FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Ultiqa Lifestyle Promotions Limited (in liq) (No 2) [2022] FCA 1228

File number:	QUD 354 of 2021
Judgment of:	**DOWNES J**
Date of judgment:	14 October 2022
Catchwords:	**CORPORATIONS** – application by regulator for pecuniary penalties arising from findings of contravention in previous decision – where declarations of contravention of s 961L *Corporations Act 2001* (Cth) already made – whether financial position of related company in corporate group relevant in circumstances where contravening entity now in liquidation
Legislation:	*Corporations Act 2001* (Cth) ss 961B, 961G, 961J, 961L, 1317E, 1317G, 1657 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) ss 2, 3, Sch 1 item 146
Cases cited:	*Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599; [2022] HCA 13 *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181 *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 142 ACSR 277; [2020] FCA 69 *Australian Securities and Investments Commission v Ultiqa Lifestyle Promotions Limited (in liq)* (2022) 159 ACSR 195; [2022] FCA 561 *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* (2022) 159 ACSR 381; [2022] FCA 515 *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172

	Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482; [2015] HCA 46 *Schneider Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2003) 127 FCR 170; [2003] FCAFC 2 *Trade Practices Commission v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076 *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24; [2021] FCAFC 49
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	69
Date of hearing:	8 September 2022
Counsel for the Plaintiff:	Mr SJ Cleary and Mr SE Seefeld
Counsel for the Defendant:	The Defendant did not appear

ORDERS

QUD 354 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**ULTIQA LIFESTYLE PROMOTIONS LIMITED (IN LIQUIDATION) (ACN 096 169 256)** Defendant

ORDER MADE BY: **DOWNES J**

DATE OF ORDER: **14 OCTOBER 2022**

PENAL NOTICE

TO: ULTIQA LIFESTYLE PROMOTIONS LIMITED (IN LIQUIDATION) (ACN 096 169 256)

IF YOU (BEING THE PERSONS BOUND BY THIS ORDER):

(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR

(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,

YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.

THE COURT ORDERS THAT:

1. Within 30 days, the defendant pay to the Commonwealth of Australia, pursuant to s 1317G *Corporations Act 2001* (Cth), a pecuniary penalty in the amount of $900,000 in respect of its contraventions of s 961L of the Act as declared in the Order dated 17 May 2022.

2. The defendant pay the plaintiff's costs of this proceeding.

3. The plaintiff forthwith serve a copy of this judgment on the defendant.

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

REASONS FOR JUDGMENT

DOWNES J:

INTRODUCTION

1 The defendant (**Ultiqa**) is the holder of an Australian financial services licence (**AFSL**). It carried on a business of promoting the sale of interests in a timeshare scheme to six couples between 5 October 2017 and 21 March 2019, which is the **relevant period** for the purposes of this proceeding.

2 The timeshare scheme, called the Ultiqa Lifestyle Managed Investment Scheme ARSN 097 961 174, is a registered managed investment scheme for the purposes of the *Corporations Act 2001* (Cth) (**Scheme**).

3 Ultiqa conducted its business through a network of corporate sales agents which were registered as corporate authorised representatives under Ultiqa's AFSL. These corporate authorised representatives employed individual sales consultants who were also registered as authorised representatives under Ultiqa's AFSL.

4 On 17 May 2022, the Court delivered judgment in this matter in *Australian Securities and Investments Commission v Ultiqa Lifestyle Promotions Limited (in liq)* (2022) 159 ACSR 195; [2022] FCA 561 (**liability judgment** or **LJ**).

5 By that decision, Ultiqa was found to have contravened s 961L of the *Corporations Act* by failing to ensure that its authorised representatives complied with ss 961B, 961G and 961J when providing financial product advice to six pleaded consumers (being the six couples): [107]–[110] LJ. The case against Ultiqa was described in the liability judgment as being a compelling one: [9] LJ.

6 Declarations were made on 17 May 2022 which reflected the findings made in the liability judgment.

7 The Australian Securities and Investments Commission (**ASIC**) seeks an order pursuant to s 1317G of the *Corporations Act* that Ultiqa pay a pecuniary penalty in respect of the contraventions of s 961L of the Act, as well as an order for costs.

8 ASIC no longer presses for the injunction sought in [7] of its originating process because Ultiqa ceased promoting the sale of interests in the Scheme on 28 January 2020 and was placed into liquidation on 30 April 2021: [10] LJ.

9 ASIC submits that a penalty of $400,000 to $500,000 per contravention of s 961L is warranted taking into account a number of matters, including the nature of Ultiqa's conduct, the loss and damage suffered by consumers, the size and financial position of the corporate group of which Ultiqa is a member (**Ultiqa Group**) and the primary purpose of deterrence.

10 For the following reasons, it will be ordered that Ultiqa pay a penalty of $300,000 for each contravention. Costs will follow the event.

PECUNIARY PENALTIES

Relevant legislation

11 The contraventions occurred during the relevant period – namely, between 5 October 2017 and 21 March 2019. During that period, the legislation relating to the imposition of pecuniary penalties was amended twice. However, as further developed below, because of the transitional provision in s 1657 *Corporations Act* and having regard to the facts of this case, the amendments made after 13 March 2019 are not relevant.

12 Section 1317G(1E)(b)(ii) (as it then was) relevantly provided that a Court may order a person to pay the Commonwealth a pecuniary penalty if a declaration of contravention by the person has been made under s 1317E and which contravention includes s 961L.

Relevant legal principles

13 The scope of the power to impose civil pecuniary penalties was considered by the High Court in *Australian Building and Construction Commissioner v* ***Pattinson*** (2022) 399 ALR 599; [2022] HCA 13.

14 The following principles are derived from the reasons of the plurality in *Pattinson* and are apposite to the approach required to be taken to the imposition of a pecuniary penalty in this case:

(1) subject to the particular statutory scheme, "the purpose of a civil penalty is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the [*Corporations Act*] by the deterrence of further contraventions of the Act": [9], [15], [42], [47]–[48]. See also *Commonwealth of Australia v Director, Fair Work Building*

Industry Inspectorate (2015) 258 CLR 482; [2015] HCA 46 at [55]; ***viagogo*** *AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 at [129] (Yates, Abraham and Cheeseman JJ);

(2) there is no place for a "notion of proportionality" in a civil penalty regime, being a notion drawn from the criminal law that a penalty must be proportionate to the seriousness of the conduct that constituted the contravention, and nor should the maximum penalty be reserved for only the most serious examples of the offending (subject to the terms of the statute). What is required is that there be "some reasonable relationship between the theoretical maximum and the final penalty imposed" which will be established where the penalty does not exceed what is reasonably necessary to achieve the purpose of the provision, being the deterrence of future contraventions of a like kind by the contravenor and others: [10]. See also *viagogo* at [131];

(3) civil penalties must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business: [17];

(4) the factors identified by French J (as his Honour then was) in *Trade Practices Commission v* ***CSR*** *Ltd* [1990] FCA 521; (1991) ATPR 41-076 at 52,152–52,153 (as set out below) are possible relevant considerations which inform the assessment of a penalty of appropriate deterrent value; however, these should not be considered as a "legal checklist": [18]–[19], [54]. See also *viagogo* at [131];

(5) another relevant factor is the maximum penalty which might be imposed, albeit it must be balanced with all other relevant factors: [52]–[54]. See also *viagogo* at [131];

(6) the power to impose a penalty is to be exercised judicially, that is, fairly and reasonably having regard to the subject matter, scope and purpose of the legislation: [40]. See also *viagogo* at [130];

(7) the penalty imposed should be "proportionate" in the sense that it strikes a reasonable balance between deterrence and oppressive severity: [41], [46]. See also *viagogo* at [130];

(8) concepts such as totality, parity and course of conduct may assist in the assessment of what may be considered reasonably necessary to deter further contraventions of the Act: [45]. See also *viagogo* at [132];

(9) considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against future contraventions of a like kind: [50].

15 The factors identified by French J in *CSR* were:

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

16 By s 1317E of the *Corporations Act*, s 961L was a civil penalty provision at all times during the relevant period.

CONSIDERATION

Maximum penalty

17 By s 3 and schedule 1, item 146 of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth), s 1657 was added to Chapter 10 of the *Corporations Act,* Transitional provisions. That section provides:

> Subject to this Part, the amendments made by Schedule 1 to the amending Act apply in relation to the contravention of a civil penalty provision if the conduct constituting the contravention of the provision occurs wholly on or after the commencement day.

18 The commencement day, as referred to in that section, was 13 March 2019: s 2 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

19 For the period 5 October 2017 to 12 March 2019, the maximum penalty that the Court may impose for a contravention of s 961L by a corporation was $1 million: s 1317G(1F)(b) (as it was before 13 March 2019).

20 For the period from 13 March 2019 to 21 March 2019 and for contraventions arising from conduct which was wholly on or after 13 March 2019, the maximum penalty was the greater of 50,000 penalty units, or various factors calculated from the benefit derived/detriment avoided by the contravention or the annual turnover of the corporation: s 1317G(4). As the value of a penalty unit was $210 during that period, 50,000 penalty units equated to $10.5 million.

21 The conduct which underpinned the findings of contravention on dates after 13 March 2019 related to only one of the six pleaded consumers, and occurred over a period of only eight days of the relevant period (being a period of more than 500 days): [60] LJ. It follows that the contraventions as found in the liability judgment did not arise from conduct which was wholly on or after 13 March 2019.

22 For the purposes of assessing penalty in this case, it is therefore appropriate to regard the relevant maximum penalty as being $1 million because the amendments made to s 1317G which commenced on 13 March 2019 do not apply.

General deterrence – financial services industry generally

23 Section 961L of the *Corporations Act* provided as follows:

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

24 Relevantly to this case, s 961B of the *Corporations Act* required that the provider must act in the best interests of the client in relation to the advice; s 961G required that the provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under s 961B to act in the best interests of the client; and s 961J required the provider to give priority to the client's interests when giving the advice if the provider knows or reasonably ought to know that there is a conflict between the interests of the client and the interests of (in this case) the provider and Ultiqa: [87]–[89] LJ.

25 Ultiqa's conduct in this case, particularly that which was the subject of the findings at [17]–[34] and [106]–[109] LJ, and the consequences to the consumers as addressed in [36]–[61], [74]–[81], [83]–[85] and [87]–[93] LJ, highlight the importance of holders of an AFSL taking reasonable steps to ensure compliance by the authorised representatives with, in particular, ss 961B, 961G and 961J of the *Corporations Act*.

26 It is important that a penalty is not imposed which would be perceived by others in the financial services industry as a "cost of doing business" and as being more cost-effective than taking reasonable steps to ensure that there is compliance by their authorised representatives with the Act. To impose such a penalty would lead to a potential distortion of competition in the market because those in the market which elect to run the risk of paying the penalty gain an unfair advantage over competitors which comply with the law: see *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181 at [149] (Jagot, Yates and Bromwich JJ).

27 The obligations imposed upon the holder of an AFSL to take such reasonable steps is for the obvious protection of third parties who are the recipients of the advice. There is a great potential for significant harm to third party consumers otherwise.

28 It is also relevant to consider that Ultiqa operated within a particular segment of the financial services industry, namely the timeshare sector. The timeshare sector has been the source of ongoing complaints of misconduct over many years, as described in ASIC's "Report 642 Timeshare: Consumers' experiences" published in December 2019.

29 Extracts of that report demonstrate that the experiences of the pleaded consumers with the authorised representatives of Ultiqa were not unique. For example:

> **Consumer experiences research—Key findings**
>
> …
>
> 25 Findings from the research suggest a risk of consumer harm during:
>
> (a) the *sales presentation*—the environment in which consumers purchase the timeshare membership. Consumers spend large sums of money on a purchase they rarely expect to make and enter into ongoing financial commitments without full understanding and under time pressure. The social norms of the sales environment (e.g. the other couples who are also attending the presentation) influenced participants and, in some cases, caused them to get caught up in the excitement or not question their purchase decision;
>
> …

How the timeshare sales process can influence consumer behaviour

29 In our view, the key findings of the consumer research set out in Table 1 and Section B showed timeshare operators using persuasive or high-pressure sales tactics that harness a range of well-known behavioural techniques to propel consumers toward a purchase decision. They include:

(a) the use of attractive incentives and time-bound 'exclusive' offers to facilitate same-day purchase decisions—harnessing scarcity and loss/regret aversion;

(b) deploying skilled and tactical sales representatives and tag-teaming among sales representatives—leveraging social factors, such as likeability, trust, peer-pressure and reciprocity;

(c) framing the product and decision as the purchase of a 'lifestyle product' to harness positive emotions and social norms associated with holidays and family, while downplaying risks, constraints and the complex, long-term financial commitment of timeshare membership;

(d) making the purchase decision (and the finance approval process) fast and easy, and cementing the commitment by celebrating the purchase;

(e) placing time pressure on the decision to purchase, and timing risk that a consumer misses the cooling-off period before a holiday was over, or because the timeshare membership was untested;

(f) employing techniques to overcome resistance, and deploying regulatory requirements to overwhelm or confound consumer decision making, including harnessing information overload and cognitive fatigue; and

(g) obscuring or not revealing how hard it is to exit timeshare membership if the consumer cannot use it as intended or if their circumstances change—timeshare is a sludgy product: easy to get into, hard to get out of.

…

Participants did not recognise they had received financial advice

76 Participants did not consider the operator's representatives to be financial advisers. No participants could recall receiving financial advice about whether the purchase was suitable for them based on their overall objectives, financial situation and needs. Few participants recalled receiving an SOA. At most, participants considered they were receiving advice about holidays.

77 Some participants were satisfied that they had enough information to make an informed decision at the sales presentation. However, other participants reported their decision was based only on a partial understanding of what they were purchasing.

78 Some participants also had concerns at the time but did not think they could raise them. The findings of the research suggest this could be because:

(a) the tactics were highly persuasive, and the participants felt pressured by the sales person and the additional representative;

(b) the participants got caught up in the excitement and the promise of

cheap holidays;

(c) the participants were in a setting where social norms influenced their behaviour (e.g. the presence of other couples); and

(d) their partner may have felt more enthusiastic about the timeshare membership—without the time to discuss and consider, they went along with the decision to purchase the membership.

30 For these reasons, the penalty to be imposed on Ultiqa ought to be one which acts as an effective deterrent to other participants in the financial services industry and, in particular, to those which bear a statutory obligation pursuant to s 961L of the *Corporations Act* and who work in the timeshare sector of the financial services industry.

The circumstances of the contravening conduct

31 Having regard to the findings in the liability judgment which are referred to above, it is the case that, not only did Ultiqa failed to take reasonable steps to ensure compliance by its authorised representatives with ss 961B, 961G and 961J of the *Corporations Act*, its conduct caused those representatives to breach their statutory obligations. That is particularly apparent from the opinions expressed by Ms Walker in the Walker Report set out at [106] LJ as well as the findings at [108] and [109] LJ. Its contraventions of s 961L were serious and occurred over a period of more than one year.

32 It is significant that this is not a matter where there has been a breakdown between Ultiqa's compliance processes and the practices of its authorised representatives. Rather, Ultiqa's business operated within a framework which was imposed by it and which included training, a compliance officer and compliance committee.

33 Further, Ultiqa had knowledge of the documents which were being used by its authorised representatives to gather information from consumers. It provided those documents and insisted upon their use.

34 It is also apparent from the sales training manual and sales scripts which were provided by Ultiqa to its authorised representatives that acting in the consumer's best interests, ensuring appropriate advice was given and preferring the consumer's interests formed no part of the required sales process. Rather, the process imposed on the authorised representatives required the sole focus to be placed upon the sale of the product to the consumer, to the financial benefit of Ultiqa and other corporations in the Ultiqa Group.

35 Ultiqa's failures were therefore fundamental and systemic, and its corporate culture was not conducive to compliance with the *Corporations Act*.

36 These matters tend to support a conclusion that a higher penalty is required in order to secure effective deterrence.

Other considerations relating to Ultiqa

37 There was no evidence that Ultiqa had previously been found by a court to have engaged in similar unlawful conduct. Further, ASIC appeared to accept that Ultiqa would not resume its business as a consequence of its liquidation.

38 These matters indicate that a lower penalty is needed to deter Ultiqa from engaging in the same unlawful conduct.

Loss and damage suffered because of the contraventions

39 The evidence demonstrated that loss has been caused to consumers as a result of Ultiqa's conduct. That is because, if Ultiqa had taken appropriate steps to ensure its authorised representatives complied with ss 961B, 961G and 961J, it is likely than the six pleaded consumers would have not have received advice to purchase interests in the Scheme and therefore would not have done so.

40 The loss caused to the pleaded consumers can be summarised in this way:

(1) principal cost of purchasing interests in the Scheme: the six pleaded consumers paid between $9,990 and $19,992 for the purchase of interests in the Scheme. The total principal cost of purchasing interests in the Scheme across the six pleaded consumers was $87,836.

(2) interest on loan to purchase interest in the Scheme: five of the six consumers obtained loans for the purchase of interests in the Scheme from the related entity, Future Holiday Finance Pty Ltd. The term of these loans varied from 24 months to 84 months. For four of these five consumers, the loan attracted an interest rate of 14.95%. The result is that these consumers became liable to interest payments varying between $3,989.01 and $11,361.31. Each of the consumers was also charged an establishment fee of $375 for their loan. The total amount of interest and establishment fees payable across the six pleaded consumers was $33,461.51.

(3) membership fees: membership of the Scheme included an obligation to pay an annual fee. The amount of the annual fee depended on the type of interest purchased. When the six consumers purchased their interests, these fees were either $199 or $825.58. The fee was payable annually for the term of each consumer's membership of the Scheme, which varied from between 15 years and 63 years across the pleaded consumers. The result is that, over the term of their membership, the consumers became liable to total fees of between $2,786 and $51,185.96. Across the six pleaded consumers, the total membership fees amount to $84,020.96.

Size and financial position of Ultiqa

41 The size of a corporation may be particularly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent. The sum required to achieve that object will generally be larger where the company has vast resources: *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24; [2021] FCAFC 49, [154] (Wigney, Beach and O'Bryan JJ).

42 Conversely, if the corporation is small and has limited resources, a lesser penalty may be appropriate.

43 In this case, Ultiqa is a company of negligible size and limited resources. In 2017, 2018 and 2019, Ultiqa had net assets of around $250,000 to $260,000. In 2020, Ultiqa's net assets were around $96,000. Ultiqa's net loss after tax was $3,850 in 2020, $12,283 in 2019, and $0 profit in 2018 and 2017. In 2017 to 2020, Ultiqa derived income between around $125,000 and $60,000 with expenses of around the same amounts.

44 The liquidator's report to creditors states the company has realisable assets of around $33,000, all of which will be consumed within the liquidation.

Size and financial position of the Ultiqa Group

45 The following factors are relevant to determining whether the size and financial position of other entities in a contravener's corporate group should be considered in fixing a pecuniary penalty:

(1) whether the contravening company is part of a much larger, internally coordinated and wealthy corporate group: *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* (2022) 159 ACSR 381; [2022] FCA 515 (Beach J),

[128]; *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 142 ACSR 277; [2020] FCA 69 (Lee J), [185];

(2) whether any other company in the corporate group had any involvement in the contravening conduct: ***Schneider*** *Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2003) 127 FCR 170; [2003] FCAFC 2 at [49] per Merkel J (Black CJ and Sackville J agreeing); *Australian Competition & Consumer Commission v* ***Renegade Gas*** *Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 (Gordon J), [184];

(3) whether the contravening company has capacity to pay any penalty that may be imposed: *Schneider*, [49]; *Renegade Gas,* [184].

46 The Ultiqa Group includes a number of companies which, but for Ultiqa and one company which has been deregistered, continue to operate.

47 Further, the Scheme itself remains in operation.

48 Within the Ultiqa Group, Ultiqa Lifestyle Points Limited (**Ultiqa Points**) is the responsible entity for the Scheme. Ultiqa Management Pty Ltd is appointed by Ultiqa Points to manage the Scheme on its behalf. **Ultiqa Developments** Pty Ltd, which appears to have the same parent company as Ultiqa, pays for properties acquired by the Scheme on behalf of its members and, of all of the companies in the corporate group, it appears to have significant assets.

49 For example, the evidence shows that Ultiqa Developments had a net profit in 2018 of just below $700,000. Its net assets exceeded $20 million in each of 2019 and 2018. This included $11.6 million and $7.9 million in cash and cash equivalents in 2019 and 2018 respectively. As the Scheme continues to operate, I infer that Ultiqa Developments continues to have a similar level of net assets, notwithstanding the absence of more recent financial records.

50 For the reasons below, Ultiqa Developments was involved in, and its common office holders bore some responsibility for, Ultiqa's contravening conduct.

51 First, Ultiqa Developments played a central role in the Ultiqa Group. It was responsible for the acquisition of accommodation properties, which was a significant drawing factor for consumers to join the Scheme. Further, Ultiqa Developments entered into sales agreements with external corporate authorised representatives.

52 Second, the product disclosure statements identified Ultiqa Developments as being an "important entity" within the Ultiqa Group. It also outlined the responsibilities and rights of Ultiqa Developments, including under the Scheme's Constitution and an agreement entered into by Ultiqa Developments and Ultiqa Points. Ultiqa Developments' influence in the Ultiqa Group is further supported by the authorised representatives' statement to the consumers that Ultiqa Developments assists "in the operation, promotion and marketing of the [Scheme]".

53 Third, while separate annual financial statements were prepared for Ultiqa and Ultiqa Developments, the statements expressly provided that the members of the Ultiqa Group were "commonly controlled" and had formed "a tax consolidated group" which was taxed as a single entity. This indicates internal coordination between companies in the Ultiqa Group.

54 Fourth, Ultiqa's directors are Mr Mark Henry, Mr Christopher Wilson and Mr Neville Beekman. Ultiqa Developments' directors include Mr Henry and Mr Beekman. Mr Wilson is one of the secretaries of Ultiqa Developments.

55 Mr Henry, Mr Wilson and Mr Beekman were named in the product disclosure statement of the Scheme as "key people" for the responsible entity.

56 Specific findings were made in the liability judgment in relation to the role of Mr Henry and Mr Wilson in Ultiqa's contraventions of the *Corporations Act*: [18], [19], [26] and [27] LJ.

57 There is a strong need to deter others within the Ultiqa Group from engaging in similar contravening conduct of the kind found in the liability judgment.

58 As Ultiqa does not have the capacity to meet a substantial pecuniary penalty, and the Scheme remains in operation, there is a need to impose a penalty that will not be regarded by members of the Ultiqa Group as an acceptable cost of doing business, and which takes into account the significant assets held by Ultiqa Developments.

Size and financial position of the Scheme

59 ASIC submits that the size and financial position of the Scheme is a relevant consideration which supports the imposition of a larger penalty.

60 As at 30 June 2021, the total number of members of the Scheme was 12,230. The number of interests on issue, excluding usage points, was 134,851,183. The members of the Scheme include the pleaded consumers.

61 Notwithstanding the Scheme's asset position, which is substantial, ASIC failed to demonstrate why the assets held by the Scheme, as opposed to members of the Ultiqa Group, is a relevant consideration or supports the imposition of a more significant penalty so as to achieve either specific or general deterrence.

Course of conduct

62 In *Australian Securities and Investments Commission v* ***Wooldridge*** [2019] FCAFC 172 (Greenwood, Middleton and Foster JJ), the Full Court stated at [25]:

> Ordinarily, separate contraventions attract separate penalties. However, in circumstances where separate acts giving rise to separate contraventions are inextricably interrelated, they should be viewed as a single 'course of conduct'. The course of conduct principle need not be used in every given case, but it is a useful tool of analysis that can help avoid double punishment for those parts of legally distinct contraventions which involve wrongdoing …

63 Consideration of whether the acts of the contravenor should be viewed as a single 'course of conduct' may assist in the assessment of what may be considered reasonably necessary to deter further contraventions of the *Corporations Act*: see *Pattinson* at [45].

64 In this case, the findings made in the liability judgment which led to the conclusions that there had been contraventions of s 961L of the *Corporations Act* were inextricably interrelated such that they should be viewed as a single course of conduct. Having regard to the facts of this case, this has the consequence that there should be a reduction in the penalty sought by ASIC for each contravention. To do otherwise would be to impose a penalty of oppressive severity and is an important reason to refuse to impose the penalties as sought by ASIC.

Totality principle

65 As submitted by ASIC, where multiple separate penalties are to be imposed upon a particular wrongdoer, the totality principle is applied as a "final check" to ensure that, overall, the penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: *Wooldridge* at [26].

66 It has been described as an analytical tool which is applied as to ensure that the overall penalty is not oppressive or disproportionate in the sense that it is greater than necessary to achieve the object of deterrence: *Pattinson* at [45].

67 In this case, the total sum of the penalties sought by ASIC is excessive having regard to the totality of the contravening conduct involved. This is another important reason to refuse to impose the penalties sought by ASIC.

CONCLUSION

68 In all of the circumstances, the considerations which have been addressed indicate that a penalty in the amount of $300,000 in respect of each contravention should be imposed on Ultiqa, being a total of $900,000.

69 Such an amount will serve the public interest by deterring future contraventions by Ultiqa and the Ultiqa Group as well as by other participants in the financial services industry, especially those in the timeshare sector of that industry. Costs should also follow the event.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes.

Associate: 

Dated: 14 October 2022