FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v DOD Bookkeeping Pty Ltd (in liq), in the matter of DOD Bookkeeping Pty Ltd (in liq) [2023] FCA 1622

File number:	NSD 444 of 2021
Judgment of:	**GOODMAN J**
Date of judgment:	20 December 2023
Catchwords:	**CORPORATIONS** – best interests obligations in Division 2 of Part 7.7A of the ***Corporations Act*** *2001* (Cth) – advice given to clients without adequate consideration of the interests of those clients – contraventions of s 961K of the Corporations Act established **CORPORATIONS** – conflicted remuneration provisions in Division 4 of Part 7.7A of the Corporations Act – application of transitional provisions – payment of bonuses to advisers employed by the defendant upon the purchase of real properties by the trustees of self-managed superannuation funds (**SMSF**) following advice provided by such advisers to the defendant's clients to establish an SMSF and to cause the trustee thereof to purchase real property – bonuses likely to influence the choice of financial product recommended to and the financial product advice given to clients of the defendant – contraventions of ss 963J and 963E of the Corporations Act established
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth), ss 13, 33 *Corporations Act 2001* (Cth), ss 9, 601RAC, 761, 761A, 761G, 761GA, 764A, 766A, 766B, 766C, 910A, 913B, 944A, 946A, 960, 961, 961B, 961F, 961G, 961K, 961L, 961P, 963A, 963B, 963C, 963D, 963E, 963J, 967, 1012IA, 1526, 1528 *Corporations Amendment (Future of Financial Advice Measures Act 2012* (Cth) *Retirement Savings Accounts Act 1997* (Cth), s 12 *Superannuation Guarantee (Administration) Act 1992* (Cth) *Superannuation Industry (Supervision) Act 1993* (Cth), ss 10, 19, 52 *Corporations Regulations 2001* (Cth), regs 7.1.29, 7.1.33A, 7.7A.16B, 7.7A.16C

	Superannuation Industry (Supervision) Regulation 1994, reg 4.09
Cases cited:	*Australian Securities and Investments Commission and AGM Markets Pty Ltd (In Liq) (No 3)* [2020] FCA 208; (2020) 275 FCR 57 *Australian Securities and Investments Commission v AGM Markets Pty Ltd (In Liq) (No 4)* [2020] FCA 1499; (2020) 148 ACSR 511 *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; (2020) 377 ALR 55 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1149; (2022) 163 ACSR 442 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2023] FCAFC 135 *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644; (2018) 131 ACSR 484 *Australian Securities and Investments Commission v MobiSuper Pty Limited* [2022] FCA 990 *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120; (2008) 169 FCR 211 *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345; (2017) 122 ACSR 47 *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 *Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 2)* [2021] FCA 877; (2022) 156 ACSR 371 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* [2019] FCAFC 187; (2019) 272 FCR 170 *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3; (2021) 270 CLR 118
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations

Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	259
Date of last submissions:	15 September 2023
Date of hearing:	2 and 3 December 2021; submissions filed 22 August 2022, 19 October 2022, 17 July 2023 and 15 September 2023
Counsel for the Plaintiff:	Mr A Leopold SC with Ms T Fishburn
Solicitor for the Plaintiff	Australian Securities and Investments Commission, Litigation Team

ORDERS

NSD 444 of 2021

IN THE MATTER OF DOD BOOKKEEPING PTY LTD (IN LIQUIDATION)

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**DOD BOOKKEEPING PTY LTD (IN LIQUIDATION)** Defendant

ORDER MADE BY: **GOODMAN J**

DATE OF ORDER: **20 DECEMBER 2023**

THE COURT ORDERS THAT:

1. The plaintiff approach the Associate to Goodman J for the purpose of scheduling a hearing as to the appropriate form of relief.

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

REASONS FOR JUDGMENT

GOODMAN J

1. INTRODUCTION

1 Part 7.7A of the *Corporations **Act** 2001* (Cth) concerns best interests obligations and remuneration. Within that Part, **Division 2** requires providers of personal advice to act in the best interests of their clients in relation to such advice and **Division 4** prohibits the provision and receipt of conflicted remuneration in connection with the provision of particular advice.

2 This proceeding concerns advice given by the defendant to certain of its clients by one of three of its employed **Advisers** – Advisers XX, YY and ZZ – during the period from May 2015 to April 2018 and the remuneration paid by the defendant to those Advisers. Orders have been made protecting the confidentiality of the identity of the Advisers and the clients of the defendant who received the advice. Thus, the Advisers' and the clients' names have been anonymised in these reasons for judgment.

3 The plaintiff, the Australian Securities and Investments Commission (**ASIC**), alleges that the defendant contravened provisions of Division 2 by providing advice that was not in the best interests of its clients and was inappropriate (**Division 2 case**); and contravened Division 4 by providing particular bonus payments to the Advisers which were accepted by the Advisers (**Division 4 case**). These reasons for judgment explain why I am satisfied that the Division 2 case has been made out; and that subject to some minor exceptions, the Division 4 case has been made out.

2. BACKGROUND

2.1 The defendant

4 At all material times the defendant, which was then known as Equiti Financial Services Pty Ltd, was a *"financial services licensee"* within the meaning of s 761A of the Act because it held an Australian financial services licence granted under s 913B of the Act. Pursuant to that licence it was authorised to provide *"financial product advice"* for, and to deal in, various classes of *"financial products"*.

2.2 The Advisers and their terms of employment

5 The defendant employed: (1) various *"authorised representatives"* (as defined in s 9 and Chapter 7, Part 6, Division 5 of the Act); and (2) financial advisers. Advisers XX, YY and ZZ

were financial advisers but were not authorised representatives of the defendant. Each of the Advisers was a representative of the defendant, by dint of his capacity as an employee of the defendant and the operation of ss 960 and 910A of the Act which deemed an employee of a financial services licensee to be a representative.

6 On or about 25 January 2013, the defendant and Adviser ZZ entered into an employment contract. Adviser ZZ's duties, roles and responsibilities were described in that contract as including:

(1) conducting financial planning presentations;

(2) following through on leads generated through the defendant's marketing processes and assisting the defendant in generating and introducing new financial planning clients;

(3) analysis and evaluation of clients' current financial status with the aim of preparing structured Statements of Advice (**SOAs**) and the presentation of such SOAs to clients; and

(4) the implementation of steps in accordance with authorities to proceed provided by clients.

7 The employment contract also provided that Adviser ZZ was to be remunerated via a base salary of $150,000 plus superannuation, payable fortnightly; and bonuses, payable monthly. The provisions of the employment contract referable to the payment of bonuses were:

> 5.5 If you are eligible for payment of bonuses or incentives in accordance with [the defendant's] scheme, the following additional terms apply:
>
> (a) You will be entitled to payment of a bonuses (sic)/incentive for sales you effect/introduce only.
>
> (b) Bonuses will be paid at the rate set out in the Bonus/Incentive Scheme as amended from time to time. Details of any changes to the bonus/incentive scheme will be communicated to you. [The defendant] reserves the right to review or change bonus/incentive arrangement with reasonable notice.
>
> (c) Bonuses/incentives will be earned and paid only after [the defendant] has received full payment of the relevant service on which bonuses/incentives are claimed.
>
> (d) Bonuses/incentives will not be paid on services for which [the defendant] received payment after your employment terminates, whether or not the sale is negotiated during your employment.
>
> Please note that actual bonuses/incentives earned are at the entire discretion of the [defendant], and are subject to the overall business performance.
>
> …

Equiti Bonus & Incentive Scheme-1 July 2012 to 30 June 2013

Financial Advisor

a) Your performance may be assessed on client acquisition, client retention and client satisfaction and you may receive performance or non-performance based bonuses as may be determined by management from time to time

8 On the same day, the defendant and Adviser YY entered into an employment contract in relevantly identical terms.

9 On or about 17 March 2016, the defendant and Adviser XX entered into an employment contract in terms relevantly identical to the employment contracts between the defendant and Advisers YY and ZZ, save that Adviser XX's base salary was $75,000 per annum plus superannuation.

10 The evidence establishes that:

(1) these arrangements between the defendant and the Advisers did not relate to an *"enterprise agreement"* or a *"collective agreement-based transitional instrument"* as those terms were defined for the purposes of reg 7.7A.16C(6) of the *Corporations* ***Regulations*** *2001* (Cth); and

(2) the Advisers were not employed by any other financial services licensee while they were employed by the defendants.

2.3 The advice

11 Each of the Advisers provided advice to clients of the defendant. That advice was provided, relevantly to the issues raised in this proceeding, between May 2015 and April 2018 to 165 clients of the defendant in the form of written SOAs on the letterhead of the defendant. The 165 SOAs in evidence before the Court were prepared by Adviser XX (19), Adviser YY (78) and Adviser ZZ (68). Of the 165 clients, 159 – including all of the clients the subject of the Division 2 case – did not already have a self-managed superannuation fund (**SMSF**). Each of those 159 clients was advised to establish an SMSF and to rollover their existing superannuation into the newly established SMSF. The SOAs followed a template format and contained a significant amount of common, or boilerplate, text. In particular, the following matters were common to each of the SOAs:

(1) a covering letter in the same form, which included: "This Statement of Advice is a comprehensive document that contains our advice and recommendations";

(2) a generic summary of "risks", which was not tailored to the individual client; and

(3) the clients were given advice (the **usual advice**) to:

(a) have the trustee of the SMSF purchase a property within the SMSF; and

(b) borrow to fund the purchase of the property.

12 ASIC's Division 2 case focusses upon the advice provided to 12 individual or pairs of clients. Those clients are identified as Mr and Mrs AA, Mr and Mrs BB, Mr and Mrs CC, Mr and Mrs DD, Mr and Mrs EE, Mr and Mrs FF, Ms GG, Mr HH and Ms JJ, Mr KK and Ms LL, Mr and Mrs MM, Mr NN and Ms OO, and Ms PP. ASIC contends that in providing the SOAs to those clients the defendant did not act in their best interests in contravention of provisions of Division 2. The Division 2 case is considered at Part 4 below.

13 For each of these clients the usual advice was given and it was implemented. The purchase of the property was facilitated by **Equiti Property** Pty Ltd, a company related to the defendant.

2.4 Bonus payments

14 The defendant made bonus payments to Adviser XX for the years ended 30 June 2017 and 2018 and to Advisers YY and ZZ for the years ended 30 June 2016, 2017 and 2018. The Advisers accepted these bonuses. ASIC's Division 4 case is that the defendant contravened provisions of Division 4 because the bonus payments made to Adviser XX (for the year ended 30 June 2018), Adviser YY (for the years ended 30 June 2017 and 2018) and Adviser ZZ (for the years ended 30 June 2017 and 2018) were *"conflicted remuneration"* within the meaning of that term in s 963A of the Act and that the defendant contravened: (1) s 963J of the Act (because it gave the bonuses to the Advisers); and (2) s 963E(2) of the Act (because the Advisers, as representatives of the defendant, accepted the bonuses). The Division 4 case is considered at Part 5 below.

2.5 The ASIC investigation and the appointment of a liquidator to the defendant

15 On 15 October 2018, ASIC commenced an investigation under s 13 of *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). That investigation included the issue of notices for the production of documents under s 33 of the ASIC Act to the defendant and other persons. Many documents were produced – including files held by the defendant concerning its clients – and have been included in the evidence before the Court which comprises more than 41,000 pages.

16 On 9 October 2020, and prior to the commencement of this proceeding the defendant entered into a members' voluntary winding up and Mr Steven Nichols was appointed as liquidator of the defendant. The defendant has not formally appeared in this proceeding. ASIC prosecutes this proceeding for the purposes of general deterrence.

17 As no defence has been filed, no admissions have been made that may have otherwise narrowed the range of issues requiring determination and it has been necessary to consider in detail whether particular provisions of the Act and the Regulations were satisfied (including the operation of various exceptions and exceptions to exceptions and so on).

2.6 The expert report of Mr Richards

18 ASIC relies upon an expert report of Mr Peter Richards, a financial planner and financial advisor of more than 30 years' experience. In that report, Mr Richards has undertaken an analysis of both the process by which the 12 clients the subject of the Division 2 case were provided with advice by the Advisers; and of the substance of that advice. I accept the evidence given by Mr Richards, whilst acknowledging that it has not been challenged by contrary evidence or cross-examination. In this regard, I note that: (1) Mr Richards's analysis is careful and detailed and appears, consistently with his obligations as an expert witness, to take a balanced approach, in which he has identified both matters which are consistent with the defendant having acted in accordance with its statutory obligations and other matters which are not; and (2) a number of the conclusions expressed by Mr Richards, respectfully, appear to be self-evident.

3. SOME MATTERS OF DEFINITION AND THEIR APPLICATION

19 I turn now to address some matters of definition and their application. The analysis below considers the provisions of the Act and the Regulations during the period of the alleged contraventions.

3.1 Statements of Advice

20 The expression *"Statement of Advice"* was defined in s 761A of the Act to mean *"a Statement of Advice required by section 946A to be given in accordance with Sub-division C and D of Division 3 of Part 7.7"*. Section 946A of the Act relevantly provided that a providing entity was required to give a client a Statement of Advice in accordance with sub-divisions C and D of Division 3 of Part 7.7 of the Act. Section 944A of the Act provided that Division 3 applied where *"personal advice"* was provided by a *"financial services licensee"* to a client as a *"retail*

client". In the present case, the SOAs constituted *"personal advice"* (see 3.5 below) and the defendant was a *"financial services licensee"* (see [4] above) and the advice was provided to the clients as retail clients (see 3.6 below). It follows that each SOA was a *"Statement of Advice"* as defined in s 761A of the Act.

3.2 Financial product

21 A central concept in Chapter 7.7A was (and remains) that of a *"financial product"*. By dint of s 9 of the Act, *"financial product"* had the meaning in Chapter 7.7A that it had in Chapter 7 of the Act. That meaning was provided by Division 3 of Part 7.1 of the Act. Within that Division, there was a general definition, some specific inclusions and some overriding exclusions. ASIC relies upon one of the specific inclusions, namely s 764A(1)(g), which provided that a *"superannuation interest"* within the meaning of the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**) was a *"financial product"*.

22 Section 10 of the SIS Act defined *"superannuation interest"* to mean *"a beneficial interest in a superannuation entity"*. That same section defined *"superannuation entity"* in terms which include a *"regulated superannuation fund"*. Section 19 of the SIS Act defined *"regulated superannuation fund"* as a superannuation fund in respect of which there had been compliance with s 19(2) to (4) of the SIS Act. Section 19(2) to (4) required that the superannuation fund have a trustee; that the trustee of the fund be a constitutional corporation pursuant to a requirement contained in the governing rules, or, the governing rules provide that the sole or primary purpose of the fund was the provision of old-age pensions; and the trustee or trustees have given to APRA, or such other body or person as is specified in the regulations, a written notice that was in the approved form and signed by the trustee or each trustee electing that the SIS Act was to apply in relation to the fund.

23 As noted at [11] above, 159 of the 165 clients – including all of the clients the subject of the Division 2 case – did not have an extant SMSF at the time that the subject advice was given. It follows that for those clients, the requirements of s 19(2) to (4) of the SIS Act had not been met because at the time the advice was given, the *"financial product"* in the form of a *"superannuation interest"* did not yet exist. However, this is not an impediment to a finding that the advice given in the SOAs to, *inter alia*, establish an SMSF and cause the trustee of the SMSF to purchase a property is advice that *"is intended to influence a person or persons in making a decision in relation to a particular financial product … or could reasonably be regarded as being intended to have such an influence"* for the purposes of s 766B(1)(a) of the

Act (see 3.3 below): see *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [401] to [421] (Sackville AJA).

24 The six clients who had a pre-existing SMSF (the **six extant SMSF clients**) had a *"superannuation interest"* in the form of a beneficial interest in that SMSF.

3.3 Financial product advice

25 The expression *"financial product advice"* was defined in s 761A of the Act as having the meaning given by s 766B of the Act which, in so far as is presently relevant, was as follows:

> **766B Meaning of financial product advice**
>
> (1) For the purposes of this Chapter, ***financial product advice*** means a recommendation or a statement of opinion, or a report of either of those things, that:
>
> (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
>
> (b) could reasonably be regarded as being intended to have such an influence.
>
> (1A) However, subject to subsection (1B), the provision or giving of an exempt document or statement does not constitute the provision of financial product advice.
>
> (1B) Subsection (1A) does not apply for the purpose of determining whether a recommendation or statement of opinion made by an outside expert, or a report of such a recommendation or statement of opinion, that is included in an exempt document or statement is financial product advice provided by the outside expert.
>
> ...
>
> (5) The following advice is not financial product advice:
>
> (a) advice given by a lawyer in his or her professional capacity, about matters of law, legal interpretation or the application of the law to any facts;
>
> (b) except as may be prescribed by the regulations—any other advice given by a lawyer in the ordinary course of activities as a lawyer, that is reasonably regarded as a necessary part of those activities;
>
> (c) except as may be prescribed by the regulations—advice given by a registered tax agent or BAS agent (within the meaning of the *Tax Agent Services Act 2009*), that is given in the ordinary course of activities as such an agent and that is reasonably regarded as a necessary part of those activities.

(6) If:

(a) in response to a request made by a person (the ***inquirer***) to another person (the ***provider***), the provider tells the inquirer the cost, or an estimate of the likely cost, of a financial product (for example, an insurance product); and

(b) that cost or estimate is worked out, or said by the provider to be worked out, by reference to a valuation of an item (for example, a house or car to which an insurance policy would relate), being a valuation that the provider suggests or recommends to the inquirer;

the acts of telling the inquirer the cost, or estimated cost, and suggesting or recommending the valuation, do not, of themselves, constitute the making of a recommendation (or the provision of any other kind of financial product advice) relating to the financial product.

(7) If:

(a) in response to a request made by a person (the ***inquirer***) to another person (the ***provider***), the provider tells the inquirer information about:

(i) the cost of a financial product; or

(ii) the rate of return on a financial product; or

(iii) any other matter identified in regulations made for the purposes of this subparagraph; and

(b) the request could also have been complied with (but was not also so complied with) by telling the inquirer equivalent information about one or more other financial products;

the act of telling the inquirer the information does not, of itself, constitute the making of a recommendation (or the provision of any other kind of financial product advice) in relation to the financial product referred to in paragraph (a).

....

(9) In this section:

exempt document or statement means:

(a) a document prepared, or a statement given, in accordance with requirements of this Chapter, other than:

(i) a Statement of Advice; or

(ii) a document or statement of a kind prescribed by regulations made for the purposes of this subparagraph; or

(b) any other document or statement of a kind prescribed by regulations made for the purposes of this paragraph.

...

(emphasis in original)

26 I am satisfied that the SOAs constituted *"financial product advice"* for the following reasons.

27 *First*, s 766B(1) was satisfied. It is plain from the face of the SOAs that they contained express recommendations and statements of opinion (as per the chapeau to s 766B(1)). So much is clear from the covering letter for each SOA which stated: *"This Statement of Advice is a comprehensive document that contains our advice and recommendations"*. It is also plain on the face of the SOAs that those recommendations and opinions were intended by the Advisers to (or could reasonably be regarded as being intended to) influence the recipients of the SOAs in making a decision *"in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products"*, where the financial product was the interest in the SMSF (s 766B(1)). I note in this regard that it is not necessary for the whole of the communication (i.e. the SOA) to have borne the character of an advice: *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (***Westpac Securities FFC***) [2019] FCAFC 187; (2019) 272 FCR 170 at 219 to 220 [217]; and that the expression *"in relation to"* in the context of legislation designed to protect consumers, should be construed with that design in mind: *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120; (2008) 169 FCR 211 at 214 [9].

28 *Secondly*, the exception in s 766B(1A) was not engaged because Statements of Advice were specifically excluded from the definition of *"exempt document or statement"* in s 766B(9).

29 *Thirdly*, the exceptions in s 766B(5), (6) and (7) were self-evidently not engaged.

3.4 Financial service

30 Section 766A of the Act provided, in so far as is presently relevant:

> **766A When does a person provide a *financial service*?**
>
> *General*
>
> (1) For the purposes of this Chapter, subject to paragraph (2)(b), a person provides a ***financial service*** if they:
>
> (a) provide financial product advice (see section 766B); or
>
> …
>
> *Regulations may deal with various matters*
>
> (2) The regulations may set out:
>
> …

(b) the circumstances in which persons are taken to provide, or are taken not to provide, a financial service.

…

(emphasis in original)

31 For the reasons set out at 3.3 above, the defendant provided *"financial product advice"* and as such provided a *"financial service"* (s 766A(1)(a)), subject only to the operation of any regulation the effect of which was to override this conclusion (s 766A(2)(b)).

32 Division 3 of Part 7.1 of the Regulations contained various regulations made for the purposes of s 766A(2)(b). Of these regulations, only regs 7.1.29(1) and 7.1.33A self-evidently was not inapplicable.

3.4.1 Regulation 7.1.29(1)

33 Regulation 7.1.29(1) provided:

(1) For paragraph 766A(2)(b) of the Act, a person who provides an eligible service is taken not to provide a financial service if:

(a) the person provides the eligible service in the course of conducting an exempt service; and

(b) it is reasonably necessary to provide the eligible service in order to conduct the exempt service; and

(c) the eligible service is provided as an integral part of the exempt service.

(2) For this regulation, a person provides an ***eligible service*** if the person engages in conduct mentioned in paragraphs 766A(1)(a) to (f) of the Act.

(emphasis in original)

34 As the defendant, in providing the SOAs, provided *"financial product advice"*, it engaged in conduct mentioned in s 766A(1)(a) of the Act, and thereby provided an *"eligible service"* within the meaning of that term in reg 7.1.29(2).

35 As is apparent from reg 7.1.29(1)(a), (b) and (c), reg 7.1.29 applied if the provision of the *"eligible service"*, i.e. the provision of SOAs: occurred in the course of conducting an *"exempt service"*; was reasonably necessary in order to conduct the exempt service; *and* occurred as an integral part of the exempt service. In this regard, reg 7.1.29(3), (3A), (4) and (5) provided circumstances in which a person was taken to have provided an *"exempt service"*. Of these, regs 7.1.29(3A) and (4) self-evidently were inapplicable. However, it is necessary to consider whether regs 7.1.29(3) and (5) applied.

3.4.1.1 Regulation 7.1.29(3)

36 Regulation 7.1.29(3) described eight types of conduct, which if engaged in, would have involved the provision of an *"exempt service"*. Of these, only reg 7.1.29(3)(f) self-evidently was not inapplicable. Regulation 7.1.29(3)(f) was in the following terms:

> For this regulation, a person who does any of the following provides an ***exempt service***:
>
> …
>
> (f) arranges for another person to engage in conduct referred to in subsection 766C(1) in relation to interests in a self managed superannuation fund in the circumstances in paragraphs (5)(b) and (c);
>
> …
>
> (emphasis in original)

37 Thus, it is also necessary to consider s 766C(1) and reg 7.1.29(5)(b) and (c). In so far as is presently relevant:

(1) s 766C relevantly provided:

> **766C Meaning of *dealing***
>
> (1) For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes ***dealing*** in a financial product:
>
> (a) applying for or acquiring a financial product;
>
> ...
>
> (emphasis in original)

(2) reg 7.1.29(5) relevantly provided:

> (5) For this regulation, a person also provides an ***exempt service*** if:
>
> ...
>
> (b) the person advised is, or is likely to become:
>
> (i) a trustee; or
>
> (ii) a director of a trustee; or
>
> (iii) an employer sponsor; or
>
> (iv) a person who controls the management;
>
> of the superannuation fund; and
>
> (c) except for advice that is given for the sole purpose, and only to the extent reasonably necessary for the purpose, of ensuring compliance by the person advised with the SIS Act (other than paragraph 52(2)(f)), the SIS Regulations (other than

regulation 4.09) or the *Superannuation Guarantee (Administration) Act 1992*—the advice:

(i) does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products; and

(ii) does not include a recommendation that a person acquire or dispose of a superannuation product; and

(iii) does not include a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level; and

...

(emphasis in original)

38 The effect of reg 7.1.29(3)(f) – considered by reference to s 766C(1)(a) and reg 7.1.29(5)(b) and (c) – was that a person provided an *"exempt service"* if they: *"arranged for another person to ... apply for or acquire a financial product ... in relation to interests in a self-managed superannuation fund ..."* in the circumstances:

(1) set out in reg 7.1.29(5)(b), namely that the person advised is, or is likely to become: (a) a trustee; (b) a director of a trustee; (c) an employer sponsor; or (d) a person who controls the management of the superannuation fund; and

(2) set out in reg 7.1.29(5)(c), namely that – except for advice that is given for the sole purpose, and only to the extent reasonably necessary for the purpose, of ensuring compliance by the person advised with the SIS Act (other than s 52(2)(f)), the SIS Regulations (i.e. the *Superannuation Industry (Supervision) Regulation 1994*) (other than reg 4.09) or the *Superannuation Guarantee (Administration) Act 1992* – the advice: (a) does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products; (b) does not include a recommendation that a person acquire or dispose of a superannuation product; and (c) does not include a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level.

39 It is plain on the evidence that the defendant arranged for the clients to apply for or acquire a financial product in relation to an SMSF and that the person advised was likely to become a director of the SMSF. It follows that the expression used in reg 7.2.29(3)(f) was satisfied and a circumstance set out in reg 7.1.29(5)(b) existed.

40 Turning to reg 7.1.29(5)(c), the exception in the chapeau is not satisfied in the present case, so it is necessary to determine whether *all* of sub-paragraphs (i), (ii) and (iii) were satisfied.

41 As noted at [11] and [23] above, the advice given to the 159 clients who did not already have an SMSF included a recommendation that they acquire a superannuation product. It follows that reg 7.1.29(5)(c)(ii) and thus reg 7.1.29(5)(c) were not satisfied and that the defendant did not provide an *"exempt service"* to those clients. It follows that the SOAs were not: provided in the course of conducting an exempt service; reasonably necessary in order to conduct an exempt service; or provided as an integral part of an exempt service and that reg 7.1.29(1) was not engaged, with respect to the 159 clients who did not have an extant SMSF.

42 For the six extant SMSF clients, the SOAs each included a recommendation to modify an investment strategy. Thus, reg 7.1.29(5)(c)(iii) was not satisfied, from which it follows that reg 7.1.29(5) was not satisfied.

3.4.1.2 Regulation 7.1.29(5)

43 I turn now to consider reg 7.1.29(5). That regulation provided:

> (5) For this regulation, a person also provides an ***exempt service*** if:
>
> (a) the person provides advice in relation to the establishment, operation, structuring or valuation of a superannuation fund, other than advice for inclusion in an exempt document or statement; and
>
> (b) the person advised is, or is likely to become:
>
> (i) a trustee; or
>
> (ii) a director of a trustee; or
>
> (iii) an employer sponsor; or
>
> (iv) a person who controls the management;
>
> of the superannuation fund; and
>
> (c) except for advice that is given for the sole purpose, and only to the extent reasonably necessary for the purpose, of ensuring compliance by the person advised with the SIS Act (other than paragraph 52(2)(f)), the SIS Regulations (other than regulation 4.09) or the *Superannuation Guarantee (Administration) Act 1992*—the advice:
>
> (i) does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products; and
>
> (ii) does not include a recommendation that a person acquire or dispose of a superannuation product; and

(iii) does not include a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level; and

(d) if the advice constitutes financial product advice provided to a retail client—the advice includes, or is accompanied by, a written statement that:

(i) the person providing the advice is not licensed to provide financial product advice under the Act; and

(ii) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.

(emphasis in original)

44 Regulation 7.1.29(5) was satisfied only if each of sub-paragraphs (a), (b), (c) and (d) was satisfied. Sub-paragraph (c) required satisfaction of each of its sub-paragraphs (i) to (iii). For the reasons set out at [41] and [42] above, reg 7.1.29(5)(c)(ii) was not satisfied with respect to the 159 clients who did not have an extant SMSF; and reg 7.1.29(5)(c)(iii) was not satisfied with respect to the six extant SMSF clients. Thus reg 7.1.29(5)(c) was not satisfied.

3.4.2 Regulation 7.1.33A

45 I turn now to consider reg 7.1.33A. That regulation provided:

7.1.33A Allocation of funds available for investment

For paragraph 766A(2)(b) of the Act, a circumstance in which a person is taken not to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act is the provision of a service that consists only of a recommendation or statement of opinion provided to a person about the allocation of the person's funds that are available for investment among 1 or more of the following:

(a) shares;

(b) debentures;

(c) debentures, stocks or bonds issued, or proposed to be issued, by a government;

(d) deposit products;

(e) managed investment products;

(f) investment life insurance products;

(g) superannuation products;

(h) other types of asset.

Note: This regulation does not apply to a recommendation or statement of opinion that relates to specific financial products or classes of financial products.

46 The SOAs did not fit this description. They did not contain *only* a recommendation or statement of opinion about the allocation of the clients' funds that were available for investment among one or more of the assets classes in (a) to (g).

47 For the reasons set out at [30] to [46] above the defendant, by providing the SOAs, provided a *"financial service"*.

3.5 Personal advice

48 *"Personal advice"* was defined in s 761A of the Act as having the meaning given by s 766B(3) of the Act, namely:

> For the purposes of this Chapter, ***personal advice*** is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:
>
> (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act); or
>
> (b) a reasonable person might expect the provider to have considered one or more of those matters.

49 It is plain on the face of the SOAs that some of the particular clients' objectives, financial situation and needs were set out therein. It is also plain that a reasonable person might have expected the Adviser to have considered those matters. This was sufficient to have rendered the *"financial product advice"* given in the SOAs *"personal advice"*. Further, the text of the SOAs suggests that the Advisers did subjectively consider these matters, again rendering the *"financial product advice"* given in the SOAs *"personal advice"*. I note in this regard that the expression *"has considered"* in s 766B(3)(a) should be understood as meaning *"took account of"* and does not import a requirement of an active and comprehensive process of evaluation: *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3; (2021) 270 CLR 118 at 132 ([15] to [17]).

3.6 Retail client

50 The expression *"retail client"* was defined in s 761A of the Act as having the meaning given by ss 761G and 761GA of the Act. Section 761G provided, in so far as is presently relevant:

> **761G Meaning of retail client and wholesale client**
>
> *Providing a financial product or financial service to a person as a retail client*
>
> (1) For the purposes of this Chapter, a financial product or a financial service is

provided to a person as a ***retail client*** unless subsection (5), (6), (6A) or (7), or section 761GA, provides otherwise.

...

General insurance products

(5) For the purposes of this Chapter, if a financial product is, or a financial service provided to a person relates to, a general insurance product, the product or service is provided to the person as a retail client if:

(a) either:

(i) the person is an individual; or

(ii) the insurance product is or would be for use in connection with a small business (see subsection (12)); and

(b) the general insurance product is:

(i) a motor vehicle insurance product (as defined in the regulations); or

(ii) a home building insurance product (as defined in the regulations); or

(iii) a home contents insurance product (as defined in the regulations); or

(iv) a sickness and accident insurance product (as defined in the regulations); or

(v) a consumer credit insurance product (as defined in the regulations); or

(vi) a travel insurance product (as defined in the regulations); or

(vii) a personal and domestic property insurance product (as defined in the regulations); or

(viii) a kind of general insurance product prescribed by regulations made for the purposes of this subparagraph.

In any other cases, the provision to a person of a financial product that is, or a financial service that relates to, a general insurance product does not constitute the provision of a financial product or financial service to the person as a retail client.

Superannuation products and RSA products

(6) For the purposes of this Chapter:

(a) if a financial product provided to a person is a superannuation product or an RSA product, the product is provided to the person as a retail client; and

(aa) however, if a trustee of a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) provides a financial product that is an interest in the trust to a person covered by subparagraph (c)(i), the product is not

provided to the person as a retail client; and

(b) if a financial service (other than the provision of a financial product) provided to a person who is not covered by subparagraph (c)(i) or (ii) relates to a superannuation product or an RSA product, the service is provided to the person as a retail client; and

(c) if a financial service (other than the provision of a financial product) provided to a person who is:

(i) the trustee of a superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) that has net assets of at least $10 million; or

(ii) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*);

relates to a superannuation product or an RSA product, that does not constitute the provision of a financial service to the person as a retail client.

Traditional trustee company services

(6A) For the purpose of this Chapter, if a financial service provided to a person is a traditional trustee company service, the service is provided to the person as a retail client unless regulations made for the purpose of this subsection provide otherwise.

Other kinds of financial product

(7) For the purposes of this Chapter, if a financial product is not, or a financial service (other than a traditional trustee company service) provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the product or service is provided to the person as a retail client unless one or more of the following paragraphs apply:

(a) the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of this paragraph as being applicable in the circumstances (but see also subsection (10)); or

(b) the financial product, or the financial service, is provided for use in connection with a business that is not a small business (see subsection (12));

(c) the financial product, or the financial service, is not provided for use in connection with a business, and the person who acquires the product or service gives the provider of the product or service, before the provision of the product or service, a copy of a certificate given within the preceding 6 months by a qualified accountant (as defined in section 9) that states that the person:

(i) has net assets of at least the amount specified in regulations made for the purposes of this subparagraph; or

(ii) has a gross income for each of the last 2 financial years of at

least the amount specified in regulations made for the purposes of this subparagraph a year;

(d) the person is a professional investor.

…

(emphasis in original)

51 Section 761GA provided:

761GA Meaning of *retail client*—sophisticated investors

For the purposes of this Chapter, a financial product, or a financial service (other than a traditional trustee company service) in relation to a financial product, is not provided by one person to another person as a ***retail client*** if:

(a) the first person (the ***licensee***) is a financial services licensee; and

(b) the financial product is not a general insurance product, a superannuation product or an RSA product; and

(c) the financial product or service is not provided for use in connection with a business; and

(d) the licensee is satisfied on reasonable grounds that the other person (the ***client***) has previous experience in using financial services and investing in financial products that allows the client to assess:

(i) the merits of the product or service; and

(ii) the value of the product or service; and

(iii) the risks associated with holding the product; and

(iv) the client's own information needs; and

(v) the adequacy of the information given by the licensee and the product issuer; and

(e) the licensee gives the client before, or at the time when, the product or advice is provided a written statement of the licensee's reasons for being satisfied as to those matters; and

(f) the client signs a written acknowledgment before, or at the time when, the product or service is provided that:

(i) the licensee has not given the client a Product Disclosure Statement; and

(ii) the licensee has not given the client any other document that would be required to be given to the client under this Chapter if the product or service were provided to the client as a retail client; and

(iii) the licensee does not have any other obligation to the client under this Chapter that the licensee would have if the product or service were provided to the client as a retail client.

(emphasis in original)

52 I am satisfied that the provision of an SOA to each client involved the provision of a *"financial product or a financial service"* to that client as a *"retail client"*, for the following reasons.

53 *First*, the provision of an SOA was the provision of a *"financial service"* for the reasons set out at 3.4 above.

54 *Secondly*, the effect of 761G(1) was that a *"financial service"* was provided to a person as a retail client *"unless subsection (5), (6), (6A), or (7), or section 761GA, provides otherwise"*.

55 *Thirdly*, s 761G(5) did not provide otherwise because the financial product was not and the financial service provided did not relate to a general insurance product (as defined in s 764A(1)(d) of the Act).

56 *Fourthly*, s 761G(6) did not apply because that sub-section provided two circumstances – s 761G(6)(aa) and (c) – in which a product was not to be treated as having been provided to the recipient as a retail client, and neither circumstance existed in the present case. In particular:

(1) s 761G(6)(aa) did not apply because the financial product was not provided by the trustee of a pooled superannuation trust; and

(2) s 761G(6)(c) did not apply because any financial service provided to the clients was not provided to the trustee of a superannuation fund with assets of at least $10 million or to an *"RSA provider"* (as defined in s 12 of the *Retirement Savings Accounts Act 1997* (Cth)).

57 *Fifthly*, s 761G(6A) did not apply because: (1) it was predicated upon the *"financial service"* that was provided being a *"traditional trustee company service"*; and (2) *"traditional trustee company service"* was defined in s 601RAC(1) of the Act in terms which are not applicable to the facts in the present case.

58 *Sixthly*, s 761G(7) did not apply because: (1) for the exceptions in that sub-section to have been engaged, the chapeau must first have been engaged; and (2) the chapeau was not engaged when the *"financial service"* provided related to a *"superannuation product"* and here there was such a relationship (see 3.2 and 3.3 above).

59 *Finally*, s 761GA did not apply because the exception created by that section required, *inter alia*, that the financial product was not a *"superannuation product"* (see s 761GA(b)); and as set out at 3.3 above the financial product in the present case was a *"superannuation product"*.

60 Thus, I am satisfied that each client who received an SOA did so as a *"retail client"*.

3.7 Platform operator

61 The term *"platform operator"* was defined at s 1526(1) of the Act as meaning *"the provider of a custodial arrangement, or custodial arrangements"*. *"Custodial arrangement"* was defined in s 1526(1) as having *"the same meaning as it has in subsection 1012IA, subject to subsection (2)"*. In s 1012IA(1), *"custodial arrangement"* was defined as follows:

> ***custodial arrangement*** means an arrangement between a person (the ***provider***) and another person (the ***client***) (whether or not there are also other parties to the arrangement) under which:
>
> (a) the client is, or is entitled, to give an instruction that a particular financial product, or a financial product of a particular kind, is to be acquired; and
>
> (b) if the client gives such an instruction, a person (the ***acquirer***), being the provider or a person with whom the provider has or will have an arrangement, must (subject to any discretion they have to refuse) acquire the financial product, or a financial product of that kind; and
>
> (c) if the acquirer acquires the financial product, or a financial product of that kind, pursuant to an instruction given by the client, either:
>
> (i) the product is to be held on trust for the client or another person nominated by the client; or
>
> (ii) the client, or another person nominated by the client, is to have rights or benefits in relation to the product or a beneficial interest in the product, or in relation to, or calculated by reference to, dividends or other benefits derived from the product.
>
> (emphasis in original)

62 The evidence suggests that there was no *"custodial arrangement"*. Section 1526(2) has no apparent relevance in the present case. Thus the defendant was not a *"platform operator"*.

3.8 Benefit

63 Central to the Division 4 case is the concept of *"benefit"* and whether each of the bonuses provided by the defendant to the Advisers was a benefit as defined. That concept was defined in s 9 of the Act, in so far as is presently relevant, as meaning: *"any benefit, whether by way of payment of cash or otherwise"*. The bonuses plainly fell within this definition.

3.9 Summary

64 Thus, in summary, the SOAs met the definition of *"Statement of Advice"*; there was a *"financial product"* in the form of the clients' interests in their extant (as to 6) or to be formed (as to 159) SMSFs; the defendant provided *"financial product advice"* to the clients in the

SOAs; in doing so, the defendant provided a *"financial service"*; the advice contained in the SOAs constituted *"personal advice"*; each of the clients who received an SOA was a *"retail client"*; the defendant was not a *"platform operator"*; and each of the bonuses received by the Advisers was a *"benefit"*.

4. THE DIVISION 2 CASE

4.1 Introduction

65 I turn now to consider the Division 2 case.

66 Section 961K(2) of the Act provided:

> **961K Civil penalty provision—sections 961B, 961G, 961H and 961J**
>
> …
>
> (2) A financial services licensee contravenes this section if:
>
> (a) a representative, other than an authorised representative, of the licensee contravenes section 961B, 961G, 961H or 961J; and
>
> (b) the licensee is the, or a, responsible licensee in relation to that contravention.

67 Section 961K(2) imposed a direct form of liability on a licensee if a representative other than an authorised representative contravened, *inter alia*, s 961B or s 961G of the Act: *Australian Securities and Investments Commission (ASIC) v **RI Advice** Group Pty Ltd (No 2)* [2021] FCA 877; (2021) 156 ACSR 371 at 478 [391] (Moshinsky J). In contrast to s 961L, which focussed on the conduct of the licensee, s 961K imposed liability on a licensee as a result of the conduct of its representative: *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; (2020) 377 ALR 55 at 89 [121] (Lee J); *Australian Securities and Investments Commission v AGM Markets Pty Ltd (In Liq) (No 4)* [2020] FCA 1499; (2020) 148 ACSR 511 at 526 [58(d)] (Beach J).

68 ASIC alleges that the Advisers (being representatives, but not authorised representatives, of the defendant – see [5] above) each contravened s 961B and 961G of the Act; the defendant was the responsible licensee in relation to those contraventions; and consequently, the defendant contravened s 961K of the Act.

4.2 Did Division 2 apply to the advice the subject of this proceeding?

69 Section 961 of the Act provided that Division 2 applied *"in relation to"* the provision of *"personal advice"* to a client as a *"retail client"*. For the reasons set out at 3.5 and 3.6 above

the recommendations and statements of opinion set out in the SOAs involved the provision of personal advice to retail clients. Thus, Division 2 applied to the provision of the advice contained in the 12 SOAs the subject of the Division 2 case.

4.3 Findings of fact

4.3.1 Generally

70 The findings of fact set out below are taken from the affidavit evidence provided by various clients, the expert report of Mr Richards, and the extensive documentary evidence tendered by ASIC. I have sought, in the findings below and with the assistance of submissions provided by ASIC, to identify only the central findings of fact.

71 As explained above: (1) none of the 12 individual or pairs of clients had an extant SMSF and each was advised to establish an SMSF; (2) each client or set of clients received advice in the form of an SOA; (3) the SOA contained the usual advice (see [11(3)] above); and (4) the advice in the SOA, including the usual advice, was implemented.

72 To this may be added that the evidence establishes that for each of the 12 individual or pairs of clients, the SOA and authority to proceed (signed by the clients) bore the same date, from which I infer that, in each case, the clients provided authority to proceed with the advice given in the SOA on the same day that the SOAs were provided to them. That inference is supported by evidence of a number of the clients, which is described below.

4.3.2 Mr and Mrs AA

73 As at July 2015, Mr and Mrs AA were aged 37 and 36 respectively and they had two children aged nine and seven. Mr AA was a full-time police officer and Mrs AA worked part-time with the New South Wales Police Force. Their salaries were $108,000 per annum and $56,500 per annum respectively. They owned their home, valued at $800,000 subject to a mortgage securing a loan of $555,000. They had funds in their superannuation accounts in the order of $250,000 but had no other investments.

74 A friend of Mr AA told him that he had dealt with the defendant in purchasing an investment property through an SMSF and provided Mr AA with contact details for Adviser YY. Mr AA had not previously heard of an SMSF.

75 On 24 July 2015, Mr AA met with Adviser YY for one to two hours. During that meeting Adviser YY asked Mr AA what his financial goals were. Mr AA indicated that he wished to

review his superannuation and that his friend had recently set up an SMSF and purchased a property. Adviser YY then said words to the effect: *"Ok, you want to buy a property, let's do it. You can purchase a property through your super. Purchasing a property through super will make your super work harder"*.

76 Around the same time, a document titled *"Financial Needs Analysis"* (**FNA**) was completed. It is not clear whether it was completed by Mr and Mrs AA or by Adviser YY or by some combination thereof.

77 On or about 14 August 2015, Mr AA and Adviser YY met again. Adviser YY provided him with an SOA. The SOA:

(1) recorded Mr and Mrs AA's short term goals as including *"Reduce existing debt"* and *"Build wealth towards a comfortable retirement"* and as a long term goal *"Aim to have the option of retirement by age 55-60 on an income of $80,000 p.a. in today's dollars"*;

(2) deferred the provision of advice concerning salary sacrificing;

(3) included statements that the defendant had classified Mr and Mrs AA as *"assertive"* style investors for whom it was appropriate to have 27 per cent of their assets in real property, yet also contained advice, the effect of which, if implemented, was that 82 per cent of their assets would be in real property;

(4) stated that *"Putting in place the recommended investments outside of the superannuation fund is in line with your goals of building your wealth and assisting with your taxable income"*. Despite that statement the SOA did not contain any recommendations for investments *"outside of the superannuation fund"*;

(5) contained the usual advice, and as part of the usual advice, advice to Mr AA to rollover only part of his superannuation funds held by First State Super.

78 The SOA did not address the quantum of the costs of establishing, and the ongoing costs of maintaining, an SMSF or the extent to which those costs represented a reasonable proportion of the level of funds likely to be held by Mr and Mrs AA within an SMSF if they established one.

79 An authority to proceed was signed by Mr and Mrs AA and by Adviser YY.

80 Mr AA's evidence is that he had not read the SOA when he signed the authority to proceed and that he signed the authority to proceed immediately after Adviser YY explained certain pages

of the SOA to him during the meeting. He signed because he trusted Adviser YY's recommendation and wanted to implement his advice to set up an SMSF and purchase a property.

81 At no time was an explanation provided to Mr AA as to the expenses involved in owning the investment property, including strata fees, council rates, management and administrative fees and water bills.

82 On the same day, Mr and Mrs AA signed documents for the establishment of an SMSF and a company which would be the trustee of the SMSF.

4.3.3 Mr and Mrs BB

83 Mrs BB first dealt with the defendant when she attended a seminar that it hosted at the North Ryde RSL Club in 2010. She and her husband, Mr BB, then obtained financial advisory services from the defendant, principally from Adviser ZZ. At about this time, they purchased two investment properties in the name of Mr BB, one in Victoria and the other in Queensland, in connection with advice provided via the defendant.

84 By July 2015, when they received an SOA from Adviser ZZ which is the subject of this proceeding, Mr and Mrs BB were in their late 40s. Mr BB was earning $150,000 per annum. Mrs BB was earning $10,000 per annum as an office assistant. Their two children were aged nine and 12. They were living in Sydney in a property valued at $1,100,000. They had an amount of $471,000 from the sale of their former home and wanted to invest in property, preferably in New South Wales.

85 At that time, their joint savings were $130,000 and Mrs BB had $136,402 in superannuation assets and shares worth approximately $112,700. Mr BB had superannuation assets of $185,800 and the two investment properties referred to at [83] above. The Victorian property was valued at $350,000 and the Queensland property was valued at $460,000. Mr BB had two mortgages securing a combined loan balance, in respect of borrowings undertaken when the properties were acquired, in the sum of approximately $530,000.

86 On 17 June 2015, Mr and Mrs BB attended an annual review meeting with Adviser ZZ. A file note of that meeting records: *"They would like to upgrade their home within 2 years"*.

87 On 8 July 2015, they met again with Adviser ZZ. He provided them with an SOA dated 8 July 2015. The SOA:

(1) recorded Mr and Mrs BB's goal or objective as "*Reduce existing debt*";

(2) failed to mention or address Mr and Mrs BB's goal of upgrading their home within two years;

(3) included a statement that the defendant had classified Mr and Mrs BB as *"assertive"* style investors for whom it was appropriate to have 27 per cent of their investments in property; together with advice to the effect of which, if implemented, was that approximately 80 per cent of their assets would be in real property;

(4) did not contain any advice in relation to government co-contribution strategies despite Mrs BB's income being $10,000 per annum; and

(5) contained the usual advice.

88 At the same meeting, Mr and Mrs BB committed to proceeding with the course recommended in the SOA.

89 On the same day (8 July 2015), Mr and Mrs BB completed an authority to proceed.

4.3.4 Mr and Mrs CC

90 In 2017, Mr and Mrs CC were both aged 47, and the parents of three children. They did not own a home and were trying to save for a house deposit. They had no substantial investments other than the superannuation accounts which each of them had with First State Super.

91 In October 2017, they met with Adviser YY. His note of that meeting includes: *"They are both currently renting. They are happy to keep renting for now but they would ideally like to by* (sic) *a home to live in eventually because they still need to save a deposit, etc"*.

92 On 14 December 2017, Adviser YY provided Mr and Mrs CC with an SOA. The SOA:

(1) recorded Mr and Mrs CC's objectives as including a short term objective to *"build wealth towards a comfortable retirement"* and a long term objective *"Aim to have the option of retirement by age 60-65 on an income of $90,000 per annum in todays dollars"*;

(2) did not address how Mr and Mrs CC might achieve their goals of saving a deposit for a home and building wealth outside superannuation;

(3) contained statements that the defendant had classified them as *"assertive"* style investors for whom it was appropriate to have 27 per cent of their investments in real

property; together with advice to the effect of which, if implemented, was that Mr and Mrs CC would have 78 per cent of their assets in real property;

(4) contained the usual advice.

93 On the same day, Mr and Mrs CC signed an authority to proceed. The next day they signed application forms to establish their SMSF and a family company which became the trustee of their SMSF.

4.3.5 Mr and Mrs DD

94 In 2013, Mrs DD attended a seminar hosted by the defendant at the Sharks Leagues Club in Sydney. They were introduced to Adviser ZZ and, in response to advice provided by him, purchased a vacant block of land at Cessnock in the Hunter Valley, New South Wales. They subsequently attended annual reviews with Adviser ZZ.

95 In 2016, Mr and Mrs DD requested to meet with a different adviser in the employ of the defendant after losing confidence in Adviser ZZ. They were referred to Adviser XX, who raised with them the idea of setting up an SMSF for property investment purposes. At that time, Mr and Mrs DD were aged 58 and 56 respectively, and their 22 year old daughter was living with them. They had a combined superannuation balance of approximately $210,000.

96 A month or so later, Mr and Mrs DD met again with Adviser XX. He presented an SOA to them. The SOA:

(1) recorded that retirement planning was an objective of Mr and Mrs DD;

(2) did not provide details of when Mr and Mrs DD wanted to retire or specify a retirement income target;

(3) "scoped out" advice concerning transition to retirement strategies;

(4) included a statement that Mr and Mrs DD had not provided the defendant with a budget;

(5) did not refer to the fact that Mr and Mrs DD's 22 year old daughter was living with them;

(6) included statements that the defendant had classified them as *"assertive"* style investors for whom it was appropriate to have 29 per cent of their investments in real property; together with advice the effect of which, if implemented, would be that they would have about 72 per cent of their assets in real property; and

(7) included the usual advice.

97 Mr and Mrs DD accepted the advice and signed an authority to proceed.

98 A few minutes later were taken to another room in the office and introduced to a Mr E, of Equiti Property. Mr E presented to them some details about an apartment development at Blue Haven, New South Wales.

99 Mr and Mrs DD then indicated that they wished to proceed with that property and signed application forms for the SMSF, the SMSF trustee company and SMSF Trust Deed.

4.3.6 Mr and Mrs EE

100 In 2018, Mr and Mrs EE were both aged in their mid-40s and they had two young children. Their only significant assets were a house and funds in superannuation. At that time they had an annual income of $165,000 and annual living expenses of $133,200 and Mr Richards inferred (from this and their high credit card debt), negative cashflow.

101 Mr EE attended a seminar hosted by the defendant. A number of the speakers spoke about investing in property and one of the speakers spoke about how to buy a property through an SMSF. Mr EE did not know much about SMSFs prior to the seminar.

102 Sometime later, Mr EE was contacted by someone from the defendant. On 8 November 2017, Mr and Mrs EE spoke to a client manager of the defendant, at their home. The client manager filled out a pro-forma questionnaire titled *"Discovery Fact Find"* (**DFF**) which Mr and Mrs EE signed. The client manager told Mr and Mrs EE that he was not an adviser, and recommended that they speak with an adviser employed by the defendant. He told them that it was likely that based on their finances they would be advised to buy a property directly and another one through superannuation. Mr EE then paid a fee of $1,650 to book an appointment with a financial adviser employed by the defendant.

103 Shortly afterwards, Mr and Mrs EE met with Adviser YY to discuss their financial situation and goals. Mr and Mrs EE agreed to engage Adviser YY to provide them with a comprehensive advice. An FNA recorded that one of their explicit goals was to *"help with children's education in the future"*.

104 Approximately two weeks later, Mr and Mrs EE were notified that Adviser YY's advice had been prepared. They met with Adviser YY for around three hours and Mr YY presented an SOA to them. During that meeting Mr EE told Adviser YY that the SOA had a number of

errors (including in relation to assets and liabilities) and Adviser YY then amended the document.

105 The SOA:

(1) recorded Mr and Mrs EE's objectives including a short term objective *"Build wealth towards a comfortable retirement"* and a long term objective *"Aim to have the option of retirement in 20 years and aim to retire on an income of $90,000 per annum in today's dollars"*;

(2) contained statements that the defendant had classified them as *"assertive"* style investors for whom it was appropriate to have 29 per cent of their investments in real property; together with advice the effect of which, if implemented, was that they would have 90 per cent of their assets in real property;

(3) indicated that retirement planning was not part of the advice;

(4) indicated that advice on salary sacrificing would be deferred;

(5) did not address Mr and Mrs EE's negative cashflow position, or present strategies in relation to educating their children; and

(6) contained the usual advice.

106 After a lunch break, Mr and Mrs EE decided to go ahead with Adviser YY's recommendations. On that day they signed an authority to proceed and application forms to establish their SMSF and two family companies which became the trustees of that SMSF.

107 Later that day, they met with Mr E from Equiti Property and agreed to cause the trustees of their soon to be established SMSF to purchase a particular property in Queensland that Mr E recommended.

4.3.7 Mr and Mrs FF

108 In 2017, Mr and Mrs FF were both in their early 40s. They owned an investment property in Denmark but did not own property in Australia. They had combined superannuation funds of about $218,000 and combined annual earnings of over $330,000.

109 On 28 June 2017, Mr FF attended a seminar hosted by the defendant. He was interested in real property investment and had heard about SMSFs through a colleague and from advertising.

110 At the seminar Mr FF was informed that rent on an investment property "*could pay for everything*" and that sometimes only $20,000 to $30,000 was required for a "*cheap apartment"*. After the seminar, Mr FF spoke to one of the presenters and took a $50 voucher that was offered to attendees.

111 On 3 July 2017, Mr and Mrs FF met with a client manager employed by the defendant at their home. The client manager completed a DFF which Mr and Mrs FF signed. The DFF included *"own a home"* in answer to the question *"Do you have any concerns about your current situation"* and a note *"want family home ultimately"*. At that meeting, Mrs FF stated that her "*dream*" was home ownership. Mr FF also stated an interest in home ownership.

112 On 6 July 2017, Mr and Mrs FF met with Adviser ZZ and agreed that Adviser ZZ should prepare an SOA for Mr and Mrs FF. During that meeting they signed an FNA which had been pre-filled. It included as a short term goal *"get a family home"*. At about that time, they provided a "*Household Expenditure*" document to Adviser ZZ who stated: "*I've looked at your budget, you two are like a Ferrari without wheels. You are making decent money but are not saving*".

113 On 24 July 2017, Mr and Mrs FF met with Adviser ZZ who presented an SOA. The SOA included:

(1) a summary of the financial objectives of Mr and Mrs FF which did not include their goal of home ownership;

(2) a deferral of advice concerning salary sacrificing;

(3) statements that the defendant had classified them as *"aggressive"* style investors for whom it was appropriate to have 30 per cent of their investments in property; together with advice the effect of which, if implemented, was that they would have 80 per cent of their investments in real property; and

(4) the usual advice.

114 At the end of the presentation, Adviser ZZ told Mr and Mrs FF to read the SOA and "*come back in around half an hour*". That same evening, Mr and Mrs FF decided to proceed and signed an authority to proceed and other documents including an SMSF Application, Trustee Company Application and Trust Deed.

115 On the same evening they were introduced to a "*property specialist*". Mr FF recognised him as one of the presenters at the seminar. The "*property specialist*" recommended to them a property located in Brisbane.

4.3.8 Ms GG

116 In 2015, Ms GG was a 48 year old divorcee with three adult children. She did not own a home and lived in social housing. She had $181,600 in superannuation and savings of $7,000. She was earning approximately $95,000 per annum (excluding superannuation) and saving approximately $400 per month.

117 In April 2015, Ms GG met with Adviser ZZ. During that meeting Ms GG said: "*I am hoping to leave something to my children. I would like to own my own house which has been paid off…*" and Adviser ZZ responded: "*You can't afford to purchase a property outside of superannuation. But you can buy one inside superannuation*". Adviser ZZ said words to the effect: "*If you want to do the right thing by your children, you should set up an SMSF and buy property, and buy the property in Queensland*". Following her meeting, Ms GG felt that she had no options other than purchasing the property in Queensland and decided to proceed "*based on what they were telling me because it was presented as though I would not provide for my children if I didn't…"*.

118 At about this time, a DFF and an FNA were prepared. The "*Goals & Objectives*" part of the FNA, included a statement: "*get on the property ladder any way that I can"*. A similar statement is attributed to her in the DFF. Ms GG denies making such a statement. She also denies saying the words: "*Expand investment portfolio*". She did not have a portfolio and was not investing.

119 On 18 May 2015, Ms GG attended a meeting with Adviser ZZ in which he presented an SOA. The SOA:

(1) included as a short term goal: *"Build wealth towards a comfortable retirement"*;

(2) did not record some of Ms GG's major goals, including home ownership, repayment of long term loans (which was implicit in Ms GG's goal of giving something to her children) and retirement planning;

(3) included statements that the defendant had classified Ms GG as an *"assertive"* style investor for whom it was appropriate to have 47 per cent of her investments in real

property; together with advice which, if implemented, would have the consequence that 92 per cent of her assets would be in real property; and

(4) included the usual advice.

120 At that meeting Ms GG completed a trustee company application and an SMSF application.

4.3.9 Mr HH and Ms JJ

121 In 2017, Mr HH and Ms JJ were married with two children under 10 years of age. Their principal asset was their home in Sydney valued at $1,900,000 in respect of which there was a mortgage securing a loan with a balance of approximately $710,000. Their combined annual income exceeded $371,000 and their superannuation assets were valued at $335,000. They had an investment property at Palm Beach in Queensland valued at $250,000 and in respect of which there was a mortgage securing a loan with a balance of approximately $85,000. Their living expenses totalled $130,200 per annum.

122 Their first dealings with the defendant came via a "*cold call*". A short time later, a representative of the defendant attended their home for approximately two hours.

123 In mid-2017, Mr HH and Ms JJ met with Adviser YY. During that meeting, Adviser YY prepared an FNA. Following this, Mr HH and Ms JJ agreed to pay the fee of $880 to the defendant for Adviser YY to prepare a detailed advice.

124 On 10 June 2017, Mr HH and Ms JJ completed a DFF. The DFF included: *"Might move to NZ & rent out our house"*; *"Clarity on implications of moving to NZ"*; *"Retirement – when can we & how comfortable?"*; and *"High school fees will start in 3-4 years"*. Further information regarding Mr HH and Ms JJ's goals of moving to New Zealand and funding their children's education, such as the proposed timing, likely costs and funding and the importance of these goals, were not collected by Adviser YY.

125 On 13 July 2017, Mr HH and Ms JJ met again with Adviser YY. The meeting lasted approximately two hours. Adviser YY presented an SOA dated 13 July 2017, which:

(1) recorded the financial objectives of Mr HH and Ms JJ including:

(a) in the short term: *"Minimise tax payable"*; *"Build wealth towards a comfortable retirement"*; and *"Look at existing loan structure and look at the options available to help reduce debt"*;

(b) in the medium term: "*help their children financially in the future*";

(c) in the long term, to have the *"option of retirement by age 60 on an income of $100,000 per annum in today's dollars"*;

(2) included statements that the defendant had classified them as *"assertive"* style investors for whom it was appropriate to have 29 per cent of their investments in real property; together with advice which, if implemented, would have resulted in Mr HH and Ms JJ having approximately 89 per cent of their investments in real property;

(3) included the usual advice;

(4) contained no reference to a possible move to New Zealand or to high school fees;

(5) contained no specific reference to Mr HH and Ms JJ's desire to fund their children's education (as opposed to the generic statement described in (1)(b) above);

(6) indicated that advice on salary sacrificing would be deferred; and

(7) did not address the possibility of alternative investment strategies, such as investing in property outside of an SMSF.

126 Also on 13 July 2017, Mr HH and Ms JJ completed an authority to proceed. At about that time, Mr HH met with Mr E of Equiti Property who recommended particular properties for purchase.

4.3.10 Mr KK and Ms LL

127 In 2016, Mr KK and Ms LL were 64 and 57 years old, respectively. They were long term partners and were looking forward to retiring in the short term which for Mr KK was, he intended, to be less than 18 months away. They worked in administrative roles and had combined earnings of approximately $101,000 per annum, including Ms LL's wages as a part-time receptionist of $30,000 per annum. They lived in Ms LL's unencumbered house valued at $600,000. They owned an investment property valued at $500,000, in respect of which there was a mortgage securing a loan with a balance of approximately $180,000. The value of their combined superannuation interests was $294,000.

128 Ms LL had recently inherited $320,000 from her parents. This prompted Mr KK and Ms LL to consider obtaining financial advice. They came into contact with the defendant and, in particular, Adviser XX. In Ms LL's initial discussions with Adviser XX, she told Adviser XX that planning for her retirement was a priority.

129 Before her dealings with the defendant, Ms LL had no knowledge of SMSFs. Her evidence was that the idea of using an SMSF came from Adviser XX and that Adviser XX seemed to assume that Mr KK and Ms LL would establish an SMSF.

130 On 24 May 2016, Adviser XX completed an FNA with Mr KK and Ms LL. The FNA recorded their goals and objectives, including in the short term *"Prepare for retirement towers* (sic) *end of this period"*; in the medium term *"Retire full time about now"*; and in the long term *"Enjoy retirement"*.

131 Ms LL told Adviser XX: "*I want to be well prepared for retirement and use my inheritance to provide for me in my retirement*". Adviser XX's notes record: "*You would like to have a stable income in retirement"*.

132 On 26 July 2016, Mr KK and Ms LL met with Adviser XX for one and a half to two hours. He presented to them an SOA. The SOA:

(1) contained a summary of the financial objectives of Mr KK and Ms LL which included as a short term goal *"Prepare for retirement"*; *"You would like to have a stable income in retirement"*; and *"Reduce existing debt"* and as a medium term goal *"Retire in the next 2-5 years"*;

(2) contained statements that the defendant had classified Mr KK and Ms LL as balanced investors, for whom an allocation of 20 per cent of their investments in real property was appropriate, together with advice, the effect of which, if implemented, would be that Mr KK and Ms LL would have approximately 79 per cent of their investments in real property;

(3) under the heading *"Your Income and Expenses"* included a table of income and the notation *"... you have not provided us with a current budget, however, you have informed us that your current income provides funds to cover your living expenses"*;

(4) included a statement that the scope of the advice given included advice as to *"Retirement Planning"*, another statement excluding *"Retirement Advance"* from the scope of advice given, and a third statement indicating that retirement options would be discussed in greater detail as Mr KK and Ms LL approached their desired retirement age;

(5) contained no advice concerning government co-contribution strategies (which were applicable to Ms LL as a low income earner); and

(6) contained the usual advice.

133 Ms LL's evidence was that she and Mr KK did not have time to read the SOA but that Adviser XX went through it with them and explained various things.

134 On the same day, Adviser XX suggested to them they purchase a particular investment property (which they went on to purchase). Adviser XX sought to dissuade Ms LL from considering a different property and from inspecting the property that he suggested before that purchase.

135 At the same meeting, Mr KK and Ms LL committed to proceeding with the advice provided by Adviser XX.

136 Also on 26 July 2016, Mr KK and Ms LL completed an authority to proceed; a Trustee Company Application; an SMSF Application and an Investment Manager Application.

4.3.11 Mr and Mrs MM

137 As at August 2016, Mr and Mrs MM were aged 45 and 40 respectively, with three children aged 10, 12 and 13. Mr MM was a train driver earning a salary of $113,000 per annum. Mrs MM was unemployed, having been made redundant on 1 August 2016 from a bookkeeping position. They owned a home valued at $850,000 in Penrith, in respect of which a mortgage secured a loan with a balance of approximately $623,000. Their combined superannuation assets were valued at $230,900.

138 On 5 August 2016, an employee of the defendant completed a DFF for Mr and Mrs MM. It records that the short-term goals for Mr and Mrs MM included *"reduce tax and mortgage – set up a smsf..."*, and their long-term goal was to *"keep building wealth via a property portfolio"*. At that meeting, Mr and Mrs MM answered: *"have greater disposable income"* to the question *"What would you like to change about your financial situation or lifestyle"*. Mrs MM's redundancy was also discussed at that meeting. On the same day, Mr and Mrs MM signed a *"Request to Commence the [Defendant] Advisory Process"* form.

139 On 9 August 2016, Mr and Mrs MM met with Adviser XX. An FNA was prepared on the same day. It records that Mrs MM was ordinarily earning wages of $39,000 per annum but had been made redundant on 1 August 2016. Mr and Mrs MM's goals and objectives were recorded (in the short term) as: *"reduce tax & mortgage; set up an SMSF with IP [investment property]; get 2 or 3 IPs outside SMSF; upgrade one car; holidays & travel"* and *"upgrade the other car"*. It described Mr and Mrs MM as having an "*aggressive*" investor risk profile.

140 On 29 August 2016, Mr and Mrs MM met again with Adviser XX. He presented to them an SOA of that date. The SOA:

(1) identified as a short term goal the continued reduction of debt;

(2) failed to address the issue of cashflow in light of Mrs MM's redundancy;

(3) deferred the provision of advice concerning salary sacrificing;

(4) contained statements that the defendant had classified Mr and Mrs MM as *"aggressive"* investors and a table suggesting that as an *"assertive investor"* (despite the earlier classification of Mr and Mrs MM as *"aggressive"* investors) they should invest 27 per cent of their assets in real property; together with advice the effect of which, if implemented, would be that Mr and Mrs MM had approximately 92 per cent of their assets in real property;

(5) deferred advice concerning salary sacrificing; and

(6) included the usual advice.

141 At the same meeting, Mr and Mrs MM committed to proceeding.

142 On the same day (29 August 2016), Mr and Mrs MM completed an authority to proceed and other documents including a trustee company application, an SMSF application and a Trust Deed.

4.3.12 Mr NN and Ms OO

143 In 2018, Mr NN and Ms OO were *de facto* partners in their early 40s with three young children. They owned a house in south-west Sydney valued at approximately $750,000 in respect of which there was a mortgage securing a home loan of approximately $425,000. Their combined annual salary was approximately $130,000. Their combined superannuation assets were approximately $211,000.

144 On 12 January 2018, a representative of the defendant met Mr NN and Ms OO at their home. The representative introduced the topic of an SMSF. Prior to that time, Mr NN had not heard of SMSFs.

145 On 24 January 2018, Mr NN and Ms OO met with Adviser XX. In February 2018, they again met with Adviser XX and Adviser XX presented an SOA. The SOA included:

(1) the identification of a short term goal of *"Build wealth towards a comfortable retirement"* and a medium term goal of *"Fund children's education"*;

(2) statements that based upon the characteristics of their investor risk profile, the ideal asset allocation would be *"aggressive"* and as such they should invest 30 per cent of

their assets in real property; together with advice the effect of which, if implemented, would be that they would have approximately 87 per cent of their assets in real property;

(3) a statement of the scope of the advice which did not include advice concerning retirement;

(4) a deferral of advice concerning salary sacrificing; and

(1) the usual advice.

146 Mr NN does not remember discussing the SOA with Adviser XX. He recalls that the meeting lasted around 45 minutes. At the end of the meeting, Mr NN told Adviser XX that they would proceed. Mr NN felt locked in because of the fees he and Ms OO had paid. Mr NN and Ms OO were then given documents to sign, which they signed at the time. Mr NN recalls that he was shown "*specific pages where there was a sticker showing where…to sign*". The documents which Mr NN and Ms OO signed included an authority to proceed; two Company Applications; an SMSF Application form; a Trust Deed; an Investment Manager form; superannuation rollover request forms; various insurance forms and various withdrawal forms for payment to the defendant.

147 At the same meeting, Mr NN and Ms OO spoke to a person in another room in the defendant's premises. He recommended the acquisition of a particular Queensland property notwithstanding the expressed interest by Mr NN in acquiring property located in New South Wales. Despite Mr NN referring to options in Sydney, Newcastle and Wollongong, that person did not budge from his recommended property. Thereafter, that same day, Mr NN and Ms OO signed further documents in connection with the purchase of that property in Queensland, namely an Authority and Instructions; a Contract for Sale and an Appointment of Agent.

4.3.13 Ms PP

148 In 2012 or 2013 Ms PP, then a recently widowed school teacher, obtained advice from an adviser employed by the defendant concerning superannuation assets she had inherited from her late husband. That advice was to rollover her superannuation into a Macquarie Bank Superannuation Fund. She remained a client of the defendant and had annual review meetings to monitor her superannuation. From about 2014, Adviser ZZ became the adviser to Ms PP.

149 In 2016, Ms PP was living in western Sydney. She was 58 years old and owned a primary residence valued at $700,000; and an investment property valued at $420,000 in respect of

which there was a mortgage securing a loan balance of approximately $419,000. She had superannuation assets valued at $139,600. In that year, Ms PP inherited approximately $100,000 from her aunt and mother. She asked Adviser ZZ for advice in respect of the inheritance monies.

150 On or about 23 August 2016, Ms PP met with Adviser ZZ. He presented an SOA to her. The SOA:

(1) included as a short term goal *"Build wealth towards a comfortable retirement"* and as medium term goals *"Reduce the amount of work hours"* and *"Build wealth towards retirement"*;

(2) provided no substantive advice concerning PP's recent inheritance;

(3) included statements that the defendant had classified Ms PP as an assertive style investor for whom it was appropriate to have 27 per cent of her investments in real property; together with advice which, if implemented, would have the consequence that she would have 92 per cent of her assets in real property. Ms PP did not recall a discussion with Adviser ZZ about her investing style; and

(4) included the usual advice.

151 During the meeting Adviser ZZ told Ms PP that she should set up an SMSF and purchase an investment property using the superannuation funds and the funds that she had inherited. Adviser ZZ did not discuss any other options with Ms PP other than property investment. Ms PP recalls saying to Adviser ZZ that she was unsure about proceeding because she thought it would be difficult to manage another investment property.

152 Ms PP met Mr E of Equiti Property either that same day or soon after. Her evidence is that Mr E and Adviser ZZ appeared to work as a "*tag team*". Mr E told her about one particular property.

153 On the same day, Ms PP signed an authority to proceed; an application for the SMSF; and trustee company forms. She had not read the SOA when she signed these documents because she relied upon the information that Adviser ZZ had explained to her during their meeting.

4.4 Section 961B

154 I turn now to consider s 961B of the Act. That section provided, in so far as is presently relevant:

> **961B Provider must act in the best interests of the client**
>
> (1) The provider must act in the best interests of the client in relation to the advice.
>
> (2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:
>
> (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
>
> (b) identified:
>
> (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
>
> (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the ***client's relevant circumstances***);
>
> (c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;
>
> (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;
>
> (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:
>
> (i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and
>
> (ii) assessed the information gathered in the investigation;
>
> (f) based all judgements in advising the client on the client's relevant circumstances;
>
> (g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

(emphasis in original)

155 One view of s 961B is that it is concerned with the actions taken, or the processes carried out, by the provider in relation to the provision of the advice, and with the objective purpose of the provider in taking those actions and giving the advice; rather than with the *substance* of the advice given: see *Australian Securities and Investments Commission v* ***Financial Circle*** *Pty Ltd* [2018] FCA 1644; (2018) 131 ACSR 484 at 509 [129] (O'Callaghan J); *Westpac Securities FFC* at 263 to 264 [405] to [408] (O'Bryan J; cf Allsop CJ at 206 [151]); *Australian Securities and Investments Commission and AGM Markets Pty Ltd (In Liq) (No 3)* (***AGM Markets No 3***) [2020] FCA 208; (2020) 275 FCR 57 at 93 [221] (Beach J); *Australian Securities and Investments Commission v MobiSuper Pty Limited* [2022] FCA 990 at [80] to [82] (Charlesworth J). Another view is that s 961B may not be confined to such procedural matters and might extend to include the content or substance of such advice: see *Australian Securities and Investments Commission v* ***NSG*** *Services Pty Ltd* [2017] FCA 345; (2017) 122 ACSR 47 at 53 to 54 [21] (Moshinsky J) and *RI Advice* at 476 to 477 ([385] to [389]) (Moshinsky J). Like Moshinsky J, I consider it to be unnecessary to reach a concluded view on this issue. For the reasons developed below, the Advisers failed to act in the best interests of each of the 12 individual or pairs of clients in connection with both the procedural matters relating to the provision of the advice and with the content or substance of the advice. There is, at least in the instant case, overlap between the matters which might be considered procedural and those which may be considered relevant to content or substance.

156 In considering whether there has been a contravention of s 961B it is appropriate to consider the matters set out in s 961B(2). If each of those matters is proven, then this is sufficient to prove that the provider has acted in the best interests of the client in relation to the advice. However, it does not follow from a failure to prove one or more of the matters set out in s 961B(2) that a failure by the provider to act in the best interests of the client has been established. Whether such a failure is established depends upon all the circumstances including the nature and extent of the failure to comply with s 961B(2).

157 The defendant has not appeared and thus has not propounded a case that s 961B(2) has been satisfied. Mr Richards has, by reference to a detailed consideration of the defendant's files for each individual or pair of clients, considered the processes undertaken by the Advisers in the formulation of the advice provided to those clients including by reference to the matters described in s 961B(2), and has concluded that: (1) the Advisers did not do each of the matters in that sub-section; and (2) more generally, did not act in the best interests of the clients. I

accept Mr Richards's analyses and his conclusions. Those conclusions may be summarised as follows.

158 For *all* of the clients:

(1) the SOAs were not tailored to the needs of the particular client or clients. In this regard: (a) there was substantial repetition and use of boilerplate text within the SOAs; (b) the stated objectives for the clients were essentially identical; (c) the wording in the SOAs concerning the scope of the advice was almost identical for each client; and (d) the advice given to each client was very similar and included the usual advice;

(2) there is no evidence of consideration of alternative investments, e.g., investing in property outside of an SMSF. There was also no evidence of consideration of advantages and disadvantages of alternatives as against the recommended strategy of investment in property within an SMSF; and

(3) the clients were not allowed sufficient time to understand the advice that had been recommended to them. As noted at [72] above, in each case the authority to proceed was signed by the clients on the same day as the SOA was dated. As Mr Richards opined, this is clearly insufficient time to consider the advice given, particularly as there is a level of complexity concerning the establishment and operation of an SMSF.

159 Mr Richards was also of the view that the advice provided to *each* of the clients was not in their best interests for reasons including the following:

(1) the initial costs to establish the SMSF and recommended portfolios were excessive and would require several years for the clients to return to a break-even position (if at all);

(2) the ongoing costs associated with the recommended advice were well in excess of the existing costs being incurred by the clients. The average increase in costs ranged from 2.5 times to 3.3 times (depending on whether property expenses were included);

(3) the advice given to the clients was not presented to them in a way that they could make informed decisions;

(4) the files did not reveal an adequate consideration of alternatives;

(5) the asset allocation for the clients contained a much higher allocation to property than what is recommended;

(6) the overall allocation to growth assets was higher than had been recommended for the clients' risk profiles;

(7) the Advisers did not prioritise the various objectives of the clients; and

(8) the files did not reveal any investigation into the investment management fees that would be incurred in connection with their existing superannuation if that superannuation adopted a similar portfolio to that which was recommended by the defendant. In Mr Richards's experience, a slight change to asset allocations could have been effected with an immaterial difference in fees.

160 In addition to the matters common to all of the clients identified at [158] and [159] above, Mr Richards identified the following further deficiencies supporting his opinion that the advice provided to the clients was not in their best interests.

161 *First*, the subject matter was not adequately addressed by the Adviser for the following clients in the following ways.

162 Adviser XX failed to:

(1) specify when Mr and Mrs DD wanted to retire, or to specify any retirement income target. As Mr Richards opined, ascertaining the living expense requirements for a client is critical in being able to prepare appropriate advice. The SOA also inappropriately "scoped out" advice in relation to transition to retirement strategies;

(2) identify that no information had been gathered in relation to Mr KK and Ms LL's living expenses. Such information would have been critical in relation to the provision of advice to clients aged 64 and 57 and thus very close or close to retirement; and

(3) address cashflow following Mrs MM's then very recent redundancy. This should have been a priority, particularly in relation to a client for whom Adviser XX was recommending an increase in overall debt levels.

163 Adviser YY failed to:

(1) address retirement planning for Mr and Mrs AA;

(2) address how Mr and Mrs CC should seek to achieve their goals of building up a deposit for a home and building wealth outside superannuation;

(3) identify the following key issues concerning Mr and Mrs EE: (a) addressing their negative cashflow position; and (b) presenting strategies in relation to educating their children;

(4) identify the following key issues concerning Mr HH and Ms JJ:

(a) as Mr HH and Ms JJ intended to relocate to New Zealand, Adviser YY should have gathered further information such as potential timing, likely outcomes in terms of selling their home in Australia and purchase in New Zealand and the level of importance attached to this goal; and

(b) some of the goals in the FNA – e.g. Mr HH and Ms JJ's indication that they wished to fund their children's education – were not included in the SOA. Adviser YY should have gathered information in relation to the potential timing of this goal and the likely annual amount of school fees.

164 Adviser ZZ failed to:

(1) address Mr and Mrs BB's goal of upgrading their property;

(2) identify the following key issues concerning Ms GG: (a) addressing the purchase of her own home, which was a priority; (b) addressing repayment of her long-term loan; and (c) planning for her retirement to ensure she would be financially secure. As Mr Richards opined, her superannuation balance at age 48 appeared quite low and should have been addressed as a priority; and

(3) address Ms PP's inheritance. The SOA identified that she had an inheritance of $100,000, as well as $85,000 in an offset account, but contained no advice in relation to this capital.

165 *Secondly*, for a number of clients, there was an inappropriate deferral of advice concerning salary sacrifice, when this was part of the subject matter for the advice. In particular:

(1) for Mr and Mrs AA and Mr and Mrs MM – the advice was inappropriately deferred to preservation age;

(2) for Mr and Mrs EE, Mr and Mrs FF, Mr HH and Ms JJ and Mr NN and Ms OO – the advice was deferred until next review.

166 For the reasons set out at [70] to [165] above, I am satisfied that each of the Advisers contravened s 961B(1) of the Act.

4.5 Section 961G

167 I turn now to consider s 961G of the Act, which provided:

> 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 section 961B to act in the best interests of the client.

168 Section 961G, when read with s 961, imposed an obligation on a *"provider"* of *"personal advice"* to a person as a *"retail client"* to only provide advice if it would be reasonable to conclude that the advice was appropriate to that client, had the provider satisfied the duty under s 961B to act in the best interests of the client.

169 The individual Adviser who provided the advice was the *"provider"* for the purposes of this section, despite being a representative of a financial services licensee: s 961(2), (4); *AGM Markets No 3* at 90 [200].

170 For the reasons set out at 3.5 and 3.6 above, the SOAs constituted the provision of *"personal advice"* to the recipients thereof as *"retail clients"*. Thus, s 961G applied and each Adviser was subject to the obligation imposed by that section.

171 Section 961G invited a focus upon the *substance* of the advice: see *Financial Circle* at 509 [129]; *NSG Services* at 53 [21]; *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [17] (Wigney J). It called for an objective assessment of the appropriateness of the advice given.

172 Mr Richards considered – on the assumption that the Advisers had satisfied the duty imposed by s 961B of the Act to act in the best interests of the clients – whether it would have been reasonable to conclude that the advice given was appropriate to the clients. Mr Richards acknowledged that there is no particular advice which is "best" and that advisers are not required to provide such advice, rather there is a range of advice which may be appropriate and the adviser's obligation is to provide advice that may be considered to fall within such a range.

173 Again, Mr Richards's analysis (which I accept) was based upon a detailed consideration of the SOAs, and the files held by the defendant for the particular clients. Having undertaken such an analysis, Mr Richards opined that there were many areas in which the advice given was inappropriate in respect of *all* of the clients, including (again, without being exhaustive):

(1) the advice given to each client was the usual advice;

(2) there was an inadequate comparative analysis undertaken by the Advisers as to whether the clients' superannuation funds would be better placed as they were or in an SMSF (including initial and ongoing administration and maintenance fees, insurance options and insurance premiums);

(3) the absence of disclosure of such analysis and of the initial and ongoing fees for the SMSF;

(4) inadequate disclosure of the costs involved in the purchase of the property and the impact of such costs upon the clients' superannuation balances.

174 As is apparent, there is an overlap between the *"procedural"* matters founding a conclusion (discussed above) that s 961B was contravened and the *"substantive"* matters founding a conclusion (discussed further below) that s 961G was contravened.

175 A particular feature which rendered inappropriate the advice given to each of the clients was the lack of tailoring of the advice to the particular clients and instead the provision of the usual advice. That is, each individual or pair of clients was advised to establish an SMSF and to cause the trustee of the SMSF to purchase a property, regardless of their individual circumstances. The use of such a *"cookie-cutter"* approach to the provision of advice is evident in the various flaws identified by Mr Richards in both the process of such provision and in the substance of the advice provided.

176 This approach is particularly evident in the asset allocations in the SOAs. The asset allocations which resulted from implementation of the advice contained in the SOAs were: (1) strikingly different from that which were expressly suggested in the SOA; (2) excessively weighted to exposure to real property assets. The table below records the suggested exposure to real property and the actual exposure to real property created by the advice given in the SOAs:

Clients	Suggested exposure %	Actual exposure %	Actual exposure/recommended exposure
Mr and Mrs AA	27	82	3
Mr and Mrs BB	27	80	3
Mr and Mrs CC	27	78	2.9
Mr and Mrs DD	29	72	2.5
Mr and Mrs EE	29	90	3.1
Mr and Mrs FF	30	80	2.7
Ms GG	47	92	2.0
Mr HH and Ms JJ	29	89	3.1
Mr KK and Ms LL	20	79	4.0
Mr and Mrs MM	27	92	3.4
Mr NN and Ms OO	30	87	2.9
Ms PP	27	92	3.4
Mean	**31.3**	**84.4**	**2.7**
Median	**29**	**84.5**	**2.95**

177 By any measure – whether by reference to the absolute percentages in the third column of the table, the proximity of those percentages to 100 per cent, those percentages expressed as a multiple of the Advisers own *"recommended"* exposures (in the final column of the table), or otherwise – the actual exposure of the clients to such high levels of real property assets was inappropriate. The exposure of the clients to such inappropriate levels of real property assets suggests that little to no heed was paid to the particular circumstances of the clients and that the advice was instead focussed upon manoeuvring the clients into property purchases through SMSFs. Relevantly, and as is explored in more detail within the Division 4 case below, this occurred in a context in which the Advisers were rewarded with bonus payments for each such property purchase made.

178 Mr Richards also identified, in detail, a series of areas in which the advice given to particular clients was inappropriate. It is unnecessary to set out Mr Richards's conclusions in these areas (which I accept). For the most part they are a function of the central defect identified at [175] above, namely the failure to attend to the requirements of particular clients and instead to manoeuvre the clients into a pre-determined model of advice which rewarded the Advisers for doing so.

179 For the reasons set out at [167] to [178] above, I am satisfied that the Advisers contravened s 961G of the Act.

4.6 Conclusions concerning the Division 2 case

180 As noted at [66] and [67] above, a financial services licensee contravenes s 961K if a representative (other than an authorised representative) contravenes, *inter alia*, ss 961B or 961G of the Act and the licensee is the, or a, responsible licensee in relation to such contraventions.

181 As noted at [5] above, each of the Advisers was a representative, but not an authorised representative, of the defendant. For the reasons set out at 4.4 and 4.5 above, I am satisfied that the Advisers contravened s 961B and s 961G respectively. As noted at [10(2)] above, the defendant was the only financial services licensee that employed the Advisers during the relevant financial years and as such was the responsible licensee for the Advisers in relation to such contraventions: see s 961P(a) of the Act.

182 It follows that the defendant contravened s 961K with respect to each of the 12 individual or pairs of clients the subject of the Division 2 case.

5. THE DIVISION 4 CASE

183 I turn now to consider the Division 4 case. As noted at [1] above, Division 4 prohibited the payment and receipt of *"conflicted remuneration"* as defined in s 963A of the Act, in particular circumstances.

184 ASIC's Division 4 case concerns the bonuses paid by the defendant to:

(1) Adviser XX and accepted by him during the year ended 30 June 2018; and

(2) Advisers YY and ZZ and accepted by them during the years ended 30 June 2017 and 30 June 2018.

185 As noted at [14] above, the defendant paid, and the Advisers received, bonuses during earlier financial years. However, the payment and receipt of those earlier bonuses is not alleged to have contravened s 963J or s 963E. ASIC nevertheless relies upon the payment and receipt of bonuses in the earlier years as part of the circumstances to be considered when deciding whether the impugned bonuses were *"conflicted remuneration"*.

186 The essence of ASIC's Division 4 case is that bonuses paid by the defendant and received by the Advisers, were *"conflicted remuneration"*; and that the defendant contravened s 963J of the Act (because it gave the bonuses to the Advisers) and s 963E(2) of the Act (because the Advisers, as representatives of the defendant, accepted the bonuses). I deal below with a threshold question as to whether Division 4 was operative (5.1); the findings of fact relevant to the Division 4 case (5.2); then the s 963J case (5.3); and finally the s 963E case (5.4).

5.1 Threshold question: was the operation of Division 4 excluded by operation of s 1528 of the Act

187 A threshold issue arises by dint of s 1528 of the Act, as to whether the provisions of Division 4 were operative upon the impugned bonuses. The impugned bonuses were paid during the period 1 July 2016 to 30 June 2018. During that period, s 1528 of the Act provided in so far as is presently relevant:

> **1528 Application of ban on conflicted remuneration**
>
> (1) Subject to subsections (2) and (3), Division 4 of Part 7.7A, as inserted by item 24 of Schedule 1 to the amending Act, does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee, if:
>
> (a) the benefit is given under an arrangement entered into before the application day; and
>
> (b) the benefit is not given by a platform operator.
>
> (2) The regulations may prescribe circumstances in which that Division applies, or does not apply, to a benefit given to a financial services licensee or a representative of a financial services licensee.
>
> …
>
> (4) In this section:
>
> ***application day***:
>
> (a) in relation to a financial services licensee or a person acting as a representative of a financial services licensee, means:
>
> (i) if the financial services licensee has lodged notice with ASIC in accordance with subsection 967(1) that the obligations and

> prohibitions imposed under Part 7.7A are to apply to the licensee and persons acting as representatives of the licensee on and from a day specified in the notice—the day specified in the notice; or
>
> (ii) in any other case—1 July 2013;
>
> ...
>
> (emphasis in original)

188 For the reasons set out at [5] and 3.8 above, the bonuses were *"a benefit given to ... a representative of a financial services licensee"* within the meaning of those words in the chapeau to s 1528(1). Further, for the reasons set out at 3.7 above, the bonuses were not given by a platform operator.

189 However, s 1528(1) is subject (relevantly) to s 1528(2) and, in turn, to the effect of regulations made for the purpose of that section.

190 Where, as in the present case, the giver of the benefit was not a platform operator, s 1528(1) and (2) require consideration of the following questions in order to determine whether Division 4 applied to the impugned bonuses:

(1) was the benefit received under an arrangement entered into before the application day, thereby rendering Division 4 *prima facie* inapplicable (**first question**)?;

(2) if the answer to (1) is *"yes"*, then did a regulation made under s 1528(2) operate so as to reverse that *prima facie* position and render Division 4 applicable (**second question**)?; and

(3) if the answer to (1) is *"no"* such that Division 4 was *prima facie* applicable, then did a regulation made under s 1528(2) operate so as to render Division 4 inapplicable (**third question**)?

191 Division 4 applied to the impugned bonuses if the answer to the first and second questions was *"yes"*; or if the answer to both the first and third questions was *"no"*. Division 4 did not apply if the answer to the first question was *"yes"* and the second question was *"no"*, or if the answer to the first question was *"no"* and the answer to the third question was *"yes"*.

5.1.1 First question: were the impugned benefits received under an arrangement entered into before the application day?

192 Section 1528(4) of the Act provided that the *"application day"* was 1 July 2013 except where the financial services licensee had lodged a notice in accordance with s 967(1) of the Act.

Section 967(1) enabled a financial services licensee, during the period beginning on 1 July 2012 and ending on 30 June 2013, to lodge a notice with ASIC the effect of which was to allow the financial services licensees to elect to be subject to Part 7.7A on and from a date set out in that notice, being a date no earlier than the day on which the notice was lodged with ASIC. ASIC submitted, and I accept, that there is no evidence before the Court of a s 967(1) notice having been lodged by the defendant which might have affected the reckoning of the application day. As such, ASIC relies on the latest possible application day, namely 1 July 2013.

193 The word *"arrangement"* in s 1528(1) was, as ASIC acknowledged, sufficiently broad to encompass the terms of the employment contracts between the defendant and each of the Advisers. This is consistent with the definition of arrangement in s 761A of the Act which defined *"arrangement"* for the purposes of Chapter 7 of the Act in terms which included *"a contract, agreement, understanding ... or other arrangement ... whether formal or informal ... and whether or not enforceable"*: see also *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1149; (2022) 163 ACSR 442 at [545] (Anderson J); and *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2023] FCAFC 135 (***ASIC v CBA (FFC)***) per O'Bryan J (at [262] to [264]) and Jackman J (at [301] and [309]).

194 As noted at [6], [8] and [9] above, the employment contracts were entered into on 25 January 2013 (Advisers YY and ZZ) and 17 March 2016 (Adviser XX).

195 Thus, the answer to the first question is: (1) *"yes"* for Advisers YY and ZZ; and (2) *"no"* for Adviser XX. That is, Division 4 is *prima facie* inapplicable to Advisers YY and ZZ but *prima facie* applicable to Adviser XX. The second and third questions, to which I now turn, address whether those *prima facie* positions are displaced.

5.1.2 Second question: did a regulation made under s 1528(2) render Division 4 applicable (Advisers YY and ZZ)?

196 As the answer to the first question is *"yes"* for Advisers YY and ZZ and thus Division 4 is *prima faci*e inapplicable to them, it is necessary to consider whether a regulation made under s 1528(2) of the Act rendered Division 4 applicable. Before considering those regulations, I pause to note that I share the view expressed by O'Bryan J (Moshinsky and Jackman JJ agreeing) in *ASIC v CBA (FFC)* that the complex and unclear drafting of these regulations should be deprecated and that persons conducting business within the financial services

industry should be able to determine whether the law applies to them without first undertaking a difficult exercise in statutory construction (see at [1], [24], [257], [265] and [288]).

197 As noted at [187] above, s 1528(2) of the Act provided that the regulations may prescribe circumstances in which Division 4 applies. Regulation 7.7A.16B provided in so far as is presently relevant:

> **7.7A.16B Application of ban on conflicted remuneration—person other than platform operator (Division 4 of Part 7.7A of Chapter 7 of the Act applies)**
>
> (1) This regulation:
>
> (a) is made for subsection 1528(2) of the Act; and
>
> (b) prescribes a circumstance in which Division 4 of Part 7.7A of Chapter 7 of Chapter 7 of the Act applies to a benefit; and
>
> (c) does not apply in relation to a benefit to which regulation 7.7A.16C applies.
>
> (2) The circumstance is that:
>
> (a) the benefit is given by a person who is not acting in the capacity of a platform operator; and
>
> (b) the benefit is given under an arrangement that was entered into before the application day, within the meaning of subsection 1528(4) of the Act; and
>
> (c) the benefit:
>
> (i) is given in relation to the acquisition, on or after 1 July 2014, of a financial product, for the benefit of a retail client; or
>
> (ii) does not relate to a financial service provided, before 1 July 2014, for the benefit of a retail client; and
>
> (d) the client did not have an interest in the product before 1 July 2014.
>
> (3) For subregulation (2), treat a benefit as having been given by a person acting in the capacity as a platform operator if it:
>
> (a) is given by a platform operator; and
>
> (b) relates to activities undertaken in connection with the platform as a result of instructions to the platform operator from a client who has set up, or is setting up, an account on the platform.
>
> …

198 Thus, reg 7.7A.16B(2) prescribed a *"circumstance"* in which Division 4 would apply. The circumstance prescribed by reg 7.7A.16B(1)(a), (b) and (2) had four components, each of which had to be satisfied.

199 The *first,* in reg 7.7A.16B(2)(a), was that the benefit was given by a person who was not acting in the capacity of a platform operator. The defendant was not a platform operator for the reasons set out at 3.7 above. Thus, the bonuses could not have been given by it acting in the capacity of a platform operator as described in reg 7.7A.16B(3). It follows that reg 7.7A.16B was satisfied.

200 The *second,* in reg 7.7A.16B(2)(b), was that the benefit was given under an arrangement that was entered into before the application day. As noted at [195] above, this component was satisfied with respect to Advisers YY and ZZ.

201 The *third,* in reg 7.7A.16B(2)(c), was that the benefit was *either*: (1) given in relation to the acquisition, on or after 1 July 2014, of a *"financial product"*, for the benefit of a *"retail client"*; *or* (2) does not relate to a *"financial service"* provided, before 1 July 2014, for the benefit of existing retail clients (adopting the construction explained by Jackman J in *ASIC v CBA (FFC)* at [321] to [329]). As all of the SOAs were provided after 1 July 2014 the *second* of these requirements, and thus reg 7.7A.16B(2)(c), was satisfied.

202 The *fourth,* in reg 7.7A.16B(2)(d), was that the client did not have an interest in the product before 1 July 2014.

203 For the reasons set out at 3.2 above, the *"product"* was the beneficial interest of each client in their respective SMSF and the *"financial product advice"* was the advice to acquire property through an SMSF. ASIC accepts that the six extant SMSF clients (of which five were clients of Adviser ZZ; and the remainder was a client of Adviser XX) did not satisfy reg 7.7A.16B(2)(d). I am satisfied that reg 7.7A.16B(2)(d) was satisfied for the remaining clients of Advisers YY and ZZ.

204 By reason of reg 7.7A.16B(1)(c), it is also necessary to determine whether the bonuses were a benefit to which reg 7.7A.16C applied (in which case reg 7.7A.16B did not apply to the bonuses). Regulation 7.7A.16C provided, in so far as is presently relevant:

> **7.7A.16C Application of ban on conflicted remuneration—employer and employee (Division 4 of Part 7.7A of Chapter 7 of the Act does not apply)**

(1) This regulation:

(a) is made for subsection 1528(2) of the Act; and

(b) prescribes circumstances in which Division 4 of Part 7.7A of the Act does not apply to a benefit.

Remuneration arrangement relating to enterprise agreement or collective agreement-based transitional instrument

(2) A circumstance is that:

(a) the benefit is paid under a remuneration arrangement between an employer and an employee; and

(b) the benefit is paid in accordance with an enterprise agreement (including its associated documents), or a collective agreement-based transitional instrument (including its associated documents), that was entered into before the application day, within the meaning of subsection 1528(4) of the Act.

...

Remuneration arrangement not relating to enterprise agreement or collective agreement-based transitional instrument

(5) A circumstance is that:

(a) the benefit is paid under a remuneration arrangement between an employer and an employee; and

(b) the benefit is not paid in accordance with an enterprise agreement (including its associated documents) or a collective agreement-based transitional instrument (including its associated documents); and

(c) the benefit is payable in relation to a period that ends before 1 July 2015.

Definitions

(6) In this regulation:

collective agreement-based transitional instrument has the meaning given by subitem 2(5) of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

enterprise agreement has the same meaning as in the *Fair Work Act 2009*.

(emphasis in original)

205 Regulation 7.7A.16C (relevantly) prescribed two circumstances in which Division 4 *"did not apply*" to a benefit – reg 7.7A.16C(2) and (5).

206 Regulation 7.7A.16C(2) was not engaged on the present facts because the remuneration arrangements of the individuals did not relate to an *"enterprise agreement"* or a "*collective agreement-based transitional instrument"* (see [10(1)] above).

207 Regulation 7.7A.16C(5) had three elements all of which had to be satisfied to constitute a circumstance in which Division 4 did not apply to a benefit. As the third of these requirements – that the bonuses were payable in relation to a period that ended before 1 July 2015 – was not satisfied, reg 7.7A.16C(5) was not engaged.

208 Thus, the bonuses were not a benefit to which reg 7.7A.16C applied, for the purposes of reg 7.7A.16B(1)(c).

209 It follows that reg 7.7A.16B applied, as the circumstances prescribed therein were engaged on the facts for the reasons set out at [198] to [208] above with respect to all of the clients of YY and ZZ other than the six extant SMSF clients (see [203] above). As noted at [203] above, the evidence establishes that five of the six extant SMSF clients were clients of Adviser ZZ; and the remainder was a client of Adviser XX. As a result, the answer to the second question, as it applied to Adviser YY and ZZ, is *"yes"* for all clients, other than the five extant SMSF clients who were clients of Adviser ZZ, for whom the answer is *"no"*.

5.1.3 Third question – did a regulation made under s 1528(2) of the Act operate so as to make Division 4 applicable (Adviser XX)?

210 As noted [195] above, the first question was answered *"no"* with respect to Adviser XX with the result that Division 4 was *prima facie* applicable to the benefits paid to him; and it is necessary to consider whether a regulation made under s 1528(2) rendered Division 4 inapplicable. The relevant regulation was reg 7.7A.16C, however for the reasons set out at [204] to [208] above, reg 7.7A.16C was not engaged on the facts of the present case with respect to Adviser XX. It follows that the answer to the third question is *"no"*, with the consequence that Division 4 applied to the bonuses paid to Adviser XX. I note for completeness that this includes the bonus paid to him with respect to one of the six extant SMSF clients.

5.1.4 Conclusion as to the effect of s 1528 of the Act

211 For Advisers YY and ZZ, the answers to questions 1 and 2 are each *"yes"* with respect to all of their clients who did not have a pre-existing SMSF but for none of their clients (being five clients of Adviser ZZ) who had an extant SMSF. It follows that Division 4 applied to the

bonuses received by Advisers YY and ZZ with respect only to those of their clients who did not have an extant SMSF.

212 For Adviser XX, the answers to questions 1 and 3 are *"no"* and *"no"*. It follows that Division 4 also applied to the bonuses received by him.

213 The analysis which follows is thus applicable to the bonuses paid with respect to the 165 clients save for the bonuses paid to Adviser ZZ with respect to five extant SMSF clients.

5.2 Findings of fact

214 I turn now to the salient facts.

215 The employment contracts for each of the Advisers are described at [6] to [10] above.

216 Bonuses were paid to and accepted by the Advisers. The individual bonus payments were amounts between $750 and $1,500. The salary and total bonus payments made by the defendant to the Advisers during the financial years ended 30 June 2016, 2017 and 2018 are summarised in the table below:

Year ended 30 June	Adviser	Salary and Wages	Bonus	Total remuneration	Bonus as a percentage of total remuneration
2016	XX	$18,750.03	-	$18,750.03	-
2016	YY	$147,692.29	$98,000	$245,692.29	39.89
2016	ZZ	$147,692.28	$81,750	$229,442.28	35.63
2017	XX	$74,134.72	$24,250	$98,384.72	24.65
2017	YY	$141,346.14	**$94,500**	$235,846.14	40.07
2017	ZZ	$147,692.29	**$101,750**	$249,442.29	40.79
2018	XX	$78,491.61	**$30,000**	$108,491.61	27.65
2018	YY	$145,075.23	**$93,500**	$238,575.23	39.19
2018	ZZ	$145,384.59	**$92,500**	$237,884.59	38.88

217 The impugned bonuses are highlighted in **bold**.

218 The defendant maintained a spreadsheet which included details of property sales where the defendant's clients (including the corporate trustees of the SMSFs) were the purchasers (**Property Sales Register**). The information recorded on the Property Sales Register included

the name of the client; details of the property; the sale price; the type of sale, including whether it was *"direct"* or via an *"SMSF"*; the date of the purchased sale; the status of the sale, including whether the sale had settled; and the details of the Adviser (being their name, *"Amount"* and *"Date Paid"*). It is clear from the Property Sales Register that the bonuses were paid regularly to the relevant Adviser after the sale of a property had settled, but not otherwise.

219 It is plain, objectively, that the payment of such bonuses – following the purchase of properties which purchases occurred by reason of the implementation of advice given by the Advisers recommending such purchases – likely created an expectation that future purchases of property upon the recommendations of the Advisers would also produce future bonus payments.

5.3 Section 963J case

220 I turn now to consider ASIC's s 963J case. Section s 963J of the Act provided:

> **963J Employer must not give employees conflicted remuneration**
>
> An employer of a financial services licensee, or a representative of a financial services licensee, must not give the licensee or representative conflicted remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of the employer.

221 Section 963J contained a prohibition. The persons the subject of the prohibition were those meeting the description: *"An employer of a financial services licensee, or a representative of a financial services licensee"*. The prohibited conduct was the giving to the licensee or representative *"conflicted remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of the employer"*. These elements are considered in turn below.

5.3.1 "An employer of a financial services licensee, or a representative of a financial services licensee …"

222 ASIC submitted that the defendant was, in the case of each Adviser, an *"employer of ... a representative of a financial services licensee"*. However, as ASIC fairly recognised, the expression *"An employer of a financial services licensee, or a representative of a financial services licensee"* contains an ambiguity. The constructional choice is between the persons subject to the prohibition being:

(1) an employer of a financial services licensee; and an *employer of a representative* of a financial services licensee (**first construction**); or

(2) an employer of a financial services licensee; and a *representative* of a financial services licensee (**second construction**).

223 Employers of representatives of financial services licensees would be subject to the prohibition on the first construction, but not on the second construction.

224 The first construction is preferable for the following reasons. *First*, the remaining text of s 963J supports the first construction. As noted at [221] above, the prohibited conduct is the giving of conflicted remuneration:

(1) *to* the *"licensee or representative"*. This suggests that the recipient of the remuneration is a different person than the person giving the remuneration and this is consistent with the first construction and not the second; and

(2) *for* work *"by the licensee or representative as an employee of the employer"*. Thus, the work undertaken by the representative is in the capacity as an employee of the employer. That employment relationship is present on the first construction but absent on the second.

225 *Secondly*, s 963J was introduced as part of the *Corporations Amendment (Future of Financial Advice Measures Act 2012* (Cth). The Explanatory Memorandum for the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) included, with respect to the proposed s 963J:

> **Treatment of benefits from employers to employees**
>
> 2.46 An employer of a licensee, or <u>of</u> a representative of a licensee, is under an obligation not to pay the employee conflicted remuneration, rather than the employee being under an obligation not to accept conflicted remuneration from the employer. This is appropriate because in the majority of cases it is the employer, rather than the employee, that sets the terms and conditions of an employment contract, as well as being in control of remuneration payments.
>
> (underline emphasis added)

226 It is clear, from the inclusion of the word *"of"* after the word *"or"* and from the heading to the quoted paragraph, that the legislative intention was consistent with the first construction.

227 On the construction which I prefer, the defendant was a person to whom s 963J applied as an employer of representatives of a financial services licensee because: (1) the defendant was a *"financial services licensee"* (see [4] above); and (2) each of the Advisers was its representative (see [5] above).

5.3.2 "representative"

228 For the reasons set out at [227] above, each of the Advisers was a representative of the defendant.

5.3.3 "…conflicted remuneration for work carried out, or to be carried out, by the licensee or representative as an employee of the employer"

229 Section 963J prohibited the defendant as the employer of the Advisers from giving those Advisers *"conflicted remuneration for work carried out, or to be carried out, by the* [Adviser] *as an employee of the employer"*. For the bonuses to have been *"conflicted remuneration"*: (1) the definition of that term in s 963A must have been satisfied; and (2) on the present facts, it must have been the case that none of ss 963B, 963C and 963D was engaged.

5.3.3.1 Section 963A

230 *"Conflicted remuneration"* was defined in s 963A of the Act as follows, prior to 1 January 2018:

> **963A Conflicted remuneration**
>
> Conflicted remuneration means any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:
>
> (a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
>
> (b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.
>
> Note: A reference in this Subdivision (including sections 963A, 963B, 963C and 963D) to giving a benefit includes a reference to causing or authorising it to be given (see section 52).

231 From 1 January 2018, the note to s 963A was amended in a manner which is presently inconsequential.

232 Each of the bonuses was a *"benefit"* (see 3.8 above). Each of the advisers was a *"representative of a financial services licensee"* (see [5] above) who provided *"financial product advice"* (see 3.3 above) to persons as *"retail clients"* (see 3.6 above).

233 Thus, the question whether the definition in s 963A of the Act was satisfied requires consideration of whether, because of the nature of the bonuses or the circumstances in which the bonuses were given, the bonuses could reasonably have been expected to influence *either*: (1) the choice of financial product recommended to clients; *or* (2) the financial product advice

given to the clients. The expression *"could reasonably be expected to influence"* is prospective in nature: *ASIC v CBA (FFC)* at [160] (O'Bryan J; Moshinsky and Jackman JJ agreeing). It posits an objective test, concerning the likelihood of the benefit affecting a future choice of financial product recommended or financial product advice given to retail clients (noting that *"retail clients"* means such clients generally and is not restricted to particular clients).

234 The *nature* of the benefit was a monetary amount payable to the Advisers. The *circumstances* in which the benefits were given included: (1) the employment contracts of the Advisers which contained cl 5.5 in the terms set out at [7] above; (2) the fact that the bonus payments were made regularly following the purchases of the properties which the Advisers recommended be purchased; (3) the quantum of the bonuses paid and that quantum as a proportion of the Advisors' total remuneration; and (4) the volume of transactions required to generate the quantum of bonuses paid.

235 The quantum of the bonuses and that quantum as a proportion of the Adviser's total remuneration are set out in the table at [216] above. As is evident from that table, the bonuses were substantial both in amount and when considered as a proportion of each Adviser's total remuneration.

236 The number of transactions undertaken to generate the total bonus payments received by each Adviser is also noteworthy. As noted at [216] above, the bonuses were typically an amount between $750 and $1,500. The total annual bonuses paid ranged from $24,250 (Adviser XX in 2017) to $101,750 (Adviser ZZ in 2017). If one assumes that the average bonus paid was $1,125 (being the average of $750 and $1,500), then the number of individual payments made ranged from approximately 22 (24,250/1,125) per annum to approximately 91 (101,750/1,125) per annum. The payment of bonuses was hardly an isolated incident of the Advisers' employment or remuneration and can reasonably be inferred to have played a significant role in both.

237 Taking all of the above matters into account I am comfortably satisfied that the availability of, and expectations to receive, the bonus payments could reasonably have been expected to have influenced both the choice of financial product recommended to, and the financial product advice given to, the defendant's clients by the Advisers. In particular:

(1) the pattern of conduct of the payment of bonuses (including the number and quantum of such payments) following the purchase of properties where such purchases had been

recommended by the Advisers could reasonably have been expected to have created an expectation on the part of the Advisers that future recommendations to purchase properties would similarly be rewarded by bonus payments; and

(2) the conclusion that there was a reasonable expectation that the existence of the bonuses could reasonably have been expected to influence the Advisers' recommendations and advice is strengthened by the evidence as to the proportion of the bonus payments to the Advisers' total income. As the table at [216] above illustrates, in many instances the bonuses comprised approximately 40 per cent of the Adviser's total remuneration. It could reasonably have been expected that the Advisers would have been influenced to favour a course which created (or maintained) a higher income for themselves.

238 As the actual operation of the bonus scheme provides a sufficient basis for the conclusion that the availability of bonus payments could reasonably have been expected to have influenced both the choice of financial product recommended to, and the financial product advice given to the defendant's clients by the Advisers, it is not necessary to consider the proper construction of cl 5.5 of the employment contracts (and in particular the extent to which there was a contractual right to receive payment in circumstances where the clause purported to provide the defendant with a discretion).

5.3.3.2 Sections 963B, 963C and 963D

239 Whilst satisfaction of s 963A was necessary it was not sufficient to establish that the bonuses were *"conflicted remuneration"*. As noted at [229] above, it is also necessary to be satisfied that none of ss 963B to 963D of the Act applied.

240 Section 963C concerned non-monetary benefits and need not be considered further. Section 963D concerned (relevantly) benefits provided to persons working for Australian ADIs (as defined in s 9 of the Act) whose access to the benefit is solely dependent on their recommendation of a *"basic banking product"* (as defined in s 961F of the Act) and was not engaged on the present facts.

241 That leaves s 963B which provided, in so far as is presently relevant, prior to 1 January 2018:

> **963B Monetary benefit given in certain circumstances not *conflicted remuneration***
>
> (1) Despite section 963A, a monetary benefit given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients is

not ***conflicted remuneration*** in the circumstances set out in any of the following paragraphs:

(a) the benefit is given to the licensee or representative solely in relation to a general insurance product;

(b) the benefit is given to the licensee or representative solely in relation to a life risk insurance product, other than:

(i) a group life policy for members of a superannuation entity (see subsection (2)); or

(ii) a life policy for a member of a default superannuation fund (see subsection (3));

(c) each of the following is satisfied:

(i) the benefit is given to the licensee or representative in relation to the issue or sale of a financial product to a person;

(ii) financial product advice in relation to the product, or products of that class, has not been given to the person as a retail client by the licensee or representative in the 12 months immediately before the benefit is given;

(d) the benefit is given to the licensee or representative by a retail client in relation to:

(i) the issue or sale of a financial product by the licensee or representative to the client; or

(ii) financial product advice given by the licensee or representative to the client;

(e) the benefit is a prescribed benefit or is given in prescribed circumstances.

(emphasis in original)

242 From 1 January 2018, s 963B provided in so far as is presently relevant:

963B Monetary benefit given in certain circumstances not *conflicted remuneration*

(1) A monetary benefit given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients is not ***conflicted remuneration*** in the circumstances set out in any of the following paragraphs:

(a) the benefit is given to the licensee or representative solely in relation to a general insurance product;

(b) each of the following is satisfied in relation to the benefit:

(i) the benefit is given to the licensee or representative in relation to a life risk insurance product or life risk

insurance products;

(ii) none of the products is a group life policy for members of a superannuation entity (see subsection (2)) or a life policy for a member of a default superannuation fund (see subsection (3));

(iii) either:

(A) the benefit ratio for the benefit is the same for the year in which the product or products are issued as it is for each year in which the product or products are continued; or

(B) the benefit ratio requirements and clawback requirements in section 963BA are satisfied in relation to the benefit;

(ba) the benefit is given to the licensee or representative in relation to consumer credit insurance;

(c) each of the following is satisfied in relation to a financial product other than a life risk insurance product:

(i) the benefit is given to the licensee or representative in relation to the issue or sale of the financial product to a person;

(ii) financial product advice in relation to the product, or products of that class, has not been given to the person as a retail client by the licensee or representative in the 12 months immediately before the benefit is given;

(d) the benefit is given to the licensee or representative by a retail client in relation to:

(i) the issue or sale of a financial product by the licensee or representative to the client; or

(ii) financial product advice given by the licensee or representative to the client;

(e) the benefit is a prescribed benefit or is given in prescribed circumstances.

Note: Under the governing rules of some regulated superannuation funds, a member may seek advice on the basis that the trustee of the fund will pay the licensee or representative for the advice and then recover the amount paid from the assets of the fund attributed to that member. In that case, the member has caused or authorised the amount to be paid to the licensee or representative and so, because of section 52 of this Act, paragraph (1)(d) would apply to that amount. This does not affect the trustee's obligations under section 62 of the *Superannuation Industry (Supervision) Act 1993* (which deals with the purposes for which a trustee may act in maintaining a regulated superannuation fund).

(2) A life risk insurance product is a ***group life policy for members of a superannuation entity*** if the product is issued to an RSE licensee of a registrable superannuation entity, or a custodian in relation to a registrable superannuation entity, for the benefit of a class of members of the entity.

(3) A life risk insurance product is a ***life policy for a member of a default superannuation fund*** if:

(a) the product is issued to an RSE licensee of a registrable superannuation entity, or a custodian in relation to a registrable superannuation entity, for the benefit of a person who is a member of the entity; and

(b) the person has not given written notice to an employer of the person that the fund is the person's chosen fund, but the employer of the person makes contributions to the fund for the benefit of the person.

Note: Superannuation guarantee surcharge may be imposed on an employer if the employer does not make contributions to a superannuation fund for the benefit of its employees. If an employee does not notify the employer of the employee's chosen fund, the employer is still able to satisfy its obligations by making contributions to certain funds (see the *Superannuation Guarantee (Administration) Act 1992*).

(3A) The ***benefit ratio*** for a benefit given to a financial services licensee, or a representative of a financial services licensee, in relation to a life risk insurance product, or life risk insurance products, for a year is the ratio between:

(a) the benefit; and

(b) the policy cost payable for the product or products, or that part of the policy cost payable for the product or products to which the benefit relates, for the year.

(3B) The ***policy cost*** for a life risk insurance product, or products, for a year is the sum of:

(a) the premiums payable for the product, or products, for that year; and

(b) any fees payable for that year to the issuer of the product or products for that issue; and

(c) any additional fees payable because the premium for the product, or products, is paid periodically rather than in a lump sum; and

(d) any other amount prescribed by the regulations for the purposes of this paragraph.

(3C) However, the ***policy cost*** for a life risk insurance product, or products, does not include any amount prescribed by the regulations for the purposes of this subsection.

(4) The regulations may prescribe circumstances in which, despite a

provision of this section, all or part of a benefit is to be treated as conflicted remuneration.

(5) This section applies despite section 963A and any regulations made for the purposes of section 963AA.

Note: The expression ***intrafund advice*** is often used to describe financial product advice given by a trustee (or an employee of, or another person acting under arrangement with, the trustee) of a regulated superannuation fund to its members, where that advice is not of a kind to which the prohibition in section 99F of the *Superannuation Industry (Supervision) Act 1993* applies. (Section 99F of that Act prohibits trustees of regulated superannuation funds from passing on the cost of providing certain kinds of financial product advice in relation to one member of the fund to another.)

(emphasis in original)

243 The chapeau of s 963B(1) at all relevant times provided that satisfaction of *any* of sub-sections 963B(1)(a) to (e) was sufficient to produce the result that a monetary benefit given to an Adviser was not conflicted remuneration.

244 Sub-sections 963B(1)(a), (b) (both prior to and subsequent to its amendment), (ba) (from its inception on 1 January 2018) and (d) self-evidently were inapplicable on the facts of the present case. However, it is necessary to consider s 963B(1)(c) and (e).

245 Sub-section 963B(1)(c) at all relevant times required that *each* of s 963B(1)(c)(i) and (ii) be satisfied.

246 Section 963B(1)(c)(i) requires consideration of the connection between the benefits (i.e. the bonuses) and the *"issue or sale of a financial product to a person"*. In the present case, the financial product was the beneficial interest in the SMSF (see 3.2 above). The connection between the payment of the bonuses and such an interest was at best remote – the bonuses were payable by reference to the purchases of property, regardless of whether such a purchase occurred in connection with an SMSF. In these circumstances, I am not satisfied that the payments of the bonuses were made *"in relation to the issue or sale of"* the beneficial interests in the SMSFs. Thus, s 963B(1)(c)(i) was not satisfied. It follows that s 963B(1)(c) was not satisfied and it is unnecessary to consider s 963B(1)(c)(ii).

247 Section 963B(1)(e) at all relevant times applied if the bonus was a *"prescribed benefit"* or it was given in *"prescribed circumstances"*.

248 Sub-divisions 1 and 2 of Division 4 of Part 7.7A of the Regulations prescribed for the purposes of s 963B(1)(e) the circumstances in which a monetary benefit (such as the impugned bonuses) given (relevantly) to a representative of a financial services licence, who provides financial product advice to persons as retail clients was *not* conflicted remuneration. However, each of these regulations was self-evidently not engaged on the present facts.

249 For the reasons set out at [240] to [248] above, none of ss 963B to 963D applied so as to exclude the bonuses from the concept of conflicted remuneration. Thus, the bonuses were conflicted remuneration by dint of the operation of s 963A of the Act.

5.3.4 "… for work carried out, or to be carried out, by the [Adviser] as an employee of the employer"

250 The next requirement of s 963J was that the conflicted remuneration was provided for work carried out, or to be carried out by the Adviser as an employee of the defendant. The word *"for"* suggests a connection between the conflicted remuneration and the work performed or to be performed by the Adviser. I am comfortably satisfied that the requisite connection exists in the present case, in circumstances where the bonuses paid to the Advisers were paid by reference to property purchases where such purchases were a central and recurring feature of the advice given as part of the work undertaken by the Advisers for the defendant. As noted at [6] above, the Advisers' responsibilities included analysis and evaluation of clients' current financial status with the aim of preparing structured SOAs and the presentation of such SOAs to clients; and the implementation of steps in accordance with authorities to proceed provided by such clients.

5.3.5 Conclusions as to the s 963J case

251 Each of the elements of s 963J has been proven. ASIC has established that the defendant contravened s 963J with respect to each of the impugned bonuses.

5.4 Section 963E case

252 I turn now to consider ASIC's s 963E case.

253 Section 963E(2) of the Act provided:

> **963E Licensee must not accept conflicted remuneration**
>
> …
>
> (2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee accepts conflicted remuneration; and

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

254 A contravention occurred only if each of s 963E(2)(a) and (b) was satisfied.

255 Section 963E(2)(a) was satisfied because each of the Advisers was a representative, but not an *"authorised representative"*, of the defendant (see [5] above); the bonuses were *"conflicted remuneration"* (see 5.3.3 above); and the Advisers accepted the bonuses (see [14] above).

256 Section 963E(2)(b) was satisfied if the defendant was *"the, or a, responsible licensee in relation to the contravention"*. As noted at [181] above, the defendant was the only financial services licensee that employed Adviser XX during the financial years ended 30 June 2018; and Advisers YY and ZZ during the financial years ended 30 June 2017 and 30 June 2018. Thus, s 963E(2)(b) was satisfied.

257 As both s 963E(2)(a) and (b) were satisfied, the defendant contravened s 963E with respect to each of the impugned bonuses.

6. CONCLUSION

258 For the reasons set out above I am satisfied that the defendant contravened: (1) s 961K of the Act with respect to each of the 12 individual or pairs of clients the subject of the Division 2 case; and (2) ss 963J and 963E of the Act with respect to the bonuses paid to and received by (a) Adviser XX in the financial year ended 30 June 2018; (b) Adviser YY for financial years ended 30 June 2017 and 30 June 2018; and (c) Adviser ZZ for financial years ended 30 June 2017 and 30 June 2018 (save to the extent that such bonuses relate to the five extant SMSF clients to whom Adviser ZZ gave advice).

259 I will direct the plaintiff to approach my Associate for the purpose of scheduling a further hearing as to the appropriate form of relief.

I certify that the preceding two hundred and fifty-nine (259) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman.

Associate: 

Dated: 20 December 2023