been registered on the PPSR by Linchpin, despite the value of each of the loans being between $3 million and $6 million as at the date of the respective PDS;

(4) Linchpin had not paid any interest or repaid any principal to the Unregistered Scheme in respect of advances it had received pursuant to the Linchpin Loan Deed; and

(5) in addition to fees to be charged by Endeavour as responsible entity of the Registered Scheme, which were disclosed at cl 11.5 of each PDS, Linchpin would charge management fees on the gross value of the assets of the Unregistered Scheme, which assets were inflated by the funds transferred by Endeavour from the Registered Scheme to the Unregistered Scheme.

312 The Second and Third PDS also failed to disclose the fact of, and details concerning such of, the Unregistered Scheme Loans as had been made at the date of each of those PDS.

313 That the Unregistered Scheme was both undersubscribed and overcommitted, and that prior to the issue of the PDS the Investment Committee had resolved that the Registered Scheme "will invest" in the Unregistered Scheme and that "[t]hese funds will be lent by [Unregistered Scheme] in accordance with the investment mandate of the [Registered Scheme]", goes to the very heart of how the Registered Scheme was to be operated. It introduced a disconnect between the controls in the Registered Scheme — in respect of which investors were given information as to diversification, security and conflict management — and the true position.

314 The true position was that investors in the Registered Scheme were investing in a pooled fund that would be used for a concentrated investment in a single, unregistered fund, operated by a related party that was not subject to the same structure and controls as the Registered Scheme. Further, that the related entity operating the Unregistered Scheme would, in the main, invest in loans made to related parties in respect of which fully effective security had not been, and would not be, put in place. Further, that the most sizeable loan would be made to Endeavour's parent which as at the date of each PDS being issued had not made payments in respect of

principal or interest on that loan. Further still, that the loans were producing little by way of income compared to the gross sum outlaid. In addition, operating the Registered Scheme in this way resulted in an impost in the form of the additional fees payable to Linchpin, which was relevant to the cost of investing in the Registered Scheme. This ought to have been disclosed. These matters are matters of obvious significance to potential investors. In order for a prospective investor to understand the significant risks associated with investing in the Registered Scheme, it was necessary for this information to be disclosed in each PDS. It was further necessary that the information included in each PDS was qualified to appropriately reflect the true position which was not disclosed.

315 The passing reference in each PDS to the fact that loans "may" be made in "similar Managed Investment Schemes" did not disclose the true position. In circumstances where the terms of Endeavour's Lending Manual prohibited investment in unregistered managed investment schemes, I do not accept that investment in the Unregistered Scheme falls within the reference in the PDS to investment in a similar managed investment scheme.

316 The Registered Scheme's investment strategy was described in each PDS as being to invest funds in a manner which achieved "a diversified loan portfolio across property and corporate sectors on a secured basis that are income producing". In these circumstances, a retail client could reasonably expect to be informed that:

(1) the responsible entity of the Registered Scheme would not in fact have direct control of the investments made using the pooled funds, but that instead, through a joint Investment Committee, loans would be made via a separate related entity acting as trustee of an unregistered scheme;

(2) though security had been given for the Beacon and Linchpin Loans, the utility of part of the security was questionable, the security was not supported by independent, or indeed any, valuation, and that such security interests as had been given had not been registered at the time the PDS were issued and that as a result the enforceability of the security may be impacted;

(3) the fund's purported "diversified loan portfolio" comprised loans to entities in the Linchpin Group, financial advisors associated with those entities, and two of Linchpin's directors; and

(4) in respect of the single largest loan, being the Linchpin Loan, as at the date of issue of each PDS, there had been no repayments of principal or interest.

317 For the same reason, changes in respect of the Unregistered Scheme Loans, including the making of new loans and increases to existing loan limits, were matters that ought to have been disclosed in the Second and Third PDS. Moreover, as at the date of the Second PDS and again as at the date of the Third PDS the low rates of return yielded on the Unregistered Scheme Loans ought to have been disclosed.

318 That the respondents appreciated the likely significance of the Unregistered Scheme Loans to investors may be inferred from the terms of the Conflict Policy which, *inter alia,* contemplated that a conflicts of interest register would be kept. Mr Nielsen appears to have made entries in that register, which stated that the fact that the Registered Scheme had lent funds to entities in the Linchpin Group had been "[d]isclosed in PDS together with legal sign off". That statement was not true. The fact of the loans, and their nature and extent, was not disclosed in the PDS. The effect of each PDS was to allude to the possibility of related party loans on the basis that such loans, if made, would be made on arm's length terms. The true position was that related party transactions were made which were not on arm's length terms and in respect of which the requirements of the Act and Endeavour's own written policies were not met. Those matters were not disclosed. The statement in the conflict register was false.

319 For these reasons, I am satisfied that ASIC has proved to the requisite standard that the information summarised in **Schedule F** to these reasons was required to be disclosed under the corresponding sections of the Act identified in the second column of Schedule F.

Contraventions of the Act

320 I now turn to consider the specific allegations of contravention made against each of the respondents. The specific grounds upon which it is alleged that each respondent contravened the Act vary slightly depending on the particular respondent and loan, or set of loans, in question. As mentioned above, Schedule E summarises the contraventions ASIC alleges against each respondent by reference to the periods covered by each of the PDS and is referenced to the pleadings.

Complaint as to pleading

321 It is first necessary to address a further complaint made by Mr Daly as to the adequacy of the way in which ASIC has pleaded its case. Mr Daly contends that ASIC has failed in its amended statement of claim (**ASOC**) to "properly plead any cause of action". The complaint as to the pleading was not raised until closing written submissions. It proceeds on a misstatement of the

way in which ASIC frames its claim against Mr Daly, and a conflation of the requirements of pleading a tortious cause of action with what is necessary to discharge the obligation of procedural fairness in civil penalty proceedings. In oral closing submissions, there was a degree of equivocation as to whether the point being taken was a complaint about the adequacy of the pleading or, in substance, a contention that ASIC had failed to prove its case. For completeness, being unclear as to whether the pleading point was ultimately pressed, I will address it first, before moving to consider the broader question as to whether ASIC has established the contraventions it alleges against Mr Daly.

322 I refer to what I have said above as to the applicable principles in relation to the function of pleadings in the present context — see paragraphs [255] to [257] above.

323 It is not necessary to address *in seriatim* each of the complaints that are made in respect of the "pleadings", which I note include the amended concise statement and the ASOC, save perhaps, in one respect. Mr Daly submits that ASIC failed to plead a counterfactual on the issue of breach which gives rise to procedural unfairness in the context of this case. That submission must be rejected. Contrary to Mr Daly's submissions, ASIC's originating documents do include a positive, and obvious, statement by way of counterfactual (amended concise statement at paragraph [21]):

> (a) ***Contravention of s. 601FD(1)(b) of the Act:*** each of Daly, Nielsen, Raftery and Williams failed to exercise the degree of care and diligence that a reasonable person would exercise in their position because: (i) they caused loans to be made from monies invested in the registered fund as referred to in paragraphs 15 to 16 above; (ii) a reasonable person in their position would not have done so, or further or alternatively, would have taken steps to prevent Endeavour from transferring monies from the registered fund so that they could be used for the purpose of those loans (which they did not do);
>
> (b) ***Contravention of s. 601FD(1)(c) of the Act***: each of Daly, Nielsen, Raftery and Williams did not act in the best interests of the members of the registered fund because of the matters referred to in (a) in this paragraph above;
>
> (c) ***Contravention of s. 601FD(1)(e) of the Act:*** each of Daly and Raftery made an improper use of their position as an officer of Endeavour to gain an advantage for themselves or cause a detriment to the members of the registered fund because: (i) they applied for a personal loan from the monies invested in the registered fund, and would not have known that the registered fund had monies available to advance but for their position as officers of Endeavour; (ii) they gained an advantage for themselves, being the benefit of the personal loans they obtained; (iii) further or alternatively, they caused a detriment to the members of the registered fund because the terms on which the personal loans were entered were for inadequate security and contrary to the Act and Endeavour's compliance plan, policies and the terms of the applicable PDS;
>
> (d) ***Contravention of s. 601FD(1)(f) of the Act:*** each of Daly, Nielsen, Raftery and Williams did not take all steps that a reasonable person would take in their position to

> ensure that Endeavour acting as responsible entity of the registered fund complied with: (i) Endeavour's compliance plan, because they caused loans to be made from monies invested in the registered fund as referred to in paragraphs 15 to 16 above in a manner that did not comply with s. 16 of the compliance plan; (ii) the Act, because the loans required member approval by operation of s. 208(1) of the Act (as modified by s. 601LC of the Act) and no such approval was obtained. Further, each of Nielsen, Raftery and Williams contravened s. 601FD(l)(f) because they: (i) caused the first PDS to be issued by Endeavour, which did not comply with ss. 1013D(l)(d) and 1013E of the Act; (ii) caused the second and third PDS to be issued by Endeavour, which did not comply with ss. 1013D(l)(d), 1013E and 1017B of the Act…

324 In short, the counterfactual is that the officers of Endeavour would not cause funds to be transferred from the Registered Scheme other than in accordance with the Act, its own policies and the PDS pursuant to which the funds were raised. The consequence of the counterfactual is that the funds would not have been transferred from the Registered Scheme to the Unregistered Scheme and would not have been used to fund the Unregistered Scheme Loans. The observations made by Wigney J in ***Trilogy Funds*** *Management Ltd (as the responsible entity for the Pacific First Mortgage Fund) v Sullivan (No 2)* [2015] FCA 1452; 331 ALR 185 at [849] and [849] are apposite:

> 848 In the particular circumstances of this case, the position the Fund is in is that funds were advanced to AGA in the period 28 April 2006 to 1 July 2007 and ultimately lost to the Fund. They were never repaid and never recovered. If the respondents had not breached their statutory duties under s 601FD of the Corporations Act, the funds would never have been advanced to AGA. They would have been retained for the benefit of the Fund and its members. The statutory purpose of s 601FD was to protect managed investment schemes, such as the Fund, and the members of such schemes, from that very kind of loss or damage. In those circumstances, it is not necessary, and indeed it is entirely irrelevant, to undertake a hypothetical analysis of, or to otherwise speculate about, what the Fund might have done with the funds if it had not advanced them to AGA.
>
> 849 A similar, though not identical, issue arose in *ABN AMRO Bank NV (ARBN 84 079 478 612) v Bathurst Regional Council (NSD 501 of 2013)* (2014) 224 FCR 1; 309 ALR 445; 99 ACSR 336; [2014] FCAFC 65. In simple terms, in that case, it was found that a party (LGFS) purchased certain financial products (Rembrandt notes) as a result of the negligence of a ratings agency (S&P). S&P contended that unless LGFS proved what it would have done with the relevant funds had it not purchased the Rembrandt notes, its case in respect of causation must fail. That contention (the "alternative universe contention") was rejected at first instance and on appeal to the Full Court. The Full Court concluded as follows (at [788] per Jacobson, Gilmour and Gordon JJ):
>
> > … S&P's Alternative Universe Contention is inconsistent with established authority. In *Marks (in a representative capacity) v GIO Australia Holdings Ltd* (1998) 196 CLR 494; 158 ALR 333; [1998] HCA 69 at [42], the Court expressed the test as requiring a comparison "between the position in which the party that allegedly has suffered loss or damage is in and the position in which that party would have been but for the contravening conduct" (emphasis added). As is readily

> apparent, this does not require any speculation about what LGFS would have done with the funds had it not purchased the Rembrandt notes.

325 The balance of Mr Daly's complaints in respect of the pleadings including his submission as to the absence of a causative link between his conduct and the contraventions alleged by ASIC are premised on a misstatement of the way in which ASIC puts its case against him. ASIC's case against him is not limited to an allegation that by approving loans to be made by Linchpin, Mr Daly contravened s 601FD(1)(b), (c), (e) and (f) of the Act. ASIC's case is principally that Mr Daly contravened s 601FD(1)(b) (c), (e) and (f) of the Act by the whole of his conduct on the Investment Committee. The material facts on which ASIC relies in respect of the role of the Investment Committee, including as to the decisions it made concerning how funds were to be invested by the Registered Scheme and, thereafter, as to whether, and if so, on what terms, loans were to be made via Linchpin and the Unregistered Scheme using the funds sourced from the Registered Scheme, are pleaded. Likewise the material facts alleged concerning Mr Daly's conduct in accepting personal loans utilising funds sourced from the Registered Scheme are pleaded. The material facts and legislative provisions upon which ASIC relies to contend that the relevant transactions were related party transactions which did not comply with the requirements of the Act or Endeavour's written policies are also pleaded. The material facts and legislative provisions relied on to establish the particular contraventions of the Act alleged against each respondent are also pleaded.

326 In *Heiko Constructions T/A Heiko Constructions Pty Ltd v Tyson* [2020] FCAFC 208; 282 FCR 297 (at [74], Collier J agreeing at [2]), Logan J described the role of pleadings as being, in effect, the servant of justice and that:

> …whether or not procedural fairness has been denied by the loss of an opportunity to know and meet, by submissions and evidence, an adverse allegation is always a matter of practical evaluation in the circumstances of a given case.

327 In *Fair Work Ombudsman v Maritime Union of Australia* [2017] FCA 1363, Jagot J (when her Honour was on this Court, observed that (at [11]):

> … the fact that the claims involve alleged contraventions of civil penalty provisions by the MUA does not mean that a party alleged to be in contravention is not bound by its conduct of the hearing. Nor does it mean a farewell to common sense in deference to the penal or quasi-criminal character of the proceedings. The MUA's approach as identified above has nothing to do with the essential principle of fairness which underlies the requirement that a person alleged to have contravened a civil penalty provision be informed "with some precision" of the case against them (*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25; (2015) 230 FCR 298 at [63]). It is one thing for a party to be provided with sufficient facts so

> the party knows the case it has to meet. It is another thing for a party to impose an unreasonable constraint on pleaded facts or evidence for its own purposes...

328 In the circumstances of this case, Mr Daly has not demonstrated a denial of procedural fairness based on the loss of an opportunity to know and meet the case against him.

Failure to exercise reasonable care and diligence: s 601FD(1)(b)

Legal principles

329 Section 601FD(1)(b) of the Act provides that an officer of the responsible entity of a registered scheme must "exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position".

330 The duty of care and diligence owed by an officer of a responsible entity under s 601FD(1)(b) of the Act corresponds with the general duty of care and diligence owed by officers of all corporations under s 180(1) of the Act – although it will often be to a higher standard: *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342 (***ASIC v APCH***) at [535] to [543]; *Trilogy Funds* at [199] to [212]; *Australian Securities and Investments Commission v Healey* [2011] FCA 717; 196 FCR 291 at [191]; *LM Investment Management Ltd (Receiver appointed) (in liquidation) v Drake & Ors* [2019] QSC 281 at [134].

331 In *Trilogy Funds*, Wigney J observed at [212]:

> … In determining the degree of care and diligence required of an officer under s 601FD(1)(b), consideration should be given to the fact that s 601FD is concerned with the duties of officers and directors of very specific companies. Responsible entities are not only required to be public companies, they are also required to hold AFSLs and effectively act as professional trustees. Regard must also be had to the potential for conflicting duties as recognised in ss 601FC(3) and 601FD(2). Those considerations are likely to lead to the need for officers of responsible entities to exercise a higher degree of care and diligence than the standard required of an officer or director under s 180 in respect of a company that does not have the specific features of a responsible entity.

332 The decision in *Trilogy Funds* was appealed but no challenge was made to his Honour's articulation of the relevant principles concerning the duty of care and diligence owed by an officer of a responsible entity under s 601FD(1)(a) of the Act: *Sullivan v Trilogy Funds Management Limited* [2017] FCAFC 153 (***Trilogy Funds Appeal***) at [169].

333 In *ASIC v APCH* Murphy J observed at [526]:

> The scope of the s 601FD duties must be considered in the light of the vulnerabilities inherent in the position of the members as beneficiaries of a trust and (as will often be the case) the fact that the [responsible entity] holds itself out to the public and is paid as a professional trustee.

334 In determining whether a director or officer has exercised reasonable care and diligence, regard must be had to the relevant circumstances of the company and the director, or by analogy, the officer, including the size and nature of the company's business, the composition of the board of directors, and the particular function the director was performing. Directors, or by analogy, officers, are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company: *Trilogy Funds* at [201] to [203].

335 A part of the inquiry involves balancing the foreseeable risk of harm against the potential benefits that could reasonably be expected to accrue to the company from the conduct in question: *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2018] VSC 347; 128 ACSR 324 at [612].

336 A failure to make loans only in accordance with authorised practices may amount to a breach of the statutory duty of care and diligence: *ASIC v Adler* at [372].

337 In *Trilogy Funds*, Wigney J ultimately found that the officers in that case had contravened s 601FD(1)(b), (c) and (f) of the Act in circumstances where they had approved increases to a loan facility without obtaining adequate security and in a manner that did not comply with the managed investment scheme's constitution, compliance plan, PDS and lending manual: [228], [248], [300], [460], [462], [618], [621], [636] and [928]. The appeal against this decision was dismissed, save for limited findings that were held to be procedurally unfair: see *Trilogy Funds Appeal*.

Determination

338 I refer to and rely on the findings I have made in relation to each of the preliminary issues identified above. To those matters I add the following.

339 The Registered Scheme was conducted by the respondents in a manner that was inconsistent with the information provided to investors in the PDS issued by Endeavour. As found above, the two schemes were conducted under the management of the Investment Committee, broadly as envisaged in the 1 April 2015 Resolution, except that the investments were not in accordance with the investment mandate of the Registered Scheme as described in the PDS. The evidence demonstrates that Endeavour did not use pooled funds to invest in a diversified range of loans

which were secured and income producing. Instead, in truth, investors in the Registered Scheme were investing in a pooled fund that would be, and was, used for a concentrated investment in a single, unregistered fund, operated by a related party, and whose loan portfolio comprised loans to related parties that were inadequately secured and in respect of which the income yielded across the portfolio was not sustainable relative to the gross sum outlaid. The operation of the scheme was subject to structural risks that were not disclosed in the PDS and which were not mitigated by the controls promoted as part of the framework of the Registered Scheme. In addition, operating the Registered Scheme in this way resulted in the impost of the additional fees payable to Linchpin, as an undisclosed cost of investing in the Registered Scheme.

340 As part of its investigation, ASIC issued compulsory notices to Endeavour, Linchpin and other parties (including NST Worldwide Pty Ltd, the company which hosted the server maintained by Endeavour and Linchpin), requiring them to produce documents relevant to ASIC's investigation. Those notices required, *inter alia*, the production of:

(1) all agendas and minutes of any meeting of the "investment committee and/or lending committee" for the Registered and Unregistered Schemes held during the period 1 January 2014 to the date of each notice;

(2) books evidencing any due diligence conducted prior to entry into the Linchpin Entity Loans and Linchpin Director Loans; and

(3) all books containing or recording information about the investments made by Endeavour using the funds raised in the Registered Scheme in any unregistered managed investment schemes and with the trustees of such unregistered managed investment schemes during the period 1 July 2015 to 5 December 2017.

341 The documents produced in response were relatively confined in number and were in evidence, and the subject of the evidence, before me. Having reviewed that evidence, I have concluded that the respondents, as officers of Endeavour:

(1) did not obtain any instrument of loan or security as between Endeavour and Linchpin in respect of the transfers of funds from the Registered Scheme to the Unregistered Scheme;

(2) did not produce any documents capable of expressly demonstrating that the transfers were in consideration for the issue of a particular amount of units in the Unregistered

Scheme or otherwise provide conclusive proof of a unit holding in the Unregistered Scheme;

(3) did not consider whether the transfer of funds from Endeavour to, or for the benefit of, Linchpin for the purpose of the Unregistered Scheme Loans, whether by way of investment in units in the Unregistered Scheme or by loan to Linchpin, constituted a related party transaction, or was non-compliant with the Act, the PDS, the Lending Manual, the Compliance Plan, or the Conflict Policy; and

(4) in circumstances where the transactions were related party transactions within the meaning of the Act and Endeavour's written policies, did not:

(a) obtain member approval in respect of the transactions;

(b) obtain independent legal advice with respect to the transactions;

(c) obtain or prepare a report in relation to the potential advantages or disadvantages of the transactions, as required by cl 5.4 of the Conflict Policy;

(d) obtain an independent valuations in respect of the security interests purported to support the Adviser Loans and the Linchpin Entity Loans;

(e) obtain, either directly or through Linchpin as trustee of the Unregistered Scheme, security in respect of the loans made using the funds from the Registered Scheme in accordance with the investment mandate of the PDS; or

(f) ensure that the transactions were on arm's length terms.

342 I am satisfied that each of these matters demonstrates that the respondents have failed to exercise the degree of care and diligence that a reasonable person would exercise if they were in the relevant officer's position as an officer of the responsible entity of a registered scheme.

343 Non-compliance with the relevant notices is punishable as a criminal offence and is accordingly a serious matter: s 63(1) of the ASIC Act. For this reason, and having regard to the fact that ASIC targeted multiple entities in an effort to flush out the documents, I infer that if documents recording the above matters did exist, they would have been produced in response to one or more of the relevant notices. They were not.

344 Ms Harris deposes to her review of some 95,259 emails sent to and from the email accounts of the respondents between 1 November 2013 and 27 June 2018, that were also obtained by ASIC

pursuant to a compulsory notice, and to a review of an even broader set of documents in addition to that set of emails. In the review, broad search terms such as "*Valuation AND shares AND 'RIAA'*" were applied to the databases of documents. The documents responsive to the searches were then manually reviewed. Ms Harris did not as a result of that process identify any documents that would undermine the conclusions that I have reached.

345 I am satisfied that it is appropriate to draw the inference that the steps identified in [341] were not taken. Had they been, there would be some documentary trace captured in the net of ASIC's investigatory trawl. There is none.

346 The next matter is as to whether the respondents, from their vantage point on the Investment Committee, took sufficient care to ensure that loans made by Linchpin from the Unregistered Scheme, using funds derived from the Registered Scheme, were made on terms consistent with the investment mandate of the Registered Scheme. The lack of evidence of any consideration of this issue by the Investment Committee, or the Endeavour board, is damning given the terms of Endeavour's own written policies and Endeavour's role as the responsible entity for the Registered Scheme.

347 In related proceedings, which did not involve the present respondents, Derrington J, at the interlocutory stage, found that the careful consideration of the terms of any loan made for the benefit of a related party was essential; that would necessarily include consideration of the strength and value of any security offered; and, in the ordinary course, it would be necessary to obtain independent third party legal advice as to the appropriateness of the loan. Before Derrington J, there was no evidence that any of these matters were attended to: *ASIC v Linchpin* at [49].

348 In these proceedings, it is clear that, having regard to the nature of the transactions as related party transactions and the deployment of the substantial majority of the funds raised in the Registered Scheme to Linchpin, the steps identified by Derrington J above are of critical importance. I was not taken to any evidence in these proceedings that indicated that any of these steps had been undertaken. Conscious of the nature and degree of satisfaction that applies at this, the liability stage of civil penalty proceedings, I find that the respondents' failure to take the necessary steps to attend to these matters constitutes a failure to exercise the degree of care and diligence required of them as officers of Endeavour by s 601FD(1)(b) of the Act. In doing so, I note that Mr Daly's role did not extend to being on the board of Endeavour. I find against him on the basis of his role on the Investment Committee.

349 I am satisfied that ASIC has established, to the requisite standard, that each of the respondents, in contravention of s 601FD(1)(b) of the Act, failed to exercise the degree of care and diligence that a reasonable person in their respective position would have, by approving the relevant Unregistered Scheme Loans, and causing or allowing funds to be transferred from the Registered Scheme to the Unregistered Scheme for the purposes of these loans, in circumstances where:

(1) the transfer of funds by Endeavour from the Registered Scheme to Linchpin for the Unregistered Scheme was unsecured and not the subject of any written legal agreement;

(2) to the extent that the Endeavour transfers were intended to be applied to the subscription for units in the Unregistered Scheme, the transactions were not documented and no valuation was undertaken to ascertain an appropriate unit price;

(3) no proper consideration was given as to whether such security as was given in respect of the Linchpin Entity Loans and the Adviser Loans was adequate, effective and enforceable;

(4) no independent valuation was obtained as to the value of the shares over which security was purportedly given;

(5) no consideration was given by the respondents as to whether the Endeavour transfers or the Unregistered Scheme Loans were related party transactions;

(6) no independent legal advice was obtained as to whether the proposed transactions complied with cl 8 of the Lending Manual or were related party transactions requiring member approval pursuant to s 208 of the Act (as modified by s 601LC) or otherwise engaged the terms of Endeavour's own written policies;

(7) no member approval was obtained in respect of transactions that were related party transactions, as required by the Act;

(8) no report was obtained in relation to the potential advantages or disadvantages of the proposed transactions, as required by cl 5.4 of the Conflict Policy; and

(9) the Endeavour transfers and the relevant loan deeds and loan deed variations were not reviewed by Endeavour's legal advisors, contrary to section 16 of the Compliance Plan;

(10) the Endeavour transactions and the Unregistered Scheme Loans were contrary to the terms of the PDS issued to investors by Endeavour because they did not constitute investments in a "*diversified loan portfolio*" that were secured and income producing; and

(11) such security as was given was not registered (with the exception of one particular Adviser Loan identified above).

350 Moreover, with respect to the Adviser Loans, proper consideration was not given to whether any security interest obtained through the relevant SSAs was adequate, in circumstances where:

(1) Endeavour was not granted security over any interest in the new businesses to be purchased by the financial advisers using the funds loaned; and

(2) even though the SSAs provided that Linchpin would obtain a right over commission income earned, or to be earned, by the financial advisors in the event of default, the agreements did not otherwise provide to Linchpin a personal guarantee exercisable in respect of any property held by the financial advisors in their personal capacity.

351 Finally, with respect to the Linchpin Director Loans, it is significant that the funds were advanced from scheme property, in the knowledge that they would be used by Mr Daly and Mr Raftery for their own personal purposes and in circumstances where Mr Daly and Mr Raftery each acknowledged they were experiencing immediate financial difficulty.

352 Accordingly, I make the following findings in relation to the contraventions of s 601FD(1)(b) of the Act.

Loans in the period 1 July 2015 to 1 October 2015

353 Mr Daly, Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because a reasonable person in their respective positions:

(1) would not have approved and / or executed the Linchpin Loan Deed Variation and the Adviser Loans during this period; and

(2) would have taken proactive steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purposes of the said loans.

354 Mr Daly contravened s 601FD(1)(b) because a reasonable person in Mr Daly's position would not have entered into the Daly Loan Deed.

355 Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because a reasonable person in their respective positions would not have approved and executed the Daly Loan Deed.

Loans in the period 1 October 2015 to 24 June 2016

356 Mr Daly, Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because a reasonable person in their respective positions:

(1) would not have approved and / or executed the First Beacon Loan Deed Variation, the Adviser Loans during this period, and the Raftery Loan Deed; and

(2) would have taken proactive steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purposes of the said loans.

357 Mr Daly contravened s 601FD(1)(b) because a reasonable person in Mr Daly's position would not have entered the Daly Loan Deed Variation.

358 Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because a reasonable person in their respective positions would not have approved and executed the Daly Loan Deed Variation.

359 Mr Raftery contravened s 601FD(1)(b) because he failed to take all steps that a reasonable person in his position would have taken by executing the Raftery Loan Deed and by failing to take any steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purpose of the Raftery Loan Deed.

Loans in the period 24 June 2016 to 7 August 2018

360 Mr Daly, Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because they failed to exercise the degree of care and diligence that a reasonable person in their respective positions would have exercised in that a reasonable person:

(1) would not have approved and / or executed the Second Beacon Loan Deed Variation, the CPG Loan Deed, the Adviser Loans made during this period, and the Raftery Loan Variation; and

(2) would have taken proactive steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purposes of those loans.

361 Mr Daly contravened s 601FD(1)(b) because a reasonable person in his position would not have applied for or executed the Further Daly Loan as varied.

362 Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because a reasonable person in their respective positions would not have approved and executed the Further Daly Loan Deed

Variation and would not have executed the RIAA Loan Deed Variation and the ISARF Loan Deed.

363 Mr Raftery contravened s 601FD(1)(b) because a reasonable person in his position would not have approved the Adviser Loans made during this period.

Failure to act in the best interests of members: s 601FD(1)(c)

Legal principles

364 Section 601FD(1)(c) of the Act provides that an officer of the responsible entity of a registered scheme must "act in the best interests of members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests". The duty owed by an officer of a responsible entity under s 601FD(1)(c) of the Act broadly corresponds with that owed by officers of corporations under s 181(1)(a) of the Act. What is required in the discharge of that duty is informed by the context of the responsible entity's role being akin to that of a professional trustee. The analysis in respect of the higher standard of conduct often required of an officer of a responsible entity under s 601FD(1)(b) is apposite in respect of s 601FD(1)(c): *Trilogy Funds* at [211] to [212], citing *ASIC v APCH* at [535] to [537], [543] and *Australian Securities Commission v AS Nominees Limited* [1995] FCA 1663; 62 FCR 504 at 517 to 518.

365 In *ASIC v Lewski*, the High Court determined that s 601FC(1)(c) of the Act provides for two separate duties of loyalty: a duty to act in the best interests, and a duty to give priority to the members' interests if there is a conflict between the members' interests and the interests of the responsible entity: *ASIC v Lewski* at [70]. The scope and content of each duty was described in the following terms (citations omitted):

> 71 The Loyalty Duty requiring a director to act in the best interests of members is not purely subjective. As Bowen LJ said of the equitable progenitor from which this statutory duty was developed and adapted, otherwise a wholly irrational but honest director could conduct the affairs of the company by "paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational". Although the duty is not satisfied merely by honesty, it is a duty to act in the best *interests* of members rather than a duty to secure the best *outcome* for members. Key factors in ascertaining the best interests of the members are the purpose and terms of the scheme, rather than "the success or otherwise of a transaction or other course of action". The purpose and terms of the Trust are the existing legal purposes and terms of the Constitution, not the purpose or terms that are honestly believed to exist.
>
> 72 The Loyalty Duty requiring a director to give priority to the members' interests in circumstances of conflict of interest is narrower in one respect than the

> equitable rule concerning conflict of interest and duty. It does not proscribe acts of a director that put herself or himself in a position of conflict. It only proscribes acts in the course of that conflict that do not give priority to the members' interests. Nevertheless, the duty is not satisfied by an honest or reasonable belief. A contravention occurs when a director prioritises her or his own interests over those of the members, no matter how honest or reasonable the director was in doing so.

366 What is in members' interests is to be determined objectively, and not by reference to what the subjective beliefs of directors or officers: *ASIC v APCH* at [613]. See also *ASIC v Lewski* at [73].

Determination

367 I refer to the findings I have made in relation to the respondents' contravention of s 601FD(1)(b) of the Act. By reason of those findings, I am satisfied that a clear conflict existed between the interests of unit holders in the Registered Scheme and the interests of Linchpin and the borrowers under the Unregistered Scheme Loans. That conflict was not recognised and was not mitigated by the respondents in their respective roles as officers of Endeavour. The respondents did not afford priority to the interests of the unit holders in the Registered Scheme. In prioritising the interests of Linchpin and the Unregistered Scheme Loan borrowers over those of unit holders in the Registered Scheme, the respondents contravened s 601FD(1)(c) by reason of the same conduct that I have found constituted a contravention of s 601FD(1)(b) of the Act.

Improper use of position: s 601FD(1)(e)

Legal principles

368 Section 601FD(1)(e) of Act provides that an officer of the responsible entity of a registered scheme must "not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme".

369 Whether a person has acted improperly for the purpose of s 601FD(1)(e) is to be determined objectively, and does not depend on an alleged offender's consciousness of impropriety. In *ASIC v Lewski* at [75], the High Court cited with approval the following passage from *R v Byrnes* (1995) 183 CLR 501 at 514 to 515 (footnote omitted):

> Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case.

> When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important: the alleged offender's knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do.

370 In the broadly analogous context of s 182(1)(a) of the Act, causing a company to enter into an agreement which confers unreasonable personal benefits on a director has been held to contravene the duty not make improper use of position to gain, directly or indirectly, an advantage: *ASIC v Adler* at [458(1)].

Determination

371 My findings in relation to each of the Linchpin Director Loans are set out above.

372 The conduct of Mr Daly and Mr Raftery respectively in entering into the Daly Loans and the Raftery Loan (as varied) fell short of the standards of conduct that would be expected of individuals in their position by reasonable persons with knowledge of the duties, powers and authority of officers of responsible entities of a registered managed investment schemes, in circumstances where they each:

(1) applied for personal loans, knowing that Linchpin would source the loan principal from funds obtained from the Registered Scheme, without the knowledge or approval of investors in that scheme, and in circumstances where the loans were not consistent with the investment strategy outlined in the PDS, and were not effected in accordance with the requirements of Endeavour's policies and the Act;

(2) knew, or ought reasonably to have known, of the matters in (1), because:

  (a) in Mr Daly's case he was a member of the Investment Committee at the relevant time; and

  (b) in Mr Raftery's case he was a director of Endeavour at the relevant time and subsequently became a member of the Investment Committee;

(3) would not have known that Linchpin had funds available to it from the Registered Scheme which it could advance to them for their personal use, but for their position as officers of Endeavour;

(4) gained a significant financial benefit for themselves, being the benefit of the personal loans advanced at a time when they were experiencing financial difficulty; and

(5) caused a detriment to members of the Registered Scheme by exposing them to the risk that the funds loaned would not be recovered, given:

(a) the loans were sought and advanced because Mr Daly and Mr Raftery were each experiencing financial difficulty;

(b) Endeavour would not, and did not, obtain any security in respect of the funds it transferred to the Unregistered Scheme for the purpose of making the said loans;

(c) the transfer of funds from Endeavour to Linchpin to fund the said loans was not documented in any written loan agreement or reflected in any entry in the investor register of the Unregistered Scheme; and

(d) did not enter into a written agreement for the provision of security with Linchpin in respect of their respective loans.

373 Accordingly, I make the following findings in relation to the contraventions of s 601FD(1)(e) of the Act.

Loans in the period 1 July 2015 to 1 October 2015

374 In the circumstances identified above, Mr Daly contravened s 601FD(1)(e) by improperly using his position as an officer of Endeavour to gain an advantage for himself or to cause a detriment to members of the Registered Scheme by applying for, and obtaining, the Daly Loan using funds sourced from the Registered Scheme.

Loans in the period 1 October 2015 to 24 June 2016

375 In the circumstances identified above, Mr Raftery contravened s 601FD(1)(e) by improperly using his position as an officer of Endeavour to gain an advantage for himself or to cause a detriment to members of the Registered Scheme by applying for, and obtaining, the Raftery Loan using funds sourced from the Registered Scheme.

Loans in the period 24 June 2016 to 7 August 2018

376 In the circumstances identified above, Mr Daly contravened s 601FD(1)(e) by improperly using his position as an officer of Endeavour to gain an advantage for himself or to cause a detriment to members of the Registered Scheme by applying for, and obtaining, the Further Daly Loan and the Further Daly Loan Deed Variation using funds sourced from Registered Scheme.

377 In the circumstances outlined above, Mr Raftery contravened s 601FD(1)(e) by improperly using his position as an officer of Endeavour to gain an advantage for himself, or cause a detriment to members of the Registered Scheme by applying for, and obtaining, a further advance of loan funds from Linchpin in about December 2016.

Failure to take reasonable steps to ensure compliance with the Act: s 601FD(1)(f)

Legal principles

378 Section 601FD(1)(f) of the Act requires that an officer of the responsible entity of a registered scheme must take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with its obligations under, *inter alia,* the Act, the scheme's constitution and the scheme's compliance plan. The importance of the scheme's constitution and compliance plan is obvious. Compliance with the requirements of these constituent documents is fundamental to the proper operation of the scheme itself and to the operation of the statutory framework regulating managed investment schemes in Chapter 5C of the Act.

379 In *Trilogy Funds*, Wigney J observed that:

> 219 The duty in s 601FD(1)(f) is likely to overlap, in many respects, with the duty of care and diligence in s 601FD(1)(b). A director who does not take all steps that a reasonable person would take to ensure that the responsible entity's compliance with the Corporations Act and the scheme's constitution and compliance plan, is also likely to have failed to exercise the standard of care and diligence required by s 601FD(1)(b).
>
> …
>
> 221 There is no relevant authority relating to the meaning or operation of s 601FD(1)(f) of the Corporations Act. Nevertheless, the following points may be made. First, the relevant duty again involves an objective test, based as it is on what a "reasonable person" would do to ensure compliance. Second, there is a subjective element to the duty, because the reasonable person is taken to be in the particular officer's position. Third, the relevant duty is not merely to take reasonable steps. Rather, it is to take "all" steps that the hypothetical reasonable person would take.

380 No challenge was made to his Honour's articulation of these principles concerning s 601FD(1)(f) of the Act in the appeal to the Full Court: *Trilogy Funds Appeal* at [169].

Determination

381 As with the alleged contraventions of ss 601FD(1)(b) and (c) of the Act, the specific grounds upon which it is alleged that each respondent failed to take all reasonable steps to ensure that Endeavour relevantly complied with the Act and its compliance plan vary slightly depending

on the particular respondent, PDS and loan (or set of loans) in question as reflected in Schedule E.

382 The extent of the factual overlap with the contraventions I have found in respect of s 601FD(1)(b) of the Act, enables me to address the contravention of s 601FD(1)(f) of the Act in relatively concise terms. I am satisfied that the respondents failed to take all reasonable steps to ensure that Endeavour complied with its obligations in two principal ways. First, by causing or allowing Endeavour to advance funds for the purpose of enabling Linchpin to enter into the Unregistered Scheme Loans in a manner which did not comply with the requirements in respect of related party transactions prescribed in the Act, the Compliance Plan and Conflict Policy. Secondly, by causing Endeavour to issue PDS that did not comply with the requirements of the Act.

383 I repeat my findings in relation to the relevant related party transactions and the application of s 208(1) of the Act (as modified by s 601LC) and section 16 of the Compliance Plan and cl 5.4 of the Conflict Policy.

384 Contrary to the requirements of s 208(1) of the Act (as modified by s 601LC), Endeavour did not obtain member approval for the related party transactions.

385 Contrary to the requirements of cl 16 of the Compliance Plan, Endeavour transferred funds from the Registered Scheme to, or on behalf of, Linchpin for the purpose of the Unregistered Scheme Loans on terms and in circumstances that were not on an arm's length basis. Endeavour did not obtain independent advice in respect of these transactions or ensure that the advances to Linchpin were documented or that the Unregistered Scheme Loan agreements were reviewed by legal advisers prior to their execution.

386 Finally, the First, Second and Third PDSs issued by Endeavour did not comply with the requirements of the Act for the reasons given above.

387 Accordingly, I make the following findings in relation to the contraventions of s 601FD(1)(f) of the Act.

Loans in the period 1 July 2015 to 1 October 2015

388 Mr Daly, Mr Nielsen and Mr Williams contravened s 601FD(1)(f) because a reasonable person in their respective positions would have complied with the Compliance Plan and the Act. In particular, a reasonable person in their respective positions:

(1) would not have approved and / or executed the Linchpin Loan Deed Variation, the Daly Loan or any Adviser Loans during this period as they were not in compliance with section 16 of the Compliance Plan; and

(2) would have ensured that requisite member approval was obtained in respect of these related-party transactions pursuant to s 208 of the Act as modified by s 601LC.

389 Mr Williams, Mr Raftery and Mr Nielsen also contravened s 601FD(1)(f) by causing the First PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f) and 1013E of the Act.

Loans in the period 1 October 2015 to 24 June 2016

390 Mr Daly, Mr Nielsen and Mr Williams contravened s 601FD(1)(f) because a reasonable person in their respective positions would have complied with the Compliance Plan and the Act. In particular, a reasonable person in their respective positions:

(1) would not have approved and / or executed the Beacon Loan Deed Variation, the Adviser Loans made during this period, and the Daly Loan Deed Variation and the Raftery Loan Deed as they did not comply with the requirements dictated by section 16 of the Compliance Plan; and

(2) would have ensured that requisite member approval was obtained in respect of these related-party transactions pursuant to s 208 of the Act as modified by s 601LC.

391 Mr Williams, Mr Raftery and Mr Nielsen also contravened s 601FD(1)(f) by causing the Second PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Act when a reasonable person in their respective positions would not have done so.

392 Mr Raftery also contravened s 601FD(1)(f) because a reasonable person in his position would have complied with the Compliance Plan and the Act. In particular, a reasonable person in his position:

(1) would not have executed the Raftery Loan Deed as it did not comply with the requirements dictated by section 16 of the Compliance Plan; and

(2) would have ensured that requisite member approval was obtained in respect of this related-party transactions pursuant to s 208 of the Act as modified by s 601LC.

Loans in the period 24 June 2016 to 7 August 2018

393 Mr Daly, Mr Nielsen and Mr Williams contravened s 601FD(1)(f) because a reasonable person in their respective positions would have complied with the Compliance Plan and the Act. In particular, a reasonable person in their respective positions:

(1) would not have approved or executed the Beacon Second Loan Deed Variation, the CPG Loan Deed, the Adviser Loans made during this period, the Raftery Loan Variation, the RIAA Loan Deed Variation, the ISARF Loan Deed, the Further Daly Loan Deed and the Further Daly Loan Deed Variation as they did not comply with the requirements dictated by section 16 of the Compliance Plan; and

(2) would have ensured that requisite member approval was obtained in respect of these related-party transactions pursuant to s 208 of the Act as modified by s 601LC.

394 Mr Williams, Mr Raftery and Mr Nielsen also contravened s 601FD(1)(f) by causing the Third PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Act.

395 Mr Raftery also contravened s 601FD(1)(f) because a reasonable person in his position would have complied with the Compliance Plan and the Act. In particular, a reasonable person in his position:

(1) would not have approved or executed the relevant Adviser Loans as they did not comply with the requirements of section 16 of the Compliance Plan; and

(2) would have ensured that requisite member approval was obtained in respect of these related-party transactions pursuant to s 208 of the Act as modified by s 601LC.

CONCLUSION

396 For the reasons given, I am satisfied that ASIC has established that each of the respondents contravened s 601AD(1)(b), (c), (e), (f) and 601FD(3) of the Act in the manner described above. The parties are to confer and propose short minutes setting out timetabling orders for the preparation of the hearing concerning relief.

I certify that the preceding three hundred and ninety-six (396) numbered paragraphs are a true copy

of the Reasons for Judgment of the Honourable Justice Cheeseman.

Associate:

Dated: 3 April 2023

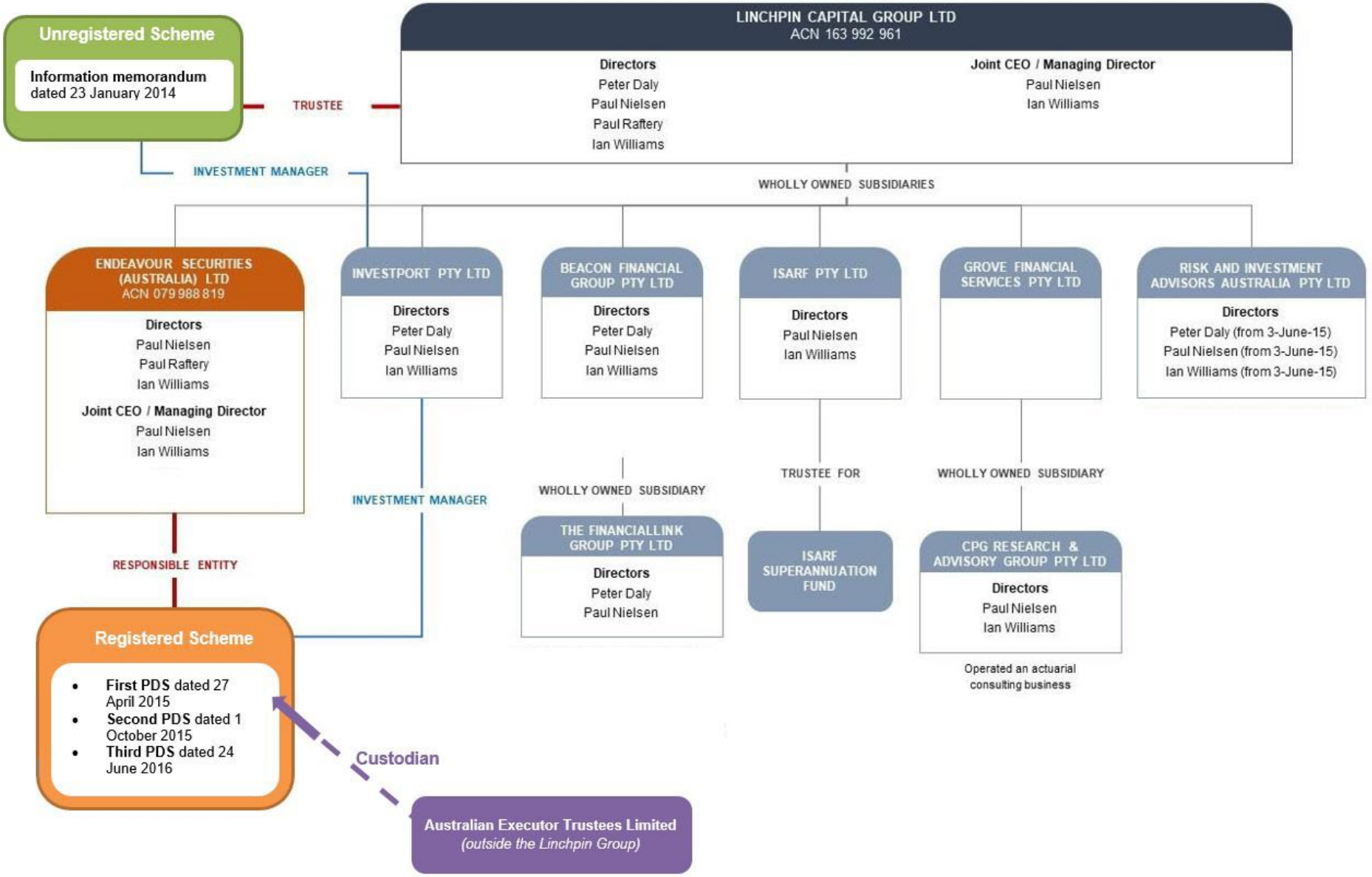
SCHEDULE OF PARTIES

QUD 269 of 2020

Respondents

Fourth Respondent: IAN COMRIE WILLIAMS

SCHEDULE A: STRUCTURE OF LINCHPIN CAPITAL GROUP AND THE TWO SCHEMES



SCHEDULE B: LINCHPIN ENTITY LOANS

#	Borrower(s)	Date	Amount	Document(s)	Executed by Linchpin in its capacity as the trustee of the Unregistered Scheme under the signature of	Investment Committee (IC) approval by Circular Resolution (CR)	Respondents who as members of the IC approved the CR
1.	Linchpin Capital Group Ltd (in liquidation)	10-Feb-14	$3 million	Linchpin Loan Deed SSA	Mr Nielsen, and Mr Williams	10-Feb-14	Mr Daly, Mr Nielsen and Mr Williams
		1-Jul-15	Increased to $6 million	Linchpin Loan Deed Variation	Mr Nielsen, and Mr Williams	3-Jul-15	Mr Daly, Mr Nielsen and Mr Williams
2.	Beacon Financial Group Pty Ltd	10-Feb-14	$3 million	Beacon Loan Deed SSA	Mr Nielsen, and Mr Williams	10-Feb-14	Mr Daly, Mr Nielsen and Mr Williams
		20-Apr-16	Increased to $4 million	First Loan Deed Variation	Mr Nielsen, and Mr Williams	20-Apr-16	Mr Daly, Mr Nielsen and Mr Williams
		30-Sep-16	Increased to $5 million	Second Loan Deed Variation	Mr Nielsen, and Mr Williams	30-Sep-16	Mr Daly, Mr Nielsen and Mr Williams
3.	Risk and Investment Advisers Australia Pty Ltd	1-Jul-16	Increased to $2.75 million	RIAA Loan Deed Variation	Mr Nielsen, and Mr Williams	1 July 2016	Mr Daly, Mr Nielsen, Mr Williams and Mr Raftery The approval of the initial loan of $2.5 million, as well as of the increase of $250,000 both occurred on 1 July 2016 by separate CR. Mr Nielsen only

							signed the circular resolution in relation to the initial loan of $2.5 million.
4.	CPG Research & Advisory Group Pty Ltd	21-Nov-16	$500,000	CPG Loan Deed	Mr Nielsen, and Mr Williams	15-Nov-16	Mr Daly, Mr Nielsen, Mr Raftery and Mr Williams
5.	ISARF Pty Ltd	30-Jun-17	$250,000	ISARF Loan Deed	Mr Nielsen, and Mr Williams	-	-

SCHEDULE C: ADVISER LOANS

#	Borrower(s)	Date	Amount	Document(s)	Executed by Linchpin in its capacity as the trustee of the Unregistered Scheme under the signature of	Investment Committee (IC) approval by Circular Resolution (CR)	Respondents who as members of the IC approved the CR
1.	ALPS Network Pty Ltd Peter Larkin Lance Miekle Each was an authorised representative of Financiallink.	Undated	$220,000	Loan Deed SSA	-	10-Dec-14	Mr Daly, Mr Nielsen and Mr Williams
		Undated	Increased to $550,000	Loan Deed Variation	Mr Nielsen, and Mr Williams	25-Apr-16	Mr Daly, Mr Nielsen and Mr Williams
		x-May-16	Increased to $760,000	Loan Deed Variation	Mr Nielsen, and Mr Williams	-	-
2.	Venture Finance & Advisory Pty Ltd David Ruthenberg Mr Ruthenberg was an authorised representative of Financiallink.	Undated	$150,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	8-Jul-15	Mr Daly, Mr Nielsen and Mr Williams and Mr Blanchette
		6-Mar-17	Increased to $220,000	Loan Deed Variation	Mr Nielsen, and Mr Williams	1-Mar-17	Mr Daly, Mr Raftery and Mr Williams
3.	Brian French Mr French was an authorised	Jul-15	$150,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	31-Jul-15	Mr Daly, Mr Nielsen, Mr Williams and Mr Blanchette
		1-Dec-15	Increased to $300,000	Loan Deed Variation	Mr Nielsen, and Mr Williams	1-Dec-15	Mr Daly, Mr Nielsen and Mr Williams

	representative of Financiallink.	2-Apr-17	Increased to $532,000	Loan Deed Variation	Mr Nielsen, and Mr Williams	12-Apr-17	Mr Daly, Mr Raftery and Mr Williams
4.	Peter Goudie Financial Services Pty Ltd Peter Goudie Each was an authorised representative of RIAA.	29-Oct-15	$150,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	29-Oct-15	Mr Daly, Mr Nielsen and Mr Williams
		18-Sep-17	Increased to $312,000	Loan Deed Variation	Mr Nielsen, and Mr Williams	18-Sep-17	Mr Daly, Mr Raftery and Mr Williams
5.	Fortuna Financial Group Pty Ltd Paul Ellenberg Southwide Holdings Pty Ltd Each was an authorised representative of Financiallink.	8-Jan-16	$419,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	2-Dec-15	Mr Daly, Mr Nielsen and Mr Williams
		12-Dec-16	Increased to $659,000	Loan Deed Variation	Mr Nielsen, and Mr Williams	10-Dec-16	Mr Daly, Mr Nielsen and Mr Williams
6.	Anderson Lutgens & Co Pty Ltd trading as Beyond iWealth Pamela Margaret Anderson Pierre Lutgens Ms Anderson and Anderson Lutgens & Co Pty Ltd were authorised	10-Oct-16	$60,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	10-Oct-16	Mr Daly, Mr Nielsen and Mr Williams
		31-Jan-17	Increased to $80,000	Loan Deed Variation	Mr Nielsen and Mr Daly	3-Feb-17	Mr Daly, Mr Raftery and Mr Williams The circular resolution records that the facility was increased from $60,000 to $120,000 whereas the Loan Deed Variation provides for

	representatives of Financiallink.						an increase from $50,000 to $80,000.
7.	Kings Lance Enterprises Pty Ltd Graham Kinder Mr Kinder was an authorised representative of Financiallink.	Undated	$1.3m	Loan Deed SSA	Mr Nielsen, and Mr Williams	16-Dec-16	Mr Daly, Mr Nielsen and Mr Williams
8.	Market St Holdings Pty Ltd Stefanie Seco Each was an authorised representative of Financiallink.	9-Feb-17	$210,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	16-Feb-17	Mr Daly, Mr Raftery and Mr Williams
9.	Macquarie Partners Financial Advisory Pty Ltd Sun Hee Hres Each was an authorised representative of Financiallink.	3-Mar-17	$100,000	Loan Deed SSA	Mr Nielsen, and Mr Williams (SSA executed by Nielsen only)	8-Mar-17	Mr Daly, Mr Raftery and Mr Williams

10.	Secured Business Equity Pty Ltd Brian David Perrin Each was an authorised representative of Financiallink.	24-Mar-17	$400,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	20-Mar-17	Mr Daly, Mr Raftery and Mr Williams
		16-May-17	Increased to $440,000	Loan Deed Variation	Mr Nielsen, and Mr Williams	13-May-17	Mr Daly, Mr Raftery and Mr Williams
11.	B and S Wilshire Pty Ltd Ben Wilshire Each was an authorised representative of RIAA.	25-May-17	$38,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	5-Mar-17	Mr Daly, Mr Raftery and Mr Williams
12.	Strategic Wealth Group Pty Ltd Neville Ortega Each was an authorised representative of Financiallink.	29-Sep-17	$459,075	Loan Deed SSA	Mr Nielsen, and Mr Williams	26-Sep-17	Mr Daly, Mr Raftery and Mr Williams
13.	Dale Financial Planning Pty Ltd Ian William Dale Each was an authorised representative of Financiallink.	2-Nov-17	$80,000	Loan Deed SSA	Mr Nielsen, and Mr Williams (SSA executed by Nielsen only)	1-Nov-17	Mr Daly, Mr Raftery and Mr Williams

14.	Polaris Financial Services Pty Ltd Peter Robert Willmott Annelise Willmott Annelise Willmott and Polaris Financial Services Pty Ltd were authorised representatives of Financiallink.	Nov-17	$70,000	Loan Deed SSA	Mr Nielsen, and Mr Williams	1-Nov-17	Mr Daly, Mr Raftery and Mr Williams

SCHEDULE D: LINCHPIN DIRECTOR LOANS

#	Borrower	Date	Amount	Document(s)	Executed by Linchpin in its capacity as the trustee of the Unregistered Scheme under the signature of	Investment Committee (IC) approval by Circular Resolution (CR)	Respondents who as members of the IC approved the CR
1.	Peter Eugene Daly	14-Sep-15	$20,000	Daly Loan Deed	Mr Nielsen, and Mr Williams	14-Sep-15	Mr Nielsen, and Mr Williams
		11-Nov-15	Increased to $55,000	Daly Loan Deed Variation	Mr Nielsen, and Mr Williams	11-Nov-15	Mr Williams
2.	Paul Anthony Raftery	1-Apr-16	$30,000.00	Raftery Loan Deed	Mr Nielsen, and Mr Williams	1-Apr-16	Mr Daly, Mr Nielsen and Mr Williams
		1-Dec-16	Increased to $40,000	-	-	1-Dec-16	Mr Daly, Mr Nielsen and Mr Williams
3.	Peter Eugene Daly	5-Jan-17	$35,000	Further Daly Loan Deed*	Mr Nielsen, and Mr Williams	10-Jan-17	Mr Williams
		25-Jul-17	Increased to $70,000	Further Daly Loan Deed Variation**	Mr Nielsen, and Mr Williams	24-Jul-17	Mr Raftery and Mr Williams

* The Loan Deed Variation dated 25 July 2017 refers to a loan deed dated 5 January 2017. However, no executed loan deed has been produced to ASIC by Linchpin or Endeavour and there is no evidence it was ever executed. Mr Daly had not executed the loan deed by 3 July 2017. See paragraphs [185] to [186] of these reasons.

** Notwithstanding date on its face, this document was executed until after ASIC commenced its investigation in January 2018.

SCHEDULE E: OVERVIEW OF CONTRAVENTIONS ALLEGED BY ASIC

#	Provision	Respondent(s)	Summary of Contravention
			LOANS IN THE PERIOD 1 JULY 2015 TO 1 OCTOBER 2015
1.	s 601FD(1)(b)	Peter Daly Paul Nielsen Ian Williams	Failed to exercise the degree of care and diligence that a reasonable person in their position would have exercised by: • approving and/or executing the Linchpin Loan Deed Variation and the Adviser Loans during this period; • in the case of Daly, entering into, and in the case of Nielsen and Williams, approving and executing, the Daly Loan Deed; and • not taking any steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purposes of those loans.
2.	s 601FD(1)(c)	Peter Daly Paul Nielsen Ian Williams	Failed to act in the best interests of the members of the Registered Scheme by reason of the same conduct as that constituting a contravention of s 601FD(1)(b), set out above.
3.	s 601FD(1)(f)	Peter Daly Paul Nielsen Ian Williams	Failed to take all steps that a reasonable person in their position would have taken to ensure that Endeavour, acting as responsible entity of the Registered Scheme, complied with the Compliance Plan and the Act, because: • the Linchpin Loan Deed Variation, the Adviser Loans during this period, and the Daly Loan Deed were not made in compliance with s 16 of the Compliance Plan; • no member approval was obtained in respect of each of the transactions mentioned above, even though they were related-party transactions and therefore such approval was required pursuant to s 208 (as modified by s 601LC) of the Act; and • further, in the case of Nielsen and Williams, each caused the First PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f) and 1013E of the Act.

#	Provision	Respondent(s)	Summary of Contravention
4.	s 601FD(1)(e)	Peter Daly	Made an improper use of his position as an officer of Endeavour to gain an advantage for himself or to cause a detriment to members of the Registered Scheme by applying for and obtaining a personal loan from the funds invested in the Registered Scheme (i.e. the Daly Loan).
5.	s 601FD(1)(f)	Paul Raftery	Failed to take all steps that a reasonable person in his position would have taken to ensure that Endeavour, acting as responsible entity of the Registered Scheme, complied with the Act because he caused the First PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f) and 1013E of the Act.
			LOANS IN THE PERIOD 1 OCTOBER 2015 TO 24 JUNE 2016
6.	s 601FD(1)(b)	Peter Daly Paul Nielsen Ian Williams	Failed to exercise the degree of care and diligence that a reasonable person in their position would have exercised by: • approving and/or executing the Beacon Loan Deed Variation, the Adviser Loans during this period, and the Raftery Loan Deed; • in the case of Daly, entering into, and in the case of Nielsen and Williams, executing, the Daly Loan Deed Variation; and • not taking any steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purposes of those loans.
7.	s 601FD(1)(c)	Peter Daly Paul Nielsen Ian Williams	Failed to act in the best interests of the members of the Registered Scheme by reason of the same conduct as that constituting a contravention of s 601FD(1)(b), set out above.
8.	s 601FD(1)(f)	Peter Daly Paul Nielsen Ian Williams	Failed to take all steps that a reasonable person in their position would have taken to ensure that Endeavour, acting as responsible entity of the Registered Scheme, complied with the Compliance Plan and the Act, because:

#	Provision	Respondent(s)	Summary of Contravention
			• the Beacon Loan Deed Variation, the Adviser Loans during this period, the Daly Loan Deed Variation and the Raftery Loan Deed were not made in compliance with s 16 of the Compliance Plan; and • no member approval was obtained in respect of each of the transactions mentioned above, even though they were related-party transactions and therefore such approval was required pursuant to s 208 (as modified by s 601LC) of the Act; and • further, in the case of Nielsen and Williams, each caused the Second PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Act.
9.	s 601FD(1)(b)	Paul Raftery	Failed to exercise the degree of care and diligence that a reasonable person in his position would have by: • executing the Raftery Loan Deed; and • not taking any steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purpose of the Raftery Loan Deed.
10.	s 601FD(1)(c)	Paul Raftery	Failed to act in the best interests of the members of the Registered Scheme by reason of the same conduct as that constituting a contravention of s 601FD(1)(b), set out above.
11.	s 601FD(1)(e)	Paul Raftery	Made an improper use of his position as an officer of Endeavour to gain an advantage for himself or to cause a detriment to members of the Registered Scheme by applying for and obtaining a personal loan from the funds invested in the Registered Scheme (i.e. the Raftery Loan).
12.	s 601FD(1)(f)	Paul Raftery	Failed to take all steps that a reasonable person in his position would have taken to ensure that Endeavour, acting as responsible entity of the Registered Scheme, complied with the Compliance Plan and the Act, because: • the Raftery Loan Deed was not made in compliance with s 16 of the Compliance Plan; • no member approval was obtained in respect of the Raftery Loan Deed, even though it constituted a related-party transaction and therefore such approval was required pursuant to s 208 (as modified by s 601LC) of the Act; and

#	Provision	Respondent(s)	Summary of Contravention
			• further, he caused the Second PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Act.
			LOANS IN THE PERIOD 24 JUNE 2016 TO 7 AUGUST 2018
13.	s 601FD(1)(b)	Peter Daly Paul Nielsen Ian Williams	Failed to exercise the degree of care and diligence that a reasonable person in their position would have exercised by: • approving and/or executing the Beacon Second Loan Deed Variation, the CPG Loan Deed, the Adviser Loans during this period and the Raftery Loan Variation; • in the case of Daly, entering into, and in the case of Nielsen and Williams, executing, the Further Daly Loan and the Further Daly Loan Deed Variation; • in the case of Nielsen and Williams, executing the RIAA Loan Deed Variation and the ISARF Loan Deed; • not taking any steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purpose of those loans.
14. ;	s 601FD(1)(c)	Peter Daly Paul Nielsen Ian Williams	Failed to act in the best interests of the members of the Registered Scheme by reason of the same conduct as that constituting a contravention of s 601FD(1)(b), set out above.
15.	s 601FD(1)(f)	Peter Daly Paul Nielsen Ian Williams	Failed to take all steps that a reasonable person in their position would have taken to ensure that Endeavour, acting as responsible entity of the Registered Scheme, complied with the Compliance Plan and the Act, because: • the Beacon Second Loan Deed Variation, the CPG Loan Deed, the Adviser Loans during this period, the Raftery Loan Variation, the RIAA Loan Deed Variation, the ISARF Loan Deed, the Further Daly Loan Deed and the Further Daly Loan Deed Variation were not made in compliance with s 16 of the Compliance Plan; • no member approval was obtained in respect of each of the transactions mentioned above, even though they were related-party transactions and therefore such approval was required pursuant to s 208 (as modified by s 601LC) of the Act; and

#	Provision	Respondent(s)	Summary of Contravention
			• further, in the case of Nielsen and Williams, each caused the Third PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Act.
16.	s 601FD(1)(e)	Peter Daly	Made an improper use of his position as an officer of Endeavour to gain an advantage for himself or to cause a detriment to members of the Registered Scheme by applying for and obtaining a personal loan from the funds invested in the Registered Scheme (i.e. the Further Daly Loan and the Further Daly Loan Deed Variation).
17.	s 601FD(1)(b)	Paul Raftery	Failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised by approving the relevant Adviser Loans.
18.	s 601FD(1)(c)	Paul Raftery	Failed to act in the best interests of the members of the Registered Scheme by reason of the same conduct as that constituting a contravention of s 601FD(1)(b), set out above.
19.	s 601FD(1)(f)	Paul Raftery	Failed to take all steps that a reasonable person in h position would have taken to ensure that Endeavour, acting as responsible entity of the Registered Scheme, complied with the Compliance Plan and the Act, because: • the relevant Adviser Loans were not made in compliance with s 16 of the Compliance Plan; • no member approval was obtained in respect of each of the Adviser Loans mentioned above, even though they were related-party transactions and therefore such approval was required pursuant to s 208 (as modified by s 601LC) of the Act; and • he caused the Third PDS to be issued in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Act.

SCHEDULE F: NON COMPLIANCE OF PRODUCT DISCLOSURE STATEMENTS

#	Information not disclosed	Required by
	FIRST PDS DATED 27 APRIL 2015	
1.	That the Investment Committee had approved the use of funds invested in the Registered Scheme for the purpose of making further advances under the Beacon and Linchpin Loans, as referred to in the 1 April 2015 resolution.	ss 1013D(1)(c), 1013E
2.	That it was intended, as identified in the 1 April 2015 resolution, that Endeavour (as trustee of the Registered Scheme) would transfer any funds invested in the Registered Scheme to Linchpin as trustee of the Unregistered Scheme, and that Linchpin (as trustee) would invest those funds.	ss 1013D(1)(f), 1013D(1)(c), 1013E
3.	That no security interest had been registered by Linchpin on the Personal Property Securities Register (or at all) in respect of the Beacon and Linchpin Loans.	ss 1013D(1)(c), 1013E
4.	That Linchpin had not paid any interest or repaid any principal to the Unregistered Scheme in respect of the advances it had received pursuant to the Linchpin Loan Deed.	ss 1013D(1)(c), 1013E
5.	That, in addition to the fees to be earned by Endeavour as responsible entity of the Registered Scheme (which was disclosed at cl. 11.5), Linchpin would charge management fees on the assets of the Unregistered Scheme which assets would include funds transferred from the Registered Scheme to the Unregistered Scheme.	ss 1013D(1)(d), 1013E
	SECOND PDS DATED 1 OCTOBER 2015	
6.	The matters set out at Items 1, 2, 3, 4 and 5 above.	See above.
7.	Information concerning the Linchpin Entity Loans, the Adviser Loans and the Linchpin Director Loans made during the period 1 July 2015 to 1 October 2015, pleaded in paragraphs 42 to 58 of the Statement of Claim.	ss 1013D(1)(c), 1013E, 1017B(1)
	THIRD PDS DATED 24 JUNE 2016	

8.	The matters set out at Items 1, 2, 3, 4 and 5 above.	See above.
9.	Information concerning Linchpin Entity Loans, the Adviser Loans and the Linchpin Director Loans made during the period 1 October 2015 to 24 June 2016 pleaded in paragraphs 67 to 88 of the Statement of Claim.	ss 1013D(1)(c), 1013E, 1017B(1)