FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Pattenden (Liability and Penalty – Clayton) [2026] FCA 1692

File number(s):	NSD 935 of 2023
Judgment of:	**KENNETT J**
Date of judgment:	11 November 2026
Catchwords:	**CORPORATIONS** – where the Australian Securities and Investments Commission (**ASIC**) seeks declarations, the imposition of pecuniary penalties and disqualification orders against five defendants for contraventions of ss 180(1), 181(1) and 182(1) of the *Corporations Act 2001* (Cth) – where ASIC reached agreement on liability and relief with the fifth defendant – where the fifth defendant was the chief operating officer and a director of the relevant entities (**the ACBF Entities**) that operated funeral funds marketed predominantly to Indigenous communities – where the fifth defendant agreed to an increase in the insurance premiums payable by one of the ACBF Entities to Crown – whether the fifth defendant failed to consider the effect of the financial arrangements with Crown on the ACBF Entities and failed to consider or pursue alternative insurance arrangements – whether the fifth defendant failed to manage a conflict of interest and preferred the Crown's and first and second defendant's interests to the interests of the ACBF Entities in maintaining the insurance arrangements with Crown – whether the Court should make the declarations sought by ASIC
Legislation:	*Corporations Act 2001* (Cth) ss 180(1), 181(1), 182(1), 206C(1)(a)(i), 206E(1)(a)(ii), 1317E(1), 1317G(1) *Federal Court Rules 2011* (Cth) r 40.02
Cases cited:	*Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; 284 FCR 24
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations

Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	24
Date of hearing:	28 April 2026
Counsel for the Plaintiff:	D McLure SC with C Conde and J Fumberger
Solicitor for the Plaintiff:	Australian Government Solicitor
Counsel for the Fifth Defendant:	The Fifth Defendant appeared in person

ORDERS

NSD 935 of 2023

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**GEOFFREY CLAYTON** Fifth Defendant

ORDER MADE BY: **KENNETT J**

DATE OF ORDER: **11 NOVEMBER 2026**

THE COURT ORDERS THAT:

1. Pursuant to s 1317G(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), within 30 days of this order, the fifth defendant pay to the Commonwealth a pecuniary penalty of $20,000 for contraventions by the fifth defendant of ss 180(1), 181(1) and 182(1) of the Corporations Act relating to Aboriginal Community Benefit Fund No 2 Pty Ltd (**ACBF 2**) ACBF Funeral Plans Pty Ltd (**ACBF Plans**) and Community Funeral Plans Pty Ltd (**ACBF Community**).
2. Pursuant to s 206C(1)(a)(i) and/or s 206E(1)(a)(ii) of the Corporations Act the fifth defendant is disqualified from managing corporations for a period of five years from the date of this order.
3. The fifth defendant pay a contribution of $2,000 to the plaintiff's costs of and incidental to the proceeding.

THE COURT DECLARES THAT:

4. Under s 1317E(1) of the Corporations Act that, in his capacity as director and officer of ACBF 2, between 5 October 2017 and 30 November 2018, the fifth defendant:
   (a) failed to consider properly or at all the effect of the Crown Insurance Services Limited (**Crown**) arrangements on the financial position of ACBF 2;

(b) failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF 2 and its fund members;

(c) failed to consider properly or at all whether there were alternative options available to ACBF 2 that would have been in the best interests of ACBF 2 and its fund members;

(d) failed to pursue properly or at all any alternative options available to ACBF 2;

(e) preferred the first defendant's, the second defendant's and Crown's financial interests in causing ACBF 2 to maintain its Crown arrangements;

(f) preferred the first defendant's, the second defendant's and Crown's financial interests in causing or allowing ACBF 2 to accept or agree to pay the increased premium, payment of which occurred on 13 occasions between 5 October 2017 and 30 November 2018; and

(g) failed to ensure properly or at all that ACBF 2, as trustee for the funeral fund operated by it (**Fund 2**), took all necessary and reasonable steps to protect the Fund (contrary to cl 13.9 of the Fund 2's trust deed),

and by reason of the above:

(h) failed to discharge his duties to ACBF 2 with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF 2's circumstances, and occupied the offices held by the fifth defendant, and had the same responsibilities within the corporation; and

(i) as a result, breached s 180(1) of the Corporations Act.

5. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF 2, between 5 October 2017 and 30 November 2018:

(a) the fifth defendant:

(i) caused ACBF 2 to maintain the arrangements with Crown without taking any or all necessary steps to consider and pursue the alternative options available to ACBF 2;

(ii) caused ACBF 2 to pay an increase in premium of 100% without taking any or all necessary steps to consider and pursue the alternative options available to ACBF 2;

(iii) failed to take all necessary steps to manage the conflict of interest that arose between the first defendant's and the second defendant's duties to

ACBF 2 and the first defendant's and the second defendant's interest in Crown;

(iv) used his position as director or officer of ACBF 2 to:

A. obtain an advantage for the first defendant, the second defendant and Crown; and

B. cause a detriment to ACBF 2.

(b) the fifth defendant's conduct referred to in 5(a) above:

(i) was not in good faith in the best interests of ACBF 2;

(ii) was done for the improper purpose of the fifth defendant gaining an advantage for the first defendant, the second defendant and Crown; and

(iii) resulted in the fifth defendant:

A. gaining an advantage for the first defendant, the second defendant and Crown; and

B. causing detriment to ACBF 2.

(c) by reason of the circumstances in 5(a) and (b) above, the fifth defendant:

(i) failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF 2 and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

(ii) used his position contrary to and in contravention of s 182(1) of the Corporations Act.

6. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF Plans between 5 October 2017 and 30 November 2018, the fifth defendant:

(a) failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF Plans;

(b) failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF Plans and its fund members;

(c) failed to consider properly or at all whether there were alternative options available to ACBF Plans that would have been in the best interests of ACBF Plans and its fund members;

(d) failed to pursue properly or at all any of the alternative options available to ACBF Plans;

(e) preferred the first defendant's, the second defendant's and Crown's financial interests in causing ACBF Plans to maintain its Crown arrangements,

and by reason of the above:

(f) failed to discharge his duties to ACBF Plans with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF Plans' circumstances, and occupied the offices held by the fifth defendant and had the same responsibilities within the corporation; and

(g) as a result, breached s 180(1) of the Corporations Act.

7. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF Plans, between 5 October 2017 and 30 November 2018:

(a) the fifth defendant:

(i) caused ACBF Plans to maintain the arrangements with Crown without taking any or all of the necessary steps to consider and pursue the alternative options available to ACBF Plans;

(ii) failed to take all necessary steps to manage the conflict of interest that arose between the first defendant's and the second defendant's duties to ACBF Plans and the first defendant's and the second defendant's interest in Crown;

(iii) used his position as a director or officer of ACBF Plans to:

A. obtain an advantage for the first defendant, the second defendant and Crown; and

B. cause a detriment to ACBF Plans,

(b) the fifth defendant's conduct referred to in 7(a) above:

(i) was not in good faith in the best interests of ACBF Plans;

(ii) was done for the improper purpose of gaining an advantage for the first defendant, the second defendant and Crown; and

(iii) resulted in the fifth defendant:

A. gaining an advantage for the first defendant, the second defendant and Crown; and

B. causing detriment to ACBF Plans,

(c) by reason of the circumstances in 7(a) and (b) above, the fifth defendant:

(i) failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF Plans and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

(ii) used his position contrary to and in contravention of s 182(1) of the Corporations Act.

8. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF Community between 5 October 2017 and 30 November 2018, the fifth defendant:

(a) failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF Community;

(b) failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF Community and its fund members;

(c) failed to consider properly or at all whether there were alternative options available to ACBF Community that would have been in the best interests of ACBF Community and its fund members;

(d) failed to pursue properly or at all any of the alternative options available to ACBF Community;

(e) preferred the first defendant's, the second defendant's and Crown's financial interests in causing ACBF Community to maintain its Crown arrangements,

and by reason of the above:

(f) failed to discharge his duties to ACBF Community with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF Community's circumstances, and occupied the offices held by the Fifth Defendant and had the same responsibilities within the corporation; and

(g) as a result, breached s 180(1) of the Corporations Act.

9. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF Community, between 5 October 2017 and 30 November 2018:

(a) the fifth defendant:

(i) caused ACBF Community to maintain the arrangements with Crown without taking any or all of the necessary steps to consider and pursue the alternative options available to ACBF Community;

(ii) failed to take all necessary steps to manage the conflict of interest that arose between the first defendant's and the second defendant's duties to ACBF Community and the first defendant's and the second defendant's interest in Crown;

(iii) used his position as a director or officer of ACBF Community to:

A. obtain an advantage for the first defendant, the second defendant and Crown; and

B. cause a detriment to ACBF Community,

(b) the fifth defendant's conduct referred to in 9(a) above:

(i) was not in good faith in the best interests of ACBF Community;

(ii) was done for the improper purpose of gaining an advantage for the first defendant, the second defendant and Crown; and

(iii) resulted in the fifth defendant:

A. gaining an advantage for the first defendant, the second defendant and Crown; and

B. causing detriment to ACBF Community,

(c) by reason of the circumstances in 9(a) and (b) above, the fifth defendant:

(i) failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF Community and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

(ii) used his position contrary to and in contravention of s 182(1) of the Corporations Act.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.
This order has been amended in accordance with Rule 39.05(h) of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KENNETT J

Introduction

1 By its originating process filed on 30 August 2023 the plaintiff (**ASIC**) seeks declarations, the imposition of pecuniary penalties, and disqualification orders under (respectively) s 1317E(1), s 1317G(1) and s 206C(1)(a)(i) and/or s 206E(1)(a)(ii) of the *Corporations Act 2001* (Cth) (**the Corporations Act**) against each of the five defendants. These remedies are sought for contraventions of ss 180(1), 181(1) and 182(1) of the Corporations Act.

2 ASIC reached agreements on liability and relief with the first defendant (**Mr Pattenden**), the second defendant (**Mr Law**), the third defendant (**Mr Wilson**) and the fifth defendant (**Mr Clayton**). No agreement was reached between ASIC and the fourth defendant (**Mr Jones**). These reasons deal with the issues of liability and relief in respect of Mr Clayton.

3 ASIC filed detailed written submissions in relation to Mr Clayton on 2 April 2026. Mr Clayton, who was unrepresented, did not file written submissions. At a short hearing on 28 April 2026 I heard oral submissions from senior counsel for ASIC, which were not contested by Mr Clayton.

4 As with *Australian Securities and Investments Commission v Pattenden (Liability and Penalty – Pattenden)* [2026] FCA 1616 (**the Pattenden reasons**) concerning Mr Pattenden's liability and penalty, the submissions proceeded from a statement of agreed facts and admissions (**SAFA**) dated 30 January 2026. The SAFA is lengthy and does not need to be discussed in detail in order to articulate my reasons for the orders that will be made. However, where pecuniary penalties are imposed, there is virtue in members of the public being able to know in some detail what was the conduct that attracted the penalties. The full text of the SAFA is therefore annexed to these reasons.

5 I have also annexed ASIC's written submissions (**the submissions**), which summarise the factual background accurately and in some detail. Although Mr Clayton has not joined in advancing those submissions and should not be assumed to agree with everything in them, I am content to adopt that summary rather than repeat the exercise.

6 The annexure to the SAFA contains orders which the parties agree should be made. The parties jointly propose the making of the following orders:

(a) six declarations under s 1317E(1) recording, in respect of each of the companies referred to as **ACBF 2**, **ACBF Plans** and **ACBF Community** (together **the ACBF Entities**), contraventions by Mr Clayton of:

(i) s 180(1); and

(ii) ss 181(1) and 182(1)

of the Corporations Act;

(b) an order under s 1317G(1) requiring payment of a pecuniary penalty of $20,000;

(c) an order under s 206C(1)(a)(i) and/or s 206E(1)(a)(ii) disqualifying Mr Clayton from managing corporations for five years; and

(d) an order that Mr Clayton pay a contribution of $2,000 towards ASIC's costs of and incidental to the proceeding.

7 For the reasons set out below, I am satisfied that the orders proposed by the parties should be made.

Contraventions of the Corporations Act

8 The issues in the proceeding concern the period from 4 September 2017 to 30 November 2018 (**the relevant period**). During the relevant period, Mr Clayton was a director or officer of the ACBF Entities. The ACBF Entities operated funeral funds (**the Funds**) which were marketed mostly to Indigenous communities. They operated as part of a single business (**the ACBF business**).

9 Mr Clayton had commenced employment in the ACBF business on 11 September 2017. At the start of the relevant period, on 5 October 2017, he became the Chief Operating Officer of the ACBF business. He served in that role throughout (and beyond) the relevant period. Mr Clayton held appointments as a director of ACBF Community from 23 October 2017 to 20 November 2018 and as Secretary of that entity from 23 October 2017 to 4 March 2019. He admits that, for the whole of the relevant period, he made or participated in making decisions that affected the whole or a substantial part of the business of the ACBF Entities as an officer (as defined in s 9(1) of the Corporations Act) of each of those entities.

10 Each of the ACBF Entities was required by its trust deed or plan rules to insure the lives of members. Each maintained an insurance policy with Crown Insurance Services Limited (**Crown**). Under those policies Crown was entitled to change the rates at which premiums were

calculated on three months' written notice. Mr Pattenden and Mr Law were also the ultimate owners of the shares in Crown.

11 On 4 September 2017, Crown doubled the monthly premiums payable by ACBF 2's fund (**Fund 2**). This was a decision taken by Mr Pattenden and formally communicated to ACBF 2 by a letter from Mr Law to Mr Wilson.

12 The premium increase had a significant negative impact on ACBF 2 and highlighted the fact that ACBF Community and ACBF Plans were exposed to the potential for similar increases. There were various steps that the directors of the ACBF Entities could have considered taking in order to protect the funds that they operated and their members against increases in the insurance premiums payable to Crown. No such steps were considered within the relevant period.

13 Mr Clayton admits (in terms set out in more detail in the SAFA) that, during the relevant period, in contravention of s 180(1) of the Corporations Act:

(a) he failed to consider the effect of the Crown insurance policies on the financial position of the ACBF Entities, to consider whether the Crown policies were in the best interests of members of the funds that those entities operated and to consider or pursue alternatives to the insurance arrangements with Crown (including whether to renegotiate or cancel the policy and find a new insurer, or wind up the funds); and

(b) he preferred Crown's, Mr Pattenden's and Mr Law's interests in causing the ACBF Entities to maintain the Crown policies and causing or allowing ACBF 2 to accept or agree to pay the increased premium and failed to ensure that ACBF 2, as trustee of Fund 2, took all necessary and reasonable steps to protect the Fund contrary to the trust deed.

14 Mr Clayton also admits that, during the relevant period, in contravention of ss 181(1) and 182(1) of the Corporations Act, he failed to take all necessary steps to manage the conflict of interest that arose between Mr Pattenden and Mr Law's duties to the ACBF Entities and their interest in Crown, used his position as an officer of ACBF 2 to obtain an advantage for Crown (and ultimately Mr Pattenden and Mr Law), and caused detriment to ACBF 2.

15 These contraventions are clearly established on the facts set out in the SAFA, for the reasons explained in the submissions.

Declarations

16 As explained in the Pattenden reasons, ss 180(1), 181(1) and 182(1) are defined as "civil penalty provisions" by s 1317E(3) of the Corporations Act and s 1317E(1) requires the Court to make a declaration of contravention if it is satisfied that a person has contravened a civil penalty provision. In the light of my acceptance that Mr Clayton contravened ss 180(1), 181(1) and 182(1) in the ways described in the SAFA and the submissions, declarations will be made in the form proposed by the parties.

Disqualification orders

17 The provisions of the Corporations Act empowering the Court to make disqualification orders, and the approach of the Court to such orders, are discussed in the Pattenden Reasons at [16] to [19]. That discussion does not need to be repeated here but forms part of the basis for the conclusions expressed below.

18 The parties jointly propose an order disqualifying Mr Clayton from managing corporations for a period of five years. For the reasons set out in the submissions at [144] to [164], I am satisfied that such an order is appropriate. In particular:

(a) Mr Clayton held a senior position in the ACBF business in which he oversaw the financial affairs of the ACBF Entities and processed the premium payments and claims sent to Crown. He was aware of the financial position of ACBF 2. The premium increase had occurred before he commenced working in the ACBF business, but was specifically brought to his attention by an email that he received from Mr Wilson on 30 October 2018. Mr Clayton knew, or at least ought to have known, that the other ACBF Entities were exposed to similar action on the part of Crown. He was involved in communications with the Office of NSW Fair Trading that raised the question whether the arrangements with Crown were in the interests of fund members. Mr Clayton also admits that he knew or ought to have known that Crown was related to Mr Pattenden and Mr Law and they derived a financial benefit from the ACBF Entities maintaining their insurance with Crown.

(b) The premium increase had a significant negative impact on ACBF2. Had any analysis been done, it would have been found that similar increases imposed on ACBF Plans and ACBF Community would threaten their viability.

(c) ASIC accepts that Mr Clayton's conduct was not deliberate. At worst, Mr Clayton was reckless as to whether the Crown arrangements were in the interests of members of the ACBF Entities.

(d) Mr Clayton did not profit from the contraventions.

(e) A period of disqualification is necessary for general deterrence. Specific deterrence is less important because Mr Clayton is no longer a director of any of the ACBF Entities.

(f) Mr Clayton engaged constructively with ASIC. He made admissions that allowed a contested hearing to be avoided, albeit at a late stage in the proceeding, and accepted responsibility for the contraventions and through the SAFA.

(g) Mr Clayton was not involved in the decision to increase the premiums payable by ACBF 2. Nor, it should be noted, was he the main decision maker as to whether the ACBF Entities should seek to modify or terminate their arrangements with Crown. However, the fact that he was in a senior management role, with responsibility for aspects of the ACBF Entities' finances and insight into their financial positions, supports the conclusion that a substantial period of disqualification is warranted.

(h) Contraventions of three civil penalty provisions for each of the three ACBF Entities are admitted. However, ASIC submits, and I agree, that the contraventions in relation to each entity should be treated as a single course of conduct. Further, they can be traced back to a single cause.

Pecuniary penalties

19 The Pattenden reasons also discuss the approach of the Court to the assessment of civil penalties generally (at [21] to [24]) and the approach to cases where the parties present an agreed position as to penalties (at [25] to [26]). Those discussions (which are consistent with the submissions) do not need to be repeated here but form part of the basis for my conclusions as to pecuniary penalties.

20 The submissions at [144] to [164], to which I have already referred above, are also directed to the appropriateness of the proposed pecuniary penalty of $20,000. I have taken into account the factors discussed in those paragraphs, important aspects of which have been noted above in connection with the proposed disqualification.

21 Having engaged in contraventions of ss 180(1), 181(1) and 182(1) of the Corporations Act in respect of the three ACBF Entities, Mr Clayton (like Mr Pattenden) is liable to a maximum

penalty of $1.8 million. His contraventions were much less pervasive and serious than those of (for example) Mr Pattenden but were also far from trivial. It is also significant that:

(a) Mr Clayton had a role that was subordinate to Mr Pattenden and Mr Jones in the structure of the ACBF business;

(b) there is nothing in the SAFA to indicate that Mr Clayton had previous experience as a director or officer of a company;

(c) Mr Clayton did not benefit financially from the contraventions (in contrast to Mr Pattenden and Mr Law); and

(d) Mr Clayton has (as noted above) cooperated with ASIC, taken responsibility for his conduct and saved the public from the expense of a contested hearing.

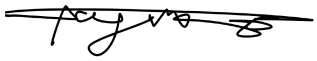
22 Taking these matters into account, I am satisfied that the proposed pecuniary penalty is proportionate to the penalties proposed in relation to Messrs Pattenden, Law and Wilson and is within the "permissible range" referred to in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; 284 FCR 24 at [127].

Costs and disposition

23 An order for costs in a lump sum is expressly authorised by r 40.02 of the *Federal Court Rules 2011* (Cth) and would, in any event, be within the Court's implied power in circumstances where the parties agree as to the amount that should be paid. There is no reason not to make the proposed costs order.

24 Orders will therefore be made in the terms proposed by the parties.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kennett.

Associate: 

Dated: 11 November 2026

ANNEXURE 1

STATEMENT OF AGREED FACTS AND ADMISSIONS OF THE FIFTH DEFENDANT

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NO NSD 935 OF 2023**

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

RONALD JOSEPH PATTENDEN
and others
Defendants

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PART I INTRODUCTION

1. This Statement of Agreed Facts and Admissions (**SAFA**) is made jointly by the plaintiff (**ASIC**) and the fifth defendant (**Mr Clayton**) for the purposes of section 191 of the *Evidence Act 1995* (Cth).

2. ASIC commenced these proceedings against the first defendant (**Mr Pattenden**), the second defendant (**Mr Law**), the third defendant (**Mr Wilson**), the fourth defendant (**Mr Jones**) and Mr Clayton on 30 August 2023. ASIC seeks declarations that the defendants contravened ss 180(1), 181(1) and 182(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), orders that the defendants pay pecuniary penalties to the Commonwealth and disqualification orders against the defendants from managing corporations.

3. By reason of the agreed facts and admissions in this document, Mr Clayton admits that, between 5 October 2017 and 30 November 2018 (the **Relevant Period**), he contravened ss 180(1), 181(1) and 182(1) of the Corporations Act in relation to each of the ACBF Entities (as defined below).

PART II PARTIES AND BACKGROUND

2.1 The parties

4. ASIC is a body corporate established by s 7 of the *Australian Securities Commission Act 1989* (Cth) and that continues by operation of s 261 of the ASIC Act. It is entitled to sue by reason of s 8 of the ASIC Act.

5. The facts relevant to the roles and responsibilities of each of the defendants are set out in Part 2.5 below.

2.2 The ACBF business

6. The proceedings relate to certain companies in the **ACBF** business, which operated to provide funeral benefits to nominated persons on the death of a fund member or nominee.

7. The ACBF group of companies relevantly included:

    7.1. The Aboriginal Community Benefit Fund Pty Limited (**ACBF 1**). ACBF 1 operated **Fund 1**;

    7.2. Aboriginal Community Benefit Fund No 2 Pty Ltd (**ACBF 2**). ACBF 2 operated **Fund 2**;

    7.3. ACBF Funeral Plans Pty Ltd (**ACBF Plans**). ACBF Plans operated **Fund 3**;

    7.4. Community Funeral Plans Pty Ltd (**ACBF Community**). ACBF Community operated **Fund 4**;

    7.5. ACBF Consultants Pty Ltd;

    7.6. ACBF Group Holdings Pty Ltd (**ACBF Group Holdings**); and

    7.7. ACBF Administration Pty Ltd (**ACBF Administration**).

8. ACBF 2, ACBF Plans and ACBF Community are referred to collectively in this SAFA as the **ACBF Entities**.

9. The ACBF business was a single business with common management across each of the entities within that business. Mr Pattenden was the founder and, at all material times, was responsible for overseeing the operation of and any significant decision relating to the ACBF group of companies and business.

10. In the period from 2010 to 30 November 2018, the ultimate holding company of the group of companies through which the ACBF business operated was Just Solutions Limited (**Just Solutions**), a company registered in Vanuatu. Just Solutions owned the majority of the shares in ACBF Group Holdings, being the Australian company which ultimately owned the ACBF group of companies.

2.3 Operation of the Funds

11. In summary, each of the ACBF Entities operated as follows. Further details are set out below.

12. ACBF 2 was trustee of Fund 2, which operated as a trust established by deed. ACBF 2 operated Fund 2 from 1993 for the purpose of providing funeral benefits to nominated persons on the death of a fund member. Fund 2 was marketed, and only available, to Indigenous Australians. Fund 2 was closed to new members from 2004.

13. ACBF Plans operated Fund 3 from 2005. Fund 3 was subject to plan rules and was registered as a contributory funeral benefit business under the *Funeral Funds Act 1979* (NSW) (**Funeral Funds Act**). ACBF Plans operated Fund 3 for the purpose of providing funeral benefits to nominated persons on the death of a fund member, and was marketed to, and until September 2017 was only available to, Indigenous Australians.

14. ACBF Community operated Fund 4 from 2005. Fund 4 was subject to plan rules and was registered as a contributory funeral benefit business under the Funeral Funds Act. ACBF Community operated Fund 4 for the purpose of providing funeral benefits to nominated persons on the death of a fund member, and was marketed to non-Indigenous Australians.

15. ACBF Administration provided the ACBF Entities with various administrative services in return for an administration fee.

2.3.1 ACBF 2 and Fund 2

16. Between at least 2002 and 30 November 2018, Fund 2 relevantly operated as follows:

    16.1. fund members were required to make fortnightly payments as contribution amounts;

    16.2. the contribution amount to be paid by fund members was set out in the application form signed by the member and automatically increased according to the fund member's age as follows:

Age	Contribution amount
0-19	$6
20-29	$8
30-39	$10
40-49	$14
50-59	$20
60 and over	$26

    16.3. the contribution amounts paid by fund members were held on trust by ACBF 2 and were to be applied in accordance with the provisions of the trust deed;

    16.4. on the death of the fund member who had made at least 2 payments, and following the making of a claim to ACBF 2, ACBF 2 would pay $6,000 to a nominated person (subject to any increase of the amount to be paid, made on application by a member after paying contribution amounts for at least one year);

    16.5. where a fund member wrote to ACBF to cancel their membership, they would receive a payment on cancellation subject to having made 26 or more payments and having not increased the amount payable by ACBF 2, in an amount equal to one third of the member's total membership payments from the 26th payment onwards;

16.6. if the fund member applied to increase the amount to be paid, they were required to agree to give up their entitlement to a cancellation benefit;

16.7. where a fund member missed payment of 4 payments in a calendar year:

16.7.1. the fund member became a non-financial member. Fund 2 was not required to make a payment on the death of a non-financial member;

16.7.2. ACBF2 would write to the non-financial member, asking that they recommence payments and pay all outstanding amounts within 1 month;

16.7.3. if the non-financial member did so, they would no longer be a non-financial member;

16.7.4. if the non-financial member failed to do so, membership was automatically cancelled and no payment was required to be made either on cancellation or on the death of the member; and

16.8. where Fund 2 was wound up and there were surplus funds following the payment of Fund 2's debts and liabilities, fund members would be entitled to be repaid an amount up to the maximum amount of their cancellation benefit.

17. Under the trust deed for Fund 2, ACBF 2 had the power to take such action as it thought fit for the adequate protection of any part or parts of the Fund.

18. The trust deed for Fund 2:

18.1. stated that it could not be amended except in accordance with the provisions of the trust deed; and

18.2. could be amended on application under s 81 of the *Trustees Act 1925* (NSW) by ACBF 2 to the Court.

19. Prior to Fund 2 closing to new members in 2004, as at 31 December 2003 Fund 2 had approximately 15,760 members (including non-financial members).

20. As at June 2017, Fund 2 had approximately 5,809 members. Each of those members had made fortnightly contributions to Fund 2 since at least 2004.

21. As set out further below, Fund 2 was required to maintain an insurance policy to underwrite the lives of its fund members. From 2002, ACBF 2 used Crown Insurance Services Limited (**Crown**) as its underwriter.

22. For the financial year 1 July 2016 to 30 June 2017, ACBF 2:

22.1. received member contributions of approximately $1.81 million;

22.2. paid administration fees to ACBF Administration of approximately $1.18 million;

22.3. paid underwriting premiums to Crown of $578,633;

22.4. received payments from Crown of:

22.4.1. $626,000 by way of claim payments; and

22.4.2. $15,584 by way of profit share payments; and

22.5. had a net operating profit of $9,794.

23. As at 30 June 2017, ACBF 2 had net assets of approximately $952,622, including $1.44 million of cash and cash equivalents. The cash held by ACBF 2 was intended to cover the value of cancellation benefits payable to members.

24. For the financial year 1 July 2017 to 30 June 2018, ACBF 2:

24.1. received member contributions of approximately $1.72 million;

24.2. paid administration fees to ACBF Administration of approximately $1.12 million;

24.3. paid underwriting premiums to Crown of $922,990;

24.4. received payments from Crown of:

24.4.1. $546,091 by way of claim payments; and

24.4.2. $61,650 by way of profit share payments; and

24.5. had a net operating loss of $198,779.

25. As at 30 June 2018, ACBF 2 had net assets of $753,843, including approximately $1.21 million of cash and cash equivalents.

26. On 24 November 2021, ACBF 2 went into administration.

27. On 2 March 2022, a liquidator was appointed to ACBF 2. On 11 April 2022, a receiver was appointed to Fund 2.

2.3.2 ACBF Plans and Fund 3, and ACBF Community and Fund 4

28. Between at least 2005 and 30 November 2018, Funds 3 and 4 operated as follows:

28.1. for Fund 3, membership was marketed to Indigenous Australians;

28.2. for Fund 4, membership was marketed to non-Indigenous Australians;

28.3. a person became a member by submitting a membership application form and their application being accepted;

28.4. fund members were required to make regular (usually fortnightly) payments as contribution amounts;

28.5. the contribution amounts to be paid by fund members were calculated in accordance with the application form signed by the member or otherwise agreed with ACBF Plans or ACBF Community and were determined by:

28.5.1. the fund member's age and chosen benefit amount; and

28.5.2. a corresponding health classification based on information provided as part of the application process;

28.6. on the death of a nominated person (including a fund member) and following the making of a claim to ACBF Plans or ACBF Community, ACBF Plans or ACBF Community would pay an amount comprising reimbursement for incurred funeral-related expenses (up to the nominated benefit amount) to or as directed by the nominated payee, calculated in accordance with the application form; and

28.7. the rules and application form did not provide members with a cancellation payment on cancellation of their membership.

29. The plan rules for Funds 3 and 4 stated that they could not be amended except in accordance with the provisions of the plan rules.

30. From 2005 to 30 November 2018, other than the requirements of the constituent documents of the ACBF Entities, neither the ACBF Entities nor the ACBF business had any system in place for notifying or managing conflicts of interest.

31. For the financial year 1 July 2016 to 30 June 2017, ACBF Plans:

31.1. received member contributions of approximately $3.82 million;

31.2. paid administration fees to ACBF Administration of approximately $2.6 million;

31.3. paid underwriting premiums to Crown of $1.18 million;

31.4. received payments from Crown of:

31.4.1. $787,000 by way of claim payments; and

31.4.2. $14,599 by way of profit share payments; and

31.5. had a loss of $76,173.

32. As at 30 June 2017, ACBF Plans had net assets of $15,294.

33. For the financial year 1 July 2017 to 30 June 2018, ACBF Plans:

33.1. received member contributions of approximately $3.63 million;

33.2. paid administration fees to ACBF Administration of approximately $2.6 million;

33.3. paid underwriting premiums to Crown of $1,508,945;

33.4. received payments from Crown of:

33.4.1. $792,000 by way of claim payments; and

33.4.2. $135,666 by way of profit share payments; and

33.5. had a profit of $95,166.

34. As at 30 June 2018, ACBF Plans had net assets of $110,460.

35. For the financial year 1 July 2016 to 30 June 2017, ACBF Community:

35.1. received member contributions of $97,286;

35.2. paid administration fees to ACBF Administration of $31,791;

35.3. paid underwriting premiums to Crown of $41,677;

35.4. received payments from Crown of:

35.4.1. $32,000 by way of claim payments; and

35.4.2. $nil by way of profit share payments; and

35.5. had a loss of $38,121.

36. As at 30 June 2017, ACBF Community had net assets of $8,957.

37. For the financial year 1 July 2017 to 30 June 2018, ACBF Community:

37.1. received member contributions of $91,252;

37.2. paid administration fees to ACBF Administration of $15,901;

37.3. paid underwriting premiums to Crown of $37,705;

37.4. received payments from Crown of:

37.4.1. $28,000 by way of claim payments; and

37.4.2. $4,465 by way of profit share payments; and

37.5. had a loss of $176.

38. As at 30 June 2018, ACBF Community had net assets of $8,781.

39. As at 30 June 2017:

39.1. Fund 3 had 13,487 members; and

39.2. Fund 4 had 308 members.

40. On 11 March 2022, ACBF Plans and ACBF Community entered liquidation.

2.3.3 ACBF Administration

41. ACBF Administration provided various administration services to each of the ACBF Entities and Funds 2, 3 and 4 in return for a fee.

42. The fees charged by ACBF Administration were not based on the cost to ACBF Administration to provide those services to each of the ACBF Entities.

43. For Fund 2, the fees payable to ACBF Administration were calculated as follows:

43.1. an annual fee, totalling $300,000 (excluding GST);

43.2. a weekly member fee of $2.80 per member (excluding GST).

44. For financial years 2015 to 2018, the administration fees paid by ACBF 2 to ACBF Administration were as follows:

44.1. for financial year 2015: $1,219,615;

44.2. for financial year 2016: $1,223,500;

44.3. for financial year 2017: $1,184,765; and

44.4. for financial year 2018: $1,118,603.

45. For Fund 3, the fees payable to ACBF Administration were calculated as follows:

45.1. an annual fee, totalling $100,000 (excluding GST); and

45.2. during the Relevant Period, a weekly member fee of $ 2.80 per member (excluding GST). Each year, the actuary for Fund 3 provided an actuarial report including assumptions about the maximum weekly member fee payable by Fund 3 to ACBF Administration (which the actuary noted would be 'negotiated' between the Fund 3 and ACBF Administration).

46. For financial years 2015 to 2018, the administration fees paid by ACBF Plans to ACBF Administration were as follows:

46.1. for financial year 2015: $2,663,870;

46.2. for financial year 2016: $2,825,929;

46.3. for financial year 2017: $2,609,746; and

46.4. for financial year 2018: $2,037,899.

47. For Fund 4, the fees payable to ACBF Administration were calculated as follows:

    47.1. an annual fee, totalling $10,000 (excluding GST);

    47.2. during the Relevant Period, a weekly member fee of $0.90 per member (excluding GST). Each year, the actuary for Fund 4 provided an actuarial report including assumptions about the maximum weekly member fee payable by Fund 4 to ACBF Administration (which the actuary noted would be 'negotiated' between the Fund 4 and ACBF Administration).

48. For financial years 2015 to 2018, the administration fees paid by ACBF Community to ACBF Administration were as follows:

    48.1. for financial year 2015: $35,937;

    48.2. for financial year 2016: $36,816;

    48.3. for financial year 2017: $31,791; and

    48.4. for financial year 2018: $15,901.

49. ACBF Administration paid dividends each year from its net profits and retained profits to ACBF Group Holdings. For the financial years from 2015 to 2018, the revenue, expenses, profits and dividends paid by ACBF Administration were as follows:

Financial year	Administration fee revenue	Total expenses	Profit	Dividends paid
FY2015	$4,240,799	$1,088,998	$3,151,801	$2,270,000
FY2016	$4,401,586	$1,286,665	$3,114,921	$2,170,000
FY2017	$4,127,546	$1,834,896	$2,292,650	$2,110,000
FY2018	$3,592,104	$3,132,687	$459,417	$410,000

2.3.4 ACBF Group Holdings

50. ACBF Group Holdings was the ultimate holding company of ACBF 1, the ACBF Entities and ACBF Administration. As set out in further detail below, from 2010 ACBF Group Holdings was owned by Just Solutions.

51. ACBF Group Holdings:

    51.1. earned revenue from the receipt of dividends from ACBF Administration;

    51.2. had nominal expenses; and

    51.3. paid dividends to Just Solutions which, for financial years 2015 to 2018, matched the value of the dividends paid by ACBF Administration to ACBF Group Holdings, being:

        51.3.1. Financial year 2015: $2,270,000;

51.3.2. Financial year 2016: $2,170,000;

51.3.3. Financial year 2017: $2,110,000; and

51.3.4. Financial year 2018: $410,000.

2.4 Crown arrangements

52. To operate the Funds, each ACBF Entity was required by the trust deed or plan rules (as applicable) to maintain an insurance policy that underwrote the lives of its fund members. Between 2002 and at least 30 November 2018, ACBF 2, ACBF Plans and ACBF Community chose to satisfy the requirement to maintain an insurance policy by insuring with Crown.

53. Crown:

53.1. was registered in Vanuatu by Mr Pattenden in 2002;

53.2. provided insurance services to the ACBF Entities from 2002;

53.3. between 2002 and 30 November 2018, operated its business from Vanuatu; and

53.4. between 2002 and 30 November 2018, was not subject to prudential or other regulatory requirements in Australia.

54. Between 2002 and 15 February 2022, the ACBF Entities were the only entities insured by Crown.

55. Under the terms of the policies with Crown:

55.1. the ACBF Entities were required to pay premiums to Crown (cl 9.1);

55.2. on the death of a fund member or other nominee (as relevant), Crown was required to pay the relevant ACBF Entity the relevant sum insured (cl 8.2);

55.3. Crown had the power to vary the premium by giving the ACBF Entity three months' written notice (cl 9.5.1 for ACBF 2 and cl 9.5 for ACBF Plans and ACBF Community);

55.4. where an ACBF Entity failed to pay the required premium 14 days after the due date, Crown could give three months' notice of termination and the policy would lapse and cover would cease (cl 9.6 for ACBF 2 and cl 9.9 for ACBF Plans and ACBF Community);

55.5. the policies were renewable annually at the expiry of the policy year, being the 12 months between annual review dates;

55.6. there was no obligation on Crown to renew the policies at the annual review date;

55.7. Crown and the ACBF Entities had a profit-sharing arrangement in accordance with a self-participation formula; and

55.8. Crown was not required to provide services to the ACBF Entities other than the payment of claims by fund members.

56. Crown's premiums for Fund 2 were structured as "level premiums". Level premiums did not vary by age, unlike the premiums charged by Funds 2, 3 and 4 which increased as members aged.

57. A consequence of an insurer charging level premiums is that the financial burden on the insurer increases as members age, particularly for a closed fund such as Fund 2. Typically, an insurer manages this by setting the premium rate so that in the early years the premiums paid by the fund are higher than the cost of expected claims, so that the insurer can retain some of the premiums to cover the increased claim costs in later years.

58. The premiums received by Crown from Fund 2 for financial years 2002 to 2016 significantly exceeded the cost of claims paid by Crown for Fund 2. In financial year 2017, Crown for the first time paid more in claims for Fund 2 than it received by way of premiums. As set out in more detail below, on 4 September 2017 Crown doubled the premiums payable by Fund 2 with effect from 1 August 2017, the result of which was that for financial year 2018 Crown again received more in premiums from Fund 2 than it paid in claims.

59. From 2003 (for Fund 2) or 2006 (for Funds 3 and 4) to at least 2018, Crown paid to each of Funds 2, 3 and 4 a 'profit share' based on a formula.

60. The table below sets out for financial years 2002 to 2018 for Fund 2 the premiums received by Crown, claims paid by Crown, profit share paid by Crown and the net profit or loss of Crown.

Financial year	Premiums received from Fund 2	Claims paid to Fund 2	Profit share paid to Fund 2	Net of premiums less claims and profit share relating to Fund 2
FY2002	86,309	0	0	86,309
FY2003	1,208,338	489,000	153,548	565,790
FY2004	1,388,420	362,500	387,201	638,719
FY2005	1,388,175	457,000	243,239	687,936
FY2006	1,309,569	375,000	283,680	650,889
FY2007	1,223,137	444,000	221,244	557,893
FY2008	1,123,329	379,000	257,288	487,041
FY2009	1,046,937	421,000	188,374	437,563
FY2010	961,646	557,000	87,623	317,023
FY2011	900,132	456,500	108,006	335,626

Financial year	Premiums received from Fund 2	Claims paid to Fund 2	Profit share paid to Fund 2	Net of premiums less claims and profit share relating to Fund 2
FY2012	843,112	542,000	79,441	221,671
FY2013	793,366	626,500	46,460	120,406
FY2014	763,344	568,500	30,424	164,420
FY2015	728,767	465,000	67,782	195,985
FY2016	693,115	468,000	18,462	206,653
FY2017	578,633	626,000	15,584	-62,951
FY2018	922,990	546,091	61,650	315,249
FY2019 to Nov	385,818	272,938	16,810	96,070
Total	**16,345,137**	**8,056,029**	**2,266,816**	**6,022,292**

61. In total, for financial years 2002 to 30 November 2018, for Fund 2:

61.1. Crown received $16,345,137 in premiums;

61.2. Crown paid $8,056,029 in claims;

61.3. Crown paid $2,266,816 in profit share; and

61.4. Crown's net premiums received less claims and profit share was $6,022,292.

62. The table below sets out for financial years 2005 to 2018 for Fund 3 the premiums received by Crown, claims paid by Crown, profit share paid by Crown and the net profit or loss of Crown.

Financial Year	Premiums received from Fund 3	Claims paid to Fund 3	Profit share paid to Fund 3	Net of premiums less claims and profit share relating to Fund 3
FY2005	56,626	4,000	0	52,626
FY2006	987,016	216,000	187,071	583,945
FY2007	1,807,253	346,000	448,534	1,012,719
FY2008	2,038,243	490,000	751,040	797,203
FY2009	2,059,727	480,000	613,517	966,210
FY2010	1,821,138	414,000	551,810	855,328
FY2011	1,909,538	476,000	510,405	923,133
FY2012	1,864,988	406,000	581,268	877,720
FY2013	1,818,876	558,000	358,875	902,001
FY2014	1,714,895	578,000	214,659	922,236

Financial Year	Premiums received from Fund 3	Claims paid to Fund 3	Profit share paid to Fund 3	Net of premiums less claims and profit share relating to Fund 3
FY2015	1,608,332	814,870	83,317	710,145
FY2016	1,496,226	777,000	75,788	643,438
FY2017	1,179,584	787,000	14,600	377,984
FY2018	1,508,045	792,000	135,668	580,377
FY2019 to Nov	710,064	350,437	25,831	333,796
Totals	**22,580,551**	**7,489,307**	**4,552,383**	**10,538,861**

63. Between 1 July 2005 and 30 November 2018, ACBF Plans paid Crown total premiums of approximately $22.6 million, approximately $7.5 million was paid by Crown by way of fund members' claims and approximately $4.5 million was returned to ACBF Plans by way of profit-sharing payment.

64. The table below sets out for financial years 2005 to 2018 for Fund 4 the premiums received by Crown, claims paid by Crown, profit share paid by Crown and the net profit or loss of Crown.

Financial Year	Premiums received from Fund 4	Claims paid to Fund 4	Profit share paid to Fund 4	Net of premiums less claims and profit share relating to Fund 4
FY2005	1,499	0	-	1,499
FY2006	50,281	4,000	12,145	34,136
FY2007	91,523	18,000	31,827	41,696
FY2008	78,481	4,000	36,768	37,713
FY2009	72,593	18,000	27,662	26,931
FY2010	64,700	12,000	26,790	25,910
FY2011	63,840	22,000	21,009	20,831
FY2012	59,642	14,000	27,736	17,906
FY2013	57,083	18,000	21,374	17,709
FY2014	55,213	4,000	14,601	36,612
FY2015	52,727	34,000	9,604	9,123
FY2016	48,968	37,000	8,499	3,469
FY2017	41,677	32,000	-	9,677
FY2018	37,705	28,000	4,465	5,240
FY2019 to Nov	12,023	20,000	1,060	- 9,037
Totals	**787,955**	**265,000**	**243,540**	**279,415**

65. Between 1 July 2005 and 30 November 2018, ACBF Community paid Crown total premiums of approximately $788,000, approximately $265,000 was paid by Crown by way of fund members' claims and approximately $240,000 was returned to ACBF Community by way of profit-sharing payment.

2.5 Mr Clayton's role

66. Mr Clayton commenced employment with the ACBF business on 11 September 2017.

67. Mr Clayton, was:

    67.1. appointed a director of ACBF Community between 23 October 2017 until 20 November 2018;

    67.2. appointed a secretary of ACBF Community between 23 October 2017 until 4 March 2019; and

    67.3. the Chief Operating Officer (**COO**) of the ACBF business from 5 October 2017 until June 2019.

68. By reason of his positions as director and secretary of ACBF Community and the COO of the ACBF business described above, Mr Clayton also:

    68.1. acted in the position of a director, within the meaning of s 9(1) of the Corporations Act, of:

        68.1.1. ACBF 2 and ACBF Plans between 5 October 2017 and relevantly 30 November 2018; and

        68.1.2. ACBF Community between 5 October 2017 and 23 October 2017, and 20 November 2018 to 30 November 2018; and

    68.2. between 5 October 2017 and 30 November 2018, made or participated in making decisions that affected the whole or a substantial part of the business of the ACBF Entities as an officer, within the meaning of s 9(1) of the Corporations Act, of each ACBF Entity.

69. Mr Clayton approved accounts receivable, dealt with the accountant and auditor, processed the premium payments and claims for Crown.

2.5.1 Other defendants

Mr Pattenden

70. Mr Pattenden was:

    70.1. a director of ACBF 2 during the Relevant Period and also between:

        70.1.1. 29 January 1992 and 18 October 2002;

70.1.2. 29 November 2007 and 7 January 2008; and

70.1.3. 19 May 2010 and 30 November 2018;

70.2. a director of ACBF Plans during the Relevant Period and also between:

70.2.1. 10 December 1997 and 23 July 2007;

70.2.2. 29 November 2007 and 7 January 2008; and

70.2.3. 5 March 2014 and 30 November 2018;

70.3. a director of ACBF Community during the Relevant Period and also between:

70.3.1. 23 May 1996 and 23 July 2007;

70.3.2. 29 November 2007 and 7 January 2008; and

70.3.3. 5 March 2014 and 30 November 2018;

70.4. from at least April 2002 until 30 November 2018, responsible for overseeing the operation of and any significant decision relating to:

70.4.1. the ACBF business; and

70.4.2. the ACBF Entities,

and acted in the role of a chief executive officer or managing director of the ACBF business and the ACBF Entities during that time;

70.5. the founder and, at all material times, a director and, indirectly, the majority shareholder of Crown; and

70.6. indirectly, the majority shareholder of Just Solutions through Mr Pattenden's company Bu Teck Management Ltd (**Bu Teck**). Mr Pattenden was the sole shareholder of Bu Teck from October 2013.

71. On 30 November 2018, Just Solutions and ACBF Consultants Pty Ltd sold their shares in ACBF Group Holdings to Elah Valley Pty Ltd (**Elah Valley**). Mr Jones and Mr Clayton were the only directors and acquired ownership interests in ACBF Group Holdings through Elah Valley. As part of the sale agreement for ACBF Group Holdings, Elah Valley was bound to ensure that the ACBF Entities continued to insure with Crown.

Mr Law

72. Mr Law was:

72.1. a director of the ACBF Entities between 18 May 2017 and 30 November 2018;

72.2. a director of Crown from 2008 until at least 30 November 2018;

72.3. the sole shareholder of Asian Markets Limited;

72.4. indirectly, the minority shareholder of Just Solutions through Mr Law's company Asian Markets Limited during, at least, the Relevant Period;

72.5. a beneficial owner of shares in Crown from:

72.5.1. January 2008, directly; and

72.5.2. 2010 and throughout the Relevant Period through his shareholding in Asian Markets Limited.

Mr Wilson

73. Mr Wilson was:

73.1. a director of ACBF 2 and ACBF Plans between 18 November 2014 and 19 December 2017;

73.2. a secretary of ACBF 2 and ACBF Plans between 18 May 2017 and 19 December 2017;

73.3. a director of ACBF Community between 18 November 2014 and 23 October 2017; and

73.4. a secretary of ACBF Community between 18 May 2017 and 23 October 2017.

74. Mr Wilson was employed as the company accountant and financial controller for the ACBF business (and ACBF Entities) from 6 March 2014 and November 2015 respectively.

75. Mr Wilson formally ceased employment with the ACBF business (and ACBF Entities) on 7 February 2018 however he had stopped performing the duties of his role in around October or November 2017.

76. Throughout his employment with the ACBF business, Mr Wilson:

76.1. transferred dividends to Just Solutions from ACBF Group Holdings, and liaised with Mr Pattenden about the transfer of those dividends;

76.2. liaised with the actuary about actuary reports prepared for the ACBF Entities, which contained a statement that "[a]t the valuation date all Plan liabilities to pay funeral benefits have been insured with Crown Insurance Services, which is a Vanuatu company with the same majority ownership as the ACBF Group";

76.3. provided Mr Pattenden by email each month the figures relevant to the claims and premiums paid by each ACBF Entity to Crown; and

76.4. was responsible for causing the financial statements of the ACBF Entities to be prepared and liaising with the auditors in this respect, and dealt with the financial statements of the ACBF Entities ended 30 June 2016.

Mr Jones

77. Mr Jones was:

77.1. a director and secretary of ACBF 2 from 18 December 2017 until 29 January 2021;

77.2. a director and secretary of ACBF Plans from in or around 18 December 2017 until 29 January 2021;

77.3. a director of ACBF Community from 23 October 2017 until 29 January 2021; and

77.4. the Chief Executive Officer (**CEO**) of the ACBF business between 5 October 2017 and 30 November 2018.

78. During the Relevant Period, Mr Clayton:

78.1. acted in accordance with Mr Pattenden's instructions in relation to ACBF 2, ACBF Plans and ACBF Community; and

78.2. deferred to Mr Pattenden for overseeing the operation of and any significant decision in relation to ACBF 2, ACBF Plans and ACBF Community.

PART III ADMISSIONS ABOUT THE DOUBLING OF PREMIUMS FOR ACBF 2

3.1 Premium increase for ACBF 2

79. At 1:57pm on 4 September 2017, Mr Law sent a letter to Mr Wilson copied to Mr Pattenden in the terms described below.

4th September 2017

Michael Wilson

Financial Controller/Director

ACBF Group of Companies

Suite T216

Level 2

The Strand

72-80 Marine Parade

Coolangatta, QLD, 4225

Dear Michael

Increase in premiums - Fund 2

In regards to Fund 2 we request that you increase the premiums by 100% to payers and nominees effective from 1st August 2017.

This decision is being made due to payer higher risk factors.

Jonathan Law

Director

Kind regards

Crown Insurance Services Limited

80. The premium paid by ACBF 2 to Crown was increased by 100% prior to 5 October 2017, being the date:

80.1. of Mr Clayton's appointment as COO of the ACBF business; and

80.2. from which Mr Clayton acted in the role of director of ACBF 2.

81. On 30 October 2017, Mr Clayton received an email from Mr Wilson with a copy of a Crown increase in premiums letter received from Jonathan Law on 4 September 2017, referred to at paragraph 79.

82. Given that from 5 October 2017 Mr Clayton was the COO of the ACBF business and acted in the role as director of ACBF 2, Mr Clayton ought to have reviewed and been familiar with the FY2017 accounts to identify the increased premiums paid by ACBF 2.

83. Each month, Mr Pattenden was sent emails by Mr Clayton which were generally copied to Mr Jones, from December 2017 for November 2017, to the end of the Relevant Period, attaching spreadsheets for each of Funds 2, 3 and 4 setting out details of:

83.1. premium payments made to Crown by the relevant Fund;

83.2. claims received by the relevant Fund, and the total claims payable by Crown to the Fund; and

83.3. the amount of profit share payable by Crown to the relevant Fund.

84. In light of paragraphs 81 to 83, Mr Clayton knew or ought to have known of the increased premium paid by ACBF 2 to Crown.

3.2 Effect of the premium increase and Crown arrangements on ACBF 2

85. Between 5 October 2017 and 30 November 2018, the premiums paid by ACBF 2 to Crown, the claims paid by Crown to ACBF 2, and profit share paid by Crown to ACBF 2 were as follows:

Payment date	Month for which payment relates	Premiums paid by ACBF2 to Crown	Claims paid by Crown to ACBF2	Profit share paid by Crown to ACBF2	Overall amount paid to Crown
5-Oct-17	Sep-17	$79,918.00	$36,000.00	$-	$43,918.00

1-Nov-17	Oct-17	$79,315.00	$45,000.00	$-	$34,315.00
4-Dec-17	Nov-17	$89,248.60	$66,000.00	$-	$23,248.60
3-Jan-18	Dec-17	$78,095.00	$61,000.00	$-	$17,095.00
2-Feb-18	Jan-18	$78,927.20	$31,000.00	$8,305.96	$39,621.24
2-Mar-18	Feb-18	$73,522.00	$22,636.67	$16,946.76	$33,938.57
4-Apr-18	Mar-18	$81,608.60	$47,990.66	$-	$33,617.94
3-May-18	Apr-18	$72,530.40	$15,000.00	$21,557.43	$35,972.97
1-Jun-18	May-18	$86,592.80	$50,363.06	$-	$36,229.74
2-Jul-18	Jun-18	$75,513.40	$26,100.87	$14,840.00	$34,572.53
3-Aug-18	Jul-18	$74,571.80	$86,661.34	$-	$(12,089.54)
3-Sep-18	Aug-18	$81,643.80	$66,000.00	$-	$15,643.80
4-Oct-18	Sep-18	$68,856.00	$31,029.22	$7,025.01	$30,801.77
5-Nov-18	Oct-18	$76,795.30	$52,771.33	$-	$24,023.97
Totals		**$1,097,137.90**	**$637,553.15**	**$68,675.16**	**$390,909.59**

86. As referred to in paragraphs 22.5 and 24.5 above, ACBF 2 went from an operating profit of $9,794 for the financial year ending 30 June 2017 to an operating loss of $198,779 for the financial year ending 30 June 2018. But for the doubling of premiums, ACBF 2 would have made an operating profit for the financial year ending 30 June 2018.

87. From 5 October 2017 and continuing until 30 November 2018:

87.1. Fund 2 was closed to new members;

87.2. ACBF 2 maintained cash reserves for the purpose of meeting its potential liability to pay cancellation benefits to fund members, which liability was not insured under the policy with Crown;

87.3. ACBF 2 was not accumulating, or attempting to accumulate, amounts from which to pay claims by fund members;

87.4. ACBF 2 did not otherwise maintain cash reserves for the purpose of paying fund members' claims and instead relied on the policy with Crown for this purpose, with such reliance arising from the fact that ACBF 2 did not have any alternative source of funds to pay member claims;

87.5. ACBF 2 could not increase its revenue from member contributions without:

87.5.1. altering the terms of the trust deed to allow it to increase member contributions, which, according to the trust deed, would have required the written consent of 75% of fund members; or

87.5.2. applying to the Court to vary the trust deed under s 81 of the *Trustees Act 1925* (NSW);

87.6. an increase in premium of 100% would have a significant negative impact on ACBF 2's financial position:

87.6.1. With the doubling of the Crown premiums during the Relevant Period, ACBF 2's projected cash position went from remaining positive indefinitely to $0 within four years.

87.6.2. In addition, if ACBF 2 had been brought to an end, it would have had amounts available to pay creditors or fund members. If ACBF 2 had been wound up, there would have been surplus funds following the payment of debts and liabilities for eligible fund members to be repaid an amount up to the maximum amount of their cancellation benefit. Similarly, if all fund members of ACBF 2 who were eligible for payment of a cancellation benefit validly cancelled their memberships, there would have been funds available for distribution both to those members and remaining members.

87.7. Fund 2 had options available to it in lieu of continuing the Crown arrangements, namely:

87.7.1. paying the Crown higher premium rates but with mitigation by attempting to increase contribution rates or negotiating lower administration fees; and

87.7.2. negotiating and agreeing alternative terms with Crown;

87.7.3. finding an alternative insurer;

87.7.4. moving to a self-insurance arrangement;

87.7.5. negotiating lower administration fees;

87.7.6. attempting to increase contribution rates; and

87.7.7. winding up.

88. If calculations were performed at the time by Mr Clayton, the result of those calculations would have been:

88.1. ACBF 2 could have withstood a 33% premium increase by Crown and remained solvent for 15 years.

88.2. ACBF 2 could have paid the Crown premium increase and remained solvent considerably longer with administration fee reductions and contribution increases.

88.3. ACBF 2 could have self-insured and remained solvent for seven years, and for considerably longer with administration fee reductions and contribution increases.

88.4. If ACBF 2 had been wound up, it would have sufficient funds to pay out:

88.4.1. all cancellation benefits, and pay a further amount (approximately $64 to $160) to all members; or

88.4.2. an amount to all members.

89. At the time of the premium increase and continuing until 30 November 2018, there was a substantial risk that:

89.1. in the circumstances described in paragraphs 87 and 88 above, the effect of the premium increase would be that ACBF 2 would become insolvent within approximately four or less years and would need to be wound up.

89.2. if ACBF 2 was wound up in insolvency, ACBF 2's policy with Crown would be terminated and the remaining members of Fund 2 would not be able to recover all or part of any cancellation benefit they were owed;

89.3. if fund members' cover was cancelled, they would be without funeral cover; and

89.4. the members of Fund 2 were never told, and therefore could not and did not know or understand, the matters referred to in subparagraphs 89.1 to 89.3 above, and had no way of knowing them unless explained to them by information provided by ACBF 2.

90. Mr Clayton ought to have known the fact described at subparagraph 89.1 above because it would have been revealed had he asked for analysis to be undertaken of the effect of the 100% premium increase on ACBF 2's financial position, which he did not do but ought to have done.

3.3 Effect of the premium increase and Crown arrangements on ACBF Plans and ACBF Community

91. At all times from 5 October 2017 and continuing until 30 November 2018, ACBF Plans and ACBF Community were vulnerable to unaffordable (in the sense described in subparagraph 91.4 below) premium increases by Crown in circumstances where:

91.1. under the policies, Crown could increase the premium payable by ACBF Plans and ACBF Community at any time by any amount;

91.2. ACBF Plans and ACBF Community depended on Crown paying claims under policies in order to meet claims by fund members, with such dependence arising from the fact that ACBF Plans and ACBF Community did not have any alternative source of funds to pay member claims;

91.3. ACBF Plans and ACBF Community were not accumulating, or attempting to accumulate, amounts from which to pay claims by fund members;

91.4. if Crown increased premiums, whether by doubling those premiums as it had done for ACBF 2 or by increasing the premiums at all, the effect of the premium increase would be, in each case, that ACBF Plans and ACBF Community would

immediately become insolvent. ACBF Plans and ACBF Community could have remained solvent indefinitely if had they self-insured;

91.5. in addition, if ACBF Plans and ACBF Community had been brought to an end, it would have had amounts available to pay creditors or fund members;

91.6. Mr Clayton ought to have known the facts described at subparagraphs 91.1 to 91.5 above because it would have been revealed had he asked for analysis to be undertaken of the relationship between Crown's premiums and ACBF Plans' and ACBF Community's financial position, which he did not do but ought to have done;

91.7. if ACBF Plans and ACBF Community were wound up in insolvency, their respective fund members' cover would be cancelled and they would be without funeral cover;

91.8. the members of Funds 3 and 4 were never told, and therefore could not and did not know or understand, the matters referred to in subparagraphs 91.1 to 91.7 above, and had no way of knowing them unless explained to them by information provided by ACBF Plans and ACBF Community; and

91.9. Funds 3 and 4 had options available to it in lieu of continuing the Crown arrangements, namely:

91.9.1. negotiating and agreeing alternative terms with Crown;

91.9.2. finding an alternative insurer;

91.9.3. moving to a self-insurance arrangement;

91.9.4. negotiating lower administration fees;

91.9.5. attempting to increase contribution rates; and

91.9.6. winding up.

3.4 Maintaining the Crown arrangements for the ACBF Entities

92. On or by 5 October 2017:

92.1. Mr Clayton was appointed COO of the ACBF business;

92.2. Mr Clayton knew or ought to have known the matters in paragraphs 87 to 91 above;

92.3. Mr Clayton knew or ought to have known that Crown was related to Mr Pattenden and Mr Law (in that it was owned and operated by them or that they were directors and/or shareholders of Crown); and

92.4. Mr Clayton knew or ought to have known that Mr Pattenden and Mr Law financially benefitted from the ACBF Entities insuring with Crown.

93. At various times between April 2018 and September 2018, Mr Jones and Mr Clayton communicated with the Office of Fair Trading New South Wales (NSW Fair Trading) about whether the Crown arrangement was in the best interests of fund members.

94. Between April 2018 and September 2018, Mr Jones kept Mr Pattenden informed of NSW Fair Trading's concerns.

95. As a result of NSW Fair Trading's concerns and the ACBF business's involvement in the Financial Services Royal Commission, from around 20 September 2018, Mr Jones and Mr Clayton gave some consideration to whether:

95.1. the ACBF business should offer a new product; and

95.2. for that new product, the ACBF business should insure with an Australian insurer rather than with Crown.

96. Despite the matters in paragraphs 93 to 95 above, at no time during the Relevant Period did Mr Clayton consider properly, or at all, changes to the insurance arrangements with Crown for Funds 2, 3 or 4.

PART IV FORMAL ADMISSIONS RELATING TO SS 180(1), 181(1), 182(1) OF THE CORPORATIONS ACT

4.1 ACBF 2

97. By 5 October 2017, and continuing until 30 November 2018, Mr Clayton:

97.1. knew or ought to have known Mr Pattenden and Mr Law were the ultimate co-owners and co-controllers of Crown, had a direct or indirect financial interest in Crown, and benefitted financially from ACBF 2 insuring with Crown;

97.2. knew or ought to have known that ACBF 2 maintained its policy with Crown at the increased premium;

97.3. ought to have known that maintaining the increased premium of 100% would have a significant negative impact on ACBF 2's financial position;

97.4. ought to have known, and from 30 October 2017 knew or ought to have known, that on 4 September 2017, Mr Pattenden, Mr Law and Mr Wilson had agreed that the premium paid by ACBF 2 to Crown would increase by 100% effective from 1 August 2017 at Mr Pattenden's direction;

97.5. knew or ought to have known that ACBF 2 paid Crown premiums in amounts that were double the amount of the premium that had previously been paid;

97.6. ought to have known that the effect of maintaining the premium increase would be that ACBF 2 would become insolvent within approximately four or less years and would need to be wound up;

97.7. ought to have known that there was a substantial risk that if ACBF 2 was wound up in insolvency, the remaining members of Fund 2:

97.7.1. would not be able to recover all or part of any cancellation benefit they were owed; and

97.7.2. would be without funeral cover;

97.8. ought to have known that the members of Fund 2 did not know or understand the matters referred to in paragraphs 97.6 and 97.7 above, and had no way of knowing them unless explained to them by information provided by ACBF 2;

97.9. ought to have known that there was a reasonable chance that if the members of Fund 2 understood the matters referred to in paragraphs 97.6 and 97.7 above, they would cancel their membership with Fund 2;

97.10. ought to have known that by causing ACBF 2 to maintain its policy with Crown at the increased premium:

97.10.1. Mr Pattenden and Mr Law (through Crown) benefitted financially from ACBF 2 continuing to pay premiums; and

97.10.2. he preferred the financial interests of Crown, Mr Pattenden and Mr Law over the financial interests of ACBF 2 and fund members.

98. A reasonable director or officer of a corporation in ACBF 2's circumstances and who occupied the office held by Mr Clayton and had the same responsibilities, and who had knowledge of the risks to ACBF 2 and its fund members referred to in paragraph 97 above, in acting with care and diligence when considering whether to continue to maintain ACBF 2's policy with Crown at the increased premium, would have taken all necessary steps to:

98.1. consider whether the Crown policy was in the interests of ACBF 2;

98.2. pursue alternatives to ACBF 2's insurance arrangements with Crown, including considering whether to:

98.2.1. renegotiate the Crown insurance policy;

98.2.2. cancel the Crown insurance policy and transition to self-insurance (and whether and how to amend the trust deed to allow for this);

98.2.3. find a cheaper external insurer;

98.2.4. increase reserves from which to pay Crown;

98.2.5. notify members of the risks to Fund 2 inherent in the arrangements with Crown; and

98.2.6. wind up the trust and pay eligible members who were entitled to it a cancellation benefit.

99. At all times from 5 October 2017 and continuing until 30 November 2018, Mr Clayton:

99.1. failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF 2;

99.2. failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF 2 and its fund members;

99.3. failed to consider properly or at all whether there were alternative options available to ACBF 2, as described in paragraph 98.2 above, that would have been in the best interests of ACBF 2 and its fund members;

99.4. failed to pursue properly or at all any of the alternative options described in paragraph 98.2 above;

99.5. preferred Mr Pattenden's, Mr Law's and Crown's financial interests in causing ACBF 2 to maintain its Crown arrangements;

99.6. preferred Mr Pattenden's, Mr Law's and Crown's financial interests in causing or allowing ACBF 2 to accept to pay the increased premium, payment of which occurred on 13 occasions between 5 October 2017 and 30 November 2018; and

99.7. failed to ensure properly or at all that ACBF 2, as trustee for Fund 2, took all necessary and reasonable steps to protect the Fund (contrary to cl 13.9 of the trust deed).

100. Mr Clayton, for each of the acts or omissions described in paragraph 99 above, between 5 October 2017 and 30 November 2018:

100.1. failed to discharge his duties to ACBF 2 with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF 2's circumstances, and occupied the offices held by Mr Clayton, and had the same responsibilities within the corporation; and

100.2. as a result, breached s 180(1) of the Corporations Act.

101. By reason of the matters described in paragraph 97 above, and Mr Clayton's positions within the ACBF business as set out in paragraph 68 above, Mr Clayton:

101.1. caused ACBF 2 to maintain the arrangements with Crown from 5 October 2017 until 30 November 2018 without taking any or all necessary steps to consider and pursue the matters in paragraph 98.2 above;

101.2. caused ACBF 2 to pay an increase in premium of 100% without taking any or all necessary steps to consider and pursue the matters in paragraph 98.2 above; and

101.3. failed to take all necessary steps to manage the conflict of interest that arose between Mr Pattenden and Mr Law's duties to ACBF 2 and Mr Pattenden and Mr Law's interest in Crown;

101.4. used his position as a director or officer of ACBF 2 to:

101.4.1. obtain an advantage for Mr Pattenden, Mr Law and Crown; and,

101.4.2. cause a detriment to ACBF 2.

102. Mr Clayton's conduct referred to in paragraph 101 above:

102.1. was not in good faith in the best interests of ACBF 2;

102.2. was done for the improper purpose of gaining an advantage for Mr Pattenden, Mr Law and Crown; and

102.3. resulted in Mr Clayton:

102.3.1. gaining an advantage for Mr Pattenden, Mr Law and Crown; and,

102.3.2. causing detriment to ACBF 2.

103. For each of the acts or omissions described in paragraphs 101 and 102 above, between 5 October 2017 and 30 November 2018, Mr Clayton:

103.1. failed to exercise his powers and discharge his duties in good faith in the best interests of any of ACBF 2 and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

103.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

104. From 5 October 2017 until 30 November 2018, the contraventions of ss 180(1), 181(1) and 182(1) of the Corporations Act by Mr Clayton, as admitted by Mr Clayton in paragraphs 100 to 103 above:

104.1. materially prejudiced the financial interests of ACBF 2 and its members;

104.2. materially prejudiced the ability of ACBF 2 to pay its creditors; and

104.3. were serious.

4.2 ACBF Plans

105. By 5 October 2017, and until 30 November 2018, Mr Clayton:

105.1. ought to have known that ACBF Plans was vulnerable to an increase in premiums by Crown in that the effect of any premium increase would be that ACBF Plans would immediately become insolvent;

105.2. ought to have known that there was a substantial risk that if ACBF Plans was wound up in insolvency, the members of ACBF Plans:

105.2.1. would have their cover cancelled; and

105.2.2. would be without funeral cover;

105.3. ought to have known that the members of Fund 3 did not know or understand the matters referred to in subparagraphs 105.1 and 105.2 above, and had no way of knowing them unless explained to them by information provided by ACBF Plans;

105.4. knew or ought to have known that ACBF Plans maintained its policy with Crown; and

105.5. ought to have known that, by ACBF Plans maintaining its policy with Crown giving rise to the vulnerability described in paragraph 105.1 above:

105.5.1. Mr Pattenden and Mr Law (through Crown) benefitted financially from ACBF Plans continuing to pay premiums; and

105.5.2. he preferred the financial interests of Crown, Mr Pattenden and Mr Law over the financial interests of ACBF Plans and fund members.

106. A reasonable director or officer of a corporation in ACBF Plans' circumstances and who occupied the office held by Mr Clayton and had the same responsibilities, and who had knowledge of the risks to ACBF Plans and its fund members referred to in paragraph 105 above, in acting with care and diligence when considering whether to continue to maintain ACBF Plans' policy with Crown, would have taken all necessary steps to:

106.1. consider whether the Crown policy was in the interests of ACBF Plans; and

106.2. pursue alternatives to ACBF Plans' insurance arrangements with Crown, including considering whether to:

106.2.1. renegotiate the Crown insurance policy;

106.2.2. cancel the Crown insurance policy and transition to self-insurance (and whether and how to amend the plan rules to allow for this);

106.2.3. find a cheaper external insurer;

106.2.4. increase reserves from which to pay Crown;

106.2.5. notify members of the risks to Fund 3 inherent in the arrangements with Crown; and

106.2.6. wind up the company and pay the remaining funds to members.

107. At all times from 5 October 2017 until 30 November 2018, Mr Clayton:

107.1. failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF Plans;

107.2. failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF Plans and its fund members;

107.3. failed to consider properly or at all whether there were alternative options available to ACBF Plans, as described in paragraph 106.2 above, that would have been in the best interests of ACBF Plans and its fund members;

107.4. failed to pursue properly or at all any of the alternative options described in paragraph 106.2 above; and

107.5. preferred Mr Pattenden, Mr Law's and Crown's financial interests in causing ACBF Plans to maintain its Crown arrangements.

108. Mr Clayton, for each of the acts or omissions described in paragraph 107 above, including when ACBF 2 paid the increased premium from 5 October 2017 until 30 November 2018 and thus presented the vulnerability for ACBF Plans described in paragraph 105.1 above:

108.1. failed to discharge his duties to ACBF Plans with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF Plans' circumstances, and occupied the offices held by Mr Clayton and had the same responsibilities within the corporation; and

108.2. as a result, breached s 180(1) of the Corporations Act.

109. By reason of the matters described in paragraph 105 above, and Mr Clayton's positions within the ACBF business as set out in paragraph 68 above, Mr Clayton:

109.1. caused ACBF Plans to maintain the arrangements with Crown from 5 October 2017 until 30 November 2018 without taking any or all of the necessary steps to consider and pursue the matters in paragraph 106.2 above;

109.2. failed to take all necessary steps to manage the conflict of interest that arose between his duties to ACBF Plans and his interest in Crown, or Mr Law's duties to ACBF Plans and Mr Law's interest in Crown; and

109.3. used his position as a director or officer of ACBF Plans to:

109.3.1. obtain an advantage for Mr Pattenden, Mr Law and Crown; and,

109.3.2. cause a detriment to ACBF Plans.

110. Mr Clayton's conduct described in paragraph 109 above:

110.1. was not in good faith in the best interests of ACBF Plans;

110.2. was done for the improper purpose of gaining an advantage for Mr Pattenden, Mr Law and Crown; and

110.3. resulted in Mr Clayton:

110.3.1. gaining an advantage for Mr Pattenden, Mr Law and Crown; and

110.3.2. causing detriment to ACBF Plans.

111. For each of the acts or omissions described in paragraphs 109 and 110 above, including when ACBF 2 paid the increased premium from 5 October 2017 until 30 November 2018 and thus presented the vulnerability for ACBF Plans described in paragraph 105.1 above, Mr Clayton:

111.1. failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF Plans and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

111.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

112. From 5 October 2017 until 30 November 2018, the contraventions of ss 180(1), 181(1) and 182(1) of the Corporations Act by Mr Clayton, as admitted by Mr Clayton in paragraphs 108 to 111 above:

112.1. materially prejudiced the financial interests of ACBF Plans and its members;

112.2. materially prejudiced the ability of ACBF Plans to pay its creditors; and

112.3. were serious.

4.3 ACBF Community

113. By 5 October 2017, and until 30 November 2018, Mr Clayton:

113.1. ought to have known that ACBF Community was vulnerable to an increase in premiums by Crown in that the effect of any premium increase would be that ACBF Community would immediately become insolvent;

113.2. ought to have known that there was a substantial risk that if ACBF Community was wound up in insolvency, the members of ACBF Community:

113.2.1. would have their cover cancelled; and

113.2.2. would be without funeral cover;

113.3. ought to have known that the members of Fund 4 did not know or understand the matters referred to in subparagraphs 113.1 and 113.2 above, and had no way of knowing them unless explained to them by information provided by ACBF Community;

113.4. knew or ought to have known that ACBF Community maintained its policy with Crown; and

113.5. ought to have known that, by ACBF Community maintaining its policy with Crown giving rise to the vulnerability described in subparagraph 113.1 above:

113.5.1. Mr Pattenden and Mr Law (through Crown) benefitted financially from ACBF Community continuing to pay premiums; and

113.5.2. he preferred the financial interests of Crown, Mr Pattenden and Mr Law over the financial interests of ACBF Community and fund members.

114. A reasonable director or officer of a corporation in ACBF Community's circumstances and who occupied the office held by Mr Clayton and had the same responsibilities, and who had knowledge of the risks to ACBF Community and its fund members referred to in paragraph 113 above, in acting with care and diligence when considering whether to continue to maintain ACBF Community's policy with Crown, would have taken all necessary steps to:

114.1. consider whether the Crown policy was in the interests of ACBF Community; and

114.2. pursue alternatives to ACBF Community's insurance arrangements with Crown, including considering whether to:

114.2.1. renegotiate the Crown insurance policy;

114.2.2. cancel the Crown insurance policy and transition to self-insurance (and whether and how to amend the plan rules to allow for this);

114.2.3. find a cheaper external insurer;

114.2.4. increase reserves from which to pay Crown;

114.2.5. notify members of the risks to Fund 4 inherent in the arrangements with Crown; and

114.2.6. wind up the company and pay the remaining funds to members.

115. At all times from 5 October 2017 until 30 November 2018, Mr Clayton:

115.1. failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF Community;

115.2. failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF Community and its fund members;

115.3. failed to consider properly or at all whether there were alternative options available to ACBF Community, as described in paragraph 114.2 above, that would have been in the best interests of ACBF Community and its fund members;

115.4. failed to pursue properly or at all any of the alternative options described in paragraph 114.2 above; and

115.5. preferred Mr Pattenden's, Mr Law's and Crown's financial interests in causing ACBF Community to maintain its Crown arrangements.

116. Mr Clayton, for each of the acts or omissions described in paragraph 115 above, including when ACBF 2 paid the increased premium from 5 October 2017 until 30 November 2018 and thus presented the vulnerability for ACBF Community described in paragraph 113.1 above:

116.1. failed to discharge his duties to ACBF Community with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF Community's circumstances, and occupied the offices held by Mr Clayton and had the same responsibilities within the corporation; and

116.2. as a result, breached s 180(1) of the Corporations Act.

117. By reason of the matters described in paragraph 113 above, and Mr Clayton's positions within the ACBF business as set out in paragraph 68 above, Mr Clayton:

117.1. caused ACBF Community to maintain the arrangements with Crown from 5 October 2017 until 30 November 2018 without taking any or all of the necessary steps to consider and pursue the matters in paragraph 114.2 above;

117.2. failed to take all necessary steps to manage the conflict of interest that arose between Mr Pattenden's duties to ACBF Community and Mr Pattenden's interest in Crown, or Mr Law's duties to ACBF Community and Mr Law's interest in Crown; and

117.3. used his position as a director or officer of ACBF Community to:

117.3.1. obtain an advantage for Mr Pattenden, Mr Law and Crown; and,

117.3.2. cause a detriment to ACBF Community.

118. Mr Clayton's conduct described in paragraph 117 above:

118.1. was not in good faith in the best interests of ACBF Community;

118.2. was done for the improper purpose of gaining an advantage for Mr Pattenden, Mr Law and Crown; and

118.3. resulted in Mr Clayton:

118.3.1. gaining an advantage for Mr Pattenden, Mr Law and Crown; and,

118.3.2. causing detriment to ACBF Community.

119. For each of the acts or omissions described in paragraphs 117 and 118 above, including when ACBF 2 paid the increased premium from 5 October 2017 until 30 November 2018 and thus presented the vulnerability for ACBF Community described in in paragraph 113.1 above, Mr Clayton:

119.1. failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF Community and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

119.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

120. From 5 October 2017 until 30 November 2018, the contraventions of ss 180(1), 181(1) and 182(1) of the Corporations Act by Mr Clayton, as admitted by Mr Clayton in paragraphs 116 to 119 above:

120.1. materially prejudiced the financial interests of ACBF Community and its members;

120.2. materially prejudiced the ability of ACBF Community to pay its creditors; and

120.3. were serious.

PART V ADMISSIONS OF OTHER FACTS

5.1 Circumstances in which the conduct took place

121. On 14 December 2018, Mr Clayton emailed lawpartnersvauatu.com, including Mr Law and Mr Pattenden, copied to Mr Jones:

> Following up on Christine Bongalon's query from Steve Adams of JKA, we have found that there has been major variances of premiums paid to Crown Insurance from Fund 2 since September 2017 to date.
>
> I confirm that this variance was only discovered following JKA's highlighting the issue. Following the receipt of this email, I instructed our accounts department to review all monthly payments from Fund 2 to Crown Insurance. This review determined that Plan Man system was altered in September 2017, and significantly changed the calculation which inadvertently has placed Fund 2 in a serious solvency situation.
>
> We cannot see why or how the system was changed and why the premiums were dramatically increased. In addition, we have investigated the Group Policy for Fund 2 and its variations and cannot find any possible reason or explanation.

> Accordingly, we have reverted to the previous calculation, and have applied it from September 2017 and to every subsequent month. We now attach our workings for your records.
>
> We can include the debt owing from Crown Insurance of $557,439 to Fund 2 balance sheet as at the 30 November 2018, as part of the settlement documentation for the purchase.

122. The issue was raised subsequently in correspondence between lawyers. No payments were made by Crown.

123. On 21 December 2018, Mr Jones emailed Adrian Edwards, lawyer for the ACBF business, copied to Mr Clayton, and instructed Mr Edwards to send a letter to Mr Pattenden requiring an explanation for the increase in the premium, noting the best interests duty that Mr Pattenden had to ACBF 2 and the members, and that the new directors had a duty to prevent ACBF 2 from trading while insolvent.

124. On 10 January 2019, Mr Matt Krog of SMH, Lawyers for Mr Pattenden and Mr Law, emailed Mr Edwards and stated that:

> 3. Our respective clients will review the premiums paid by Fund 2 to Crown from 1 August 2017 to the present day to determine whether any adjustments ought to be made. As was stated yesterday, until such a time as an agreement has been made in relation to those premiums (if any), Crown is under no obligation to repay any of the $557,439.80 paid by Fund 2.

125. On 21 February 2019, Mr Krog emailed Mr Edwards and continued to dispute that Crown is under an obligation to repay any of the $557,439.80 and stated that the doubled premium remained payable by ACBF 2 to Crown.

126. On 3 April 2019, Mr Jones emailed Mr Thomson, requesting a report on the solvency of ACBF 2 for NSW Fair Trading and to demonstrate the ability to self-insure or cover costs until alternative insurance was found. On 8 April 2019, Mr Thompson provided the requested report, copied to Mr Clayton.

127. On 17 and 22 May 2019, Mr Jones emailed Mr Edwards and Ms Corbutt (lawyers for the ACBF business), copied to Mr Clayton, seeking legal advice about whether they were legally allowed to have no underwriting for the Funds and could self-insure or switch to an alternative insurer.

5.2 The nature of the loss or damage suffered

5.2.1 ACBF 2

128. Paragraphs 87.6 and 87.7 above outline how the increase in Crown premiums by 100% for ACBF 2 had a significant negative impact on ACBF's financial position and describes alternative scenarios or possibilities that could have been pursued by Mr Clayton.

129. The above alternative scenarios or possibilities may be contrasted with what actually took place, namely, that ACBF 2 entered liquidation in March 2022, with members and creditors to receive no or negligible payments.

130. As described in paragraph 98.2 above, Mr Clayton had options available to him to pursue for ACBF 2 in lieu of continuing the Crown arrangements or varying the arrangements with Crown but did not consider or pursue any such alternative options.

5.2.2 ACBF Plans and ACBF Community

131. Paragraph 91 above outlines how at the time of the premium increase, ACBF Plans and ACBF Community were vulnerable to unaffordable premium increases by Crown and describes alternative scenarios or possibilities that could have been pursued by Mr Clayton.

132. The above alternative scenarios or possibilities are contrasted with what actually took place, namely, that ACBF Plans entered liquidation in March 2022, with members and creditors to receive no or negligible payments.

133. As described in paragraphs 106.2 and 114.2 above, Mr Clayton had options available to him to pursue for ACBF Plans and ACBF Community in lieu of continuing the Crown arrangements or varying the arrangements with Crown but did not consider or pursue any such alternative options.

5.3 Mr Clayton's financial position

134. Mr Clayton does not rely on his financial position to mitigate the penalty.

5.4 Whether previously found to have engaged in similar conduct

135. Mr Clayton has not been found to have engaged in similar conduct.

5.5 Cooperation with ASIC and contrition

136. Mr Clayton:

    136.1. participated in the mediation in good faith at which time the proceedings against him were settled;

    136.2. cooperated with ASIC to agree a detailed SAFA setting out the underlying facts and admissions going to his liability and penalty; and

    136.3. cooperated with ASIC and agreed to the declarations set out at Annexure A.

137. As a result of his willingness to settle the matter, ASIC has been spared a contested trial of an estimated 3 week duration with the consequent savings in time and cost to the public and ASIC (as it will enable it to focus on and pursue other matters).

Date:

.....
James Docherty
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Plaintiff

Date:

.....
Geoff Clayton
In person
Fifth Defendant

ANNEXURE A

SHORT MINUTE OF ORDERS

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NO NSD 935 OF 2023**

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

RONALD JOSEPH PATTENDEN
and others named in the Schedule
Defendants

THE COURT DECLARES THAT

1. Under s 1317E(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) that, in his capacity as a director and officer of Aboriginal Community Benefit Fund No 2 Pty Ltd (**ACBF 2**), between 5 October 2017 and 30 November 2018, the Fifth Defendant:

    1.1. failed to consider properly or at all the effect of the Crown Insurance Services Limited (**Crown**) arrangements on the financial position of ACBF 2;

    1.2. failed to consider properly or at all whether continuing the policies with Crown was in the best interests of ACBF 2 and the fund members;

    1.3. failed to consider properly or at all whether there were alternative options available to ACBF 2 that would have been in the best interests of ACBF 2 and its fund members;

    1.4. failed to pursue properly or at all any of the alternative options available to ACBF 2;

    1.5. preferred the First Defendant's, the Second Defendant's and Crown's financial interests in causing ACBF 2 to maintain its Crown arrangements;

    1.6. preferred the First Defendant's, the Second Defendant's and Crown's financial interests in causing or allowing ACBF 2 to accept or agree to pay the increased premium, payment of which occurred on 13 occasions between 5 October 2017 and 30 November 2018; and

    1.7. failed to ensure properly or at all that ACBF 2, as trustee for the funeral fund operated by it (**Fund 2**), took all necessary and reasonable steps to protect the Fund (contrary to cl 13.9 of Fund 2's trust deed),

    and by reason of the above:

1.8. failed to discharge his duties to ACBF 2 with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF 2's circumstances, and occupied the offices held by the Fifth Defendant, and had the same responsibilities within the corporation; and

1.9. as a result, breached s 180(1) of the Corporations Act.

2. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF 2, between 5 October 2017 and 30 November 2018:

2.1. the Fifth Defendant:

2.1.1. caused ACBF 2 to maintain the arrangements with Crown without taking any or all necessary steps to consider and pursue the alternative options available to ACBF 2;

2.1.2. caused ACBF 2 to pay an increase in premium of 100% without taking any or all necessary steps to consider and pursue the alternative options available to ACBF 2;

2.1.3. failed to take all necessary steps to manage the conflict of interest that arose between the First Defendant's and the Second Defendant's duties to ACBF 2 and the First Defendant's and the Second Defendant's interests in Crown;

2.1.4. used his position as a director or officer of ACBF 2 to:

2.1.4.1. obtain an advantage for the First Defendant, the Second Defendant and Crown; and

2.1.4.2. cause a detriment to ACBF 2.

2.2. the Fifth Defendant's conduct referred to in 2.1 above:

2.2.1. was not in good faith in the best interests of ACBF 2;

2.2.2. was done for the improper purpose of the Fifth Defendant gaining an advantage for the First Defendant, the Second Defendant and Crown; and

2.2.3. resulted in the Fifth Defendant:

2.2.3.1. gaining an advantage for the First Defendant, the Second Defendant and Crown; and

2.2.3.2. causing detriment to ACBF 2,

2.3. by reason of the circumstances in 2.1 and 2.2 above, the Fifth Defendant:

2.3.1. failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF 2 and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

2.3.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

3. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF Funeral Plans Pty Ltd (**ACBF Plans**) between 5 October 2017 and 30 November 2018, the Fifth Defendant:

3.1. failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF Plans;

3.2. failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF Plans and its fund members;

3.3. failed to consider properly or at all whether there were alternative options available to ACBF Plans that would have been in the best interests of ACBF Plans and its fund members;

3.4. failed to pursue properly or at all any of the alternative options available to ACBF Plans;

3.5. preferred the First Defendant's, the Second Defendant's and Crown's financial interests in causing ACBF Plans to maintain its Crown arrangements,

and by reason of the above:

3.6. failed to discharge his duties to ACBF Plans with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF Plans' circumstances, and occupied the offices held by the Fifth Defendant and had the same responsibilities within the corporation; and

3.7. as a result, breached s 180(1) of the Corporations Act.

4. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF Plans, between 5 October 2017 and 30 November 2018:

4.1. the Fifth Defendant:

4.1.1. caused ACBF Plans to maintain the arrangements with Crown without taking any or all of the necessary steps to consider and pursue the alternative options available to ACBF Community;

4.1.2. failed to take all necessary steps to manage the conflict of interest that arose between the First Defendant's and the Second Defendant's duties to ACBF Plans and the First Defendant's and the Second Defendant's interest in Crown;

4.1.3. used his position as a director or officer of ACBF Plans to:

4.1.3.1. obtain an advantage for the First Defendant, the Second Defendant and Crown; and

4.1.3.2. cause a detriment to ACBF Plans,

4.2. the Fifth Defendant's conduct referred to in 4.1 above:

4.2.1. was not in good faith in the best interests of ACBF Plans;

4.2.2. was done for the improper purpose of gaining an advantage for the First Defendant, the Second Defendant and Crown; and

4.2.3. resulted in the Fifth Defendant:

4.2.3.1. gaining an advantage for the First Defendant, the Second Defendant and Crown; and

4.2.3.2. causing detriment to ACBF Plans,

4.3. by reason of the circumstances in 4.1 and 4.2 above, the Fifth Defendant:

4.3.1. failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF Plans and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

4.3.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

5. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of Community Funeral Plans Pty Ltd (**ACBF Community**) between 5 October 2017 and 30 November 2018, the Fifth Defendant:

5.1. failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF Community;

5.2. failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF Community and its fund members;

5.3. failed to consider properly or at all whether there were alternative options available to ACBF Community that would have been in the best interests of ACBF Community and its fund members;

5.4. failed to pursue properly or at all any of the alternative options available to ACBF Community;

5.5. preferred the First Defendant's, the Second Defendant's and Crown's financial interests in causing ACBF Community to maintain its Crown arrangements,

and by reason of the above:

5.6. failed to discharge his duties to ACBF Community with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF Community's circumstances, and occupied the offices held by the Fifth Defendant and had the same responsibilities within the corporation; and

5.7. as a result, breached s 180(1) of the Corporations Act.

6. Under s 1317E(1) of the Corporations Act that, in his capacity as a director and officer of ACBF Community, between 5 October 2017 and 30 November 2018:

6.1. the Fifth Defendant:

6.1.1. caused ACBF Community to maintain the arrangements with Crown without taking any or all of the necessary steps to consider and pursue the alternative options available to ACBF Community;

6.1.2. failed to take all necessary steps to manage the conflict of interest that arose between the First Defendant's and the Second Defendant's duties to ACBF Community and the First Defendant's and the Second Defendant's interest in Crown;

6.1.3. used his position as a director or officer of ACBF Community to:

6.1.3.1. obtain an advantage for the First Defendant, the Second Defendant and Crown; and

6.1.3.2. cause a detriment to ACBF Community,

6.2. the Fifth Defendant's conduct referred to in 6.1 above:

6.2.1. was not in good faith in the best interests of ACBF Community;

6.2.2. was done for the improper purpose of gaining an advantage for the First Defendant, the Second Defendant and Crown; and

6.2.3. resulted in the Fifth Defendant:

6.2.3.1. gaining an advantage for the First Defendant, the Second Defendant and Crown; and

6.2.3.2. causing detriment to ACBF Community,

6.3. by reason of the circumstances in 6.1 and 6.2 above, the Fifth Defendant:

6.3.1. failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF Community and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

6.3.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

THE COURT ORDERS THAT

7. An order under s 1317G(1) of the Corporations Act that, within 30 days of the order, the Fifth Defendant pay to the Commonwealth of Australia a pecuniary penalty of $20,000 for contraventions of ss 180(1), 181(1) and 182(1) of the Corporations Act relating to ACBF 2, ACBF Plans and ACBF Community.

8. An order under s 206C(1)(a)(i) and/or s 206E(1)(a)(ii) of the Corporations Act disqualifying the Fifth Defendant from managing corporations for 5 years.

9. An order that the Fifth Defendant to pay a contribution of $2,000 to the Plaintiff's costs of and incidental to the proceeding.

Schedule

FEDERAL COURT OF AUSTRALIA DISTRICT
REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **No NSD 935 of 2023**

Respondents

Second Respondent	Jonathan Glen Law
Third Respondent	Michael Brendan Wilson
Fourth Respondent	Bryn Elwyn Jones
Fifth Respondent	Geoffrey Peter Clayton

Date:

ANNEXURE 2

Form 1

Rule 2.13(2)

PLAINTIFF'S SUBMISSIONS

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NO NSD 935 OF 2023**

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

RONALD JOSEPH PATTENDEN and others
Defendants

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A INTRODUCTION

1. These submissions are filed by the Plaintiff (**ASIC**) in relation to ASIC's case against the Fifth Defendant (**Mr Clayton**).

2. Between 5 October 2017 and 30 November 2018 (**Relevant Period**), Mr Clayton was the Chief Operating Officer (**COO**) of **ACBF 2**, **ACBF Plans** and **ACBF Community**[1] (collectively, the **ACBF Entities**), which operated funeral funds mostly marketed to Indigenous consumers (being **Fund 2**, **Fund 3** and **Fund 4** respectively).

3. On 4 September 2017, Crown doubled the premium payable by ACBF 2. This had a significant negative impact on ACBF 2, and demonstrated the vulnerability of ACBF Plans and ACBF Community to price increases by Crown.

4. Mr Clayton admits that, during the Relevant Period, in contravention of s 180(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**):

    4.1. he failed to consider the effect of the Crown insurance policies on the financial position of the Funds, to consider whether the Crown policies were in the best interests of members of the Funds and to consider or pursue alternatives to the insurance arrangements with Crown (including whether to renegotiate or cancel the policy and find a new insurer, or wind up the Funds);

    4.2. he preferred Crown's, Mr Pattenden's and Mr Law's interests in causing the ACBF Entities to maintain the Crown policies, causing or allowing ACBF 2 to accept to pay the increased premium and failed to ensure that ACBF 2, as trustee of Fund 2, took all necessary and reasonable steps to protect the Fund contrary to the trust deed.

5. Mr Clayton also admits that, during the Relevant Period, in contravention of ss 181(1) and 182(1) of the Corporations Act, he failed to take all necessary steps to manage the conflict of interest that arose between Mr Pattenden's and Mr Law's duties to the ACBF Entities and Mr Pattenden's and Mr Law's interest in Crown, used his position as an officer of the ACBF Entities to obtain an advantage for Crown, Mr Pattenden and Mr Law, and caused a detriment to the ACBF Entities.

6. The parties have filed a Statement of Agreed Facts and Admissions on 30 January 2026 and an amended Statement of Agreed Facts and Admissions on 2 April 2026 (**SAFA**). **Annexure A** to the SAFA sets out the **Agreed Proposed Orders**, which seek:

    6.1. six declarations under s 1317E(1) of the Corporations Act;

    6.2. a pecuniary penalty of $20,000 under s 1317G(1) of the Corporations Act;

    6.3. a disqualification order under s 206C(1)(a)(i) and/or s 206E(1)(a)(ii) of the Corporations Act that Mr Clayton be disqualified from managing corporations for a period of 5 years; and

    6.4. an order that Mr Clayton pay $2,000 as a contribution towards ASIC's costs of and incidental to the proceeding.

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[1] Mr Clayton was also a director of ACBF Community from 23 October 2017 to 20 November 2018 and the secretary of ACBF Community from 23 October 2017 to 4 March 2019: SAFA [67].

B THE CONTRAVENING CONDUCT

B1. FACTUAL BACKGROUND

ACBF business

7. The ACBF business was a single business with common management across each of the entities within that business. Mr Pattenden was the founder and, at all material times, was responsible for overseeing the operation of and any significant decision relating to the ACBF group of companies and business.[2]

8. The ACBF group of companies relevantly included: The Aboriginal Community Benefit Fund Pty Limited (**ACBF 1**), ACBF 2, ACBF Plans, ACBF Community, ACBF Consultants Pty Ltd, ACBF Group Holdings Pty Ltd (**ACBF Group Holdings**) and ACBF Administration Pty Ltd (**ACBF Administration**).[3]

9. In the period from 2010 to 30 November 2018, the ultimate holding company of the group of companies through which the ACBF business operated was Just Solutions Limited (**Just Solutions**), a company registered in Vanuatu. Just Solutions owned the majority of the shares in ACBF Group Holdings, being the Australian company which ultimately owned the ACBF group of companies.[4]

Operation of the Funds

10. The SAFA explains in detail the way in which the Funds of each of the ACBF Entities, ACBF Administration and ACBF Group Holdings operated.[5]

11. In summary, for Fund 2:

    11.1. ACBF 2 was trustee of Fund 2, which operated as a trust established by deed.[6]

    11.2. ACBF 2 operated Fund 2 from 1993 for the purpose of providing funeral benefits to nominated persons on the death of a fund member. Fund 2 was marketed, and only available, to Indigenous Australians. Fund 2 was closed to new members from 2004.[7]

    11.3. On the death of the fund member who had made at least 2 payments, and following the making of a claim to ACBF 2, ACBF 2 would pay $6,000 to a nominated person (subject to any increase of the amount to be paid, made on application by a member after paying contribution amounts for at least one year).[8]

    11.4. Where a fund member wrote to ACBF to cancel their membership, they would receive a payment on cancellation subject to having made 26 or more payments and having not increased the amount payable by ACBF 2, in an amount equal to one third of the member's total membership payments from the 26th payment onwards.

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2 SAFA at [9].

3 SAFA at [7].

4 SAFA at [10].

5 SAFA at Section 2.3, [11]-[51].

6 SAFA at [12].

7 SAFA at [12].

8 SAFA at [16.4].

11.5. Where Fund 2 was wound up and there were surplus funds following the payment of Fund 2's debts and liabilities, fund members would be entitled to be repaid an amount up to the maximum amount of their cancellation benefit.[10]

11.6. The trust deed for Fund 2:

(a) required Fund 2 to maintain an insurance policy to underwrite the lives of its fund members. From 2002, ACBF 2 used Crown as its underwriter;[11]

(b) provided ACBF 2 with the power to take such action as it thought fit for the adequate protection of any part or parts of the Fund;[12]

(c) could not be amended except in accordance with the provisions of the trust deed, and could be amended on application under s 81 of the *Trustees Act 1925* (NSW) by ACBF 2 to the Court.[13]

11.7. On 24 November 2021, ACBF 2 went into administration.[14]

11.8. On 2 March 2022, a liquidator was appointed to ACBF 2. On 11 April 2022, a receiver was appointed to Fund 2.[15]

12. In summary, for Funds 3 and 4:

12.1. Both were subject to plan rules and were registered as a contributory funeral benefit business under the *Funeral Funds Act 1979* (NSW) (**Funeral Funds Act**).[16]

12.2. ACBF Plans operated Fund 3 from 2005 for the purpose of providing funeral benefits to nominated persons on the death of a fund member, and was marketed to, and until September 2017 was only available to, Indigenous Australians.[17]

12.3. ACBF Community operated Fund 4 from 2005 for the purpose of providing funeral benefits to nominated persons on the death of a fund member, and was marketed to non-Indigenous Australians.[18]

12.4. On the death of a nominated person (including a fund member) and following the making of a claim to ACBF Plans or ACBF Community, ACBF Plans or ACBF Community would pay an amount comprising reimbursement for incurred funeral-related expenses (up to the nominated benefit amount) to or as directed by the nominated payee, calculated in accordance with the application form.[19]

12.5. The rules and application form did not provide members with a cancellation payment on cancellation of their membership.

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10 SAFA at [16.8].

11 SAFA at [21].

12 SAFA at [17].

13 SAFA at [18].

14 SAFA at [26].

15 SAFA at [27].

16 SAFA at [13], [14].

17 SAFA at [13].

18 SAFA at [14].

19 SAFA at [28.6].

12.6. The plan rules for Funds 3 and 4 required that:

(a) the plan rules could not be amended except in accordance with the provisions of the plan rules;[21]

(b) ACBF Plans and ACBF Community must at all times maintain an insurance policy that underwrites the amounts required to be paid following a claim on the death of a nominee.[22]

12.7. On 11 March 2022, ACBF Plans and ACBF Community entered liquidation.[23]

13. ACBF Administration provided administration services to each of the ACBF Entities and Funds 2, 3 and 4 in return for a fee.[24] The fees charged by ACBF Administration were not based on the cost to ACBF Administration to provide those services to each of the ACBF Entities.[25]

14. ACBF Group Holdings was the ultimate holding company of ACBF 1, the ACBF Entities and ACBF Administration.[26] ACBF Group Holdings earned revenue from receiving dividends from ACBF Administration, had nominal expenses and paid dividends to Just Solutions for financial years 2015 to 2018.[27]

Crown arrangements

15. The SAFA explains in detail the way in which the Crown arrangements with each of the ACBF Entities operated.[28]

16. Between 2002 and at least 30 November 2018, ACBF 2, ACBF Plans and ACBF Community chose to satisfy the requirement to maintain an insurance policy by insuring with Crown.[29]

17. Crown:[30]

17.1. was registered in Vanuatu by Mr Pattenden in 2002;

17.2. provided insurance services to the ACBF Entities from 2002;

17.3. between 2002 and 30 November 2018, operated its business from Vanuatu; and

17.4. between 2002 and 30 November 2018, was not subject to prudential or other regulatory requirements in Australia.

18. Between 2002 and 15 February 2022, the ACBF Entities were the only entities insured by Crown.[31]

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21 SAFA at [29].

22 SAFA at [52].

23 SAFA at [40].

24 SAFA at [41].

25 SAFA at [42].

26 SAFA at [50].

27 SAFA at [51].

28 SAFA at Section 2.4, [52]-[65].

29 SAFA at [52].

30 SAFA at [53].

31 SAFA at [54]

19. In summary, under the terms of the policies with Crown:[32]

19.1. the ACBF Entities were required to pay premiums to Crown (cl 9.1);

19.2. Crown had the power to vary the premium by giving the ACBF Entity three months' written notice (cl 9.5.1 for ACBF 2 and cl 9.5 for ACBF Plans and ACBF Community);

19.3. the policies were renewable annually at the expiry of the policy year, being the 12 months between annual review dates;

19.4. there was no obligation on Crown to renew the policies at the annual review date;

19.5. Crown and the ACBF Entities had a profit-sharing arrangement in accordance with a self-participation formula; and

19.6. Crown was not required to provide services to the ACBF Entities other than the payment of claims by fund members.[33]

20. From 2003 (for Fund 2) or 2006 (for Funds 3 and 4) to at least 2018, Crown paid to each of Funds 2, 3 and 4 a 'profit share' based on a formula.[34] The tables at paragraph 60, 62 and 64 of the SAFA set out for financial years 2002 to 2018 for Fund 2 and financial years 2005 to 2018 for Funds 3 and 4 respectively the premiums received by Crown, claims paid by Crown, profit share paid by Crown and the net profit or loss of Crown.[35]

21. In each financial year prior to financial year 2017, Crown received more in premiums from Fund 2 than it paid to Fund 2 for claims and profit share. In financial year 2017, Crown paid more to Fund 2 in claims and profit share than it received in premiums from Fund 2.[36]

22. As set out in more detail below, on 4 September 2017 Crown doubled the premiums payable by Fund 2 with effect from 1 August 2017, the result of which was that for financial year 2018 Crown received more in premiums from Fund 2 than it paid in claims.[37]

23. In total, for financial years 2002 to 2018, for Fund 2:[38]

23.1. Crown received $16,345,137 in premiums;

23.2. Crown paid $8,056,029 in claims;

23.3. Crown paid $2,266,816 in profit share; and

23.4. Crown's net premiums received less claims and profit share was $6,022,292.

24. Between 1 July 2005 and 30 November 2018:

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32 SAFA at [55].

33 Crown's premiums for Fund 2 were structured as "level premiums", which did not vary by age, unlike the premiums charged or Funds 3 and 4 which increased as members aged. This placed a financial burden on the insurer as members aged, especially for a closed fund like Fund 2: SAFA at [56]-[57].

34 SAFA at [59].

35 SAFA at [60], [62], [64].

36 SAFA at [58].

37 SAFA at [58].

38 SAFA at [61].

24.1. ACBF Plans paid Crown total premiums of approximately $22.6 million, approximately $7.5 million was paid by Crown by way of fund members' claims and approximately $4.5 million was returned to ACBF Plans by way of profit-sharing payment;[39] and

24.2. ACBF Community paid Crown total premiums of approximately $788,000, approximately $265,000 was paid by Crown by way of fund members' claims and approximately $240,000 was returned to ACBF Community by way of profit-sharing payment.[40]

Mr Clayton's role

25. Mr Clayton commenced employment with the ACBF business on 11 September 2017.[41]

26. Mr Clayton was a director of ACBF Community for only part of the Relevant Period (23 October 2017 to 20 November 2018). Mr Clayton was not formally appointed a director of ACBF 2 or ACBF Plans during the Relevant Period.[42]

27. Mr Clayton admits that, for the part of the Relevant Period in which he was not formally a director of ACBF Community (5 October to 22 October 2017), and for ACBF 2 and ACBF Plans for the whole of the Relevant Period, he should be deemed to be a director for the purposes of s 9(1) of the Corporations Act given that, during the Relevant Period, he:

27.1. acted in the position of a director within the meaning of s 9(1) of the Corporations Act by reason of his positions as director and secretary of ACBF Community, and his position of COO of the ACBF business;[43] and

27.2. made or participated in making decisions that affected the whole or a substantial part of the business of the ACBF Entities as an officer, within the meaning of s 9(1) of the Corporations Act, of each ACBF Entity.[44]

Other defendants

28. The other defendants in the proceeding are Mr Pattenden, the Second Defendant Mr Law, the Third Defendant Mr Wilson, and the Fourth Defendant Mr Jones. Each was a director of the ACBF Entities at various times during the Relevant Period.[45]

29. Mr Pattenden was also the founder and, at all material times, a director and, indirectly, the majority shareholder of Crown; and indirectly, the majority shareholder of Just Solutions through Mr Pattenden's company Bu Teck Management Ltd (**Bu Teck**). Mr Pattenden was the sole shareholder of Bu Teck from October 2013.[46]

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39 SAFA at [63].

40 SAFA at [65].

41 SAFA at [66].

42 SAFA at [67].

43 SAFA at [68].

44 SAFA at [69].

45 SAFA at [70], [72], [73], [77].

46 SAFA at [70.5]-[70.6].

30. Mr Law was also a director of Crown from 2008 until at least 30 November 2018,[47] indirectly the minority shareholder of Just Solutions through his company Asian Markets Limited[48] and a beneficial owner of shares in Crown from 2008.[49]

31. During the Relevant Period, Mr Clayton acted in accordance with Mr Pattenden's instructions and deferred to Mr Pattenden for overseeing the operation of and any significant decision in relation to ACBF 2, ACBF Plans and ACBF Community.[50]

Premium increase for ACBF 2

32. At 1:57pm on 4 September 2017, Mr Law sent a letter to Mr Wilson, copied to Mr Pattenden, stating that the premiums payable by Fund 2 would be doubled and the decision to increase premiums by 100% was being made "due to payer higher risk factors".[51]

33. The premium paid by ACBF 2 to Crown was increased by 100% prior to 5 October 2017, being the date:[52]

    33.1. of Mr Clayton's appointment as COO of the ACBF business; and

    33.2. from which Mr Clayton acted in the role of director of ACBF 2.

34. On 30 October 2017, Mr Clayton received an email from Mr Wilson with a copy of a Crown increase in premiums letter received from Mr Law on 4 September 2017, referred to at paragraph 32.[53]

35. Given that from 5 October 2017 Mr Clayton was the COO of the ACBF business and acted in the role as director of ACBF 2, Mr Clayton ought to have reviewed and been familiar with the FY2017 accounts to identify the increased premiums paid by ACBF 2.[54]

36. Each month, Mr Pattenden was sent emails by Mr Clayton which were generally copied to Mr Jones, from December 2017 for November 2017, to the end of the Relevant Period, attaching spreadsheets for each of Funds 2, 3 and 4 setting out details of:[55]

    36.1. premium payments made to Crown by the relevant Fund;

    36.2. claims received by the relevant Fund, and the total claims payable by Crown to the Fund; and

    36.3. the amount of profit share payable by Crown to the relevant Fund.

37. In light of paragraphs 34 to 36, Mr Clayton knew or ought to have known of the increased premium paid by ACBF 2 to Crown.[56]

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47 SAFA at [72.2]
48 SAFA at [72.3]-[72.4].
49 SAFA at [72.3], [72.5].
50 SAFA at [78].
51 SAFA at [79].
52 SAFA at [80].
53 SAFA at [81].
54 SAFA at [82].
55 SAFA at [83].
56 SAFA at [84].

Effect of the premium increase on ACBF 2

Effect of increase

38. The premium increase had a substantial negative effect on the financial position of ACBF 2. ACBF 2 went from an operating profit of $9,794 for the financial year ending 30 June 2017 to an operating loss of $198,779 for the financial year ending 30 June 2018.[57]

39. This occurred in circumstances where, as noted at paragraph 11.2 above, Fund 2 was closed to new members in 2004 and where ACBF 2 could not increase its revenue from member contributions without altering the terms of the trust deed (which required the written consent of 75% of fund members or an application to the court to vary the trust deed).[58] The effect of these matters is that ACBF 2 could not unilaterally increase its revenue from member contributions, and was not gaining any new members (instead the member numbers were declining over time).

40. Further, ACBF 2 was not accumulating, or attempting to accumulate, amounts from which to pay claims by fund members.[59] Apart from the cash reserves that ACBF 2 maintained for the purpose of meeting its potential liability to pay cancellation benefits to fund members, which liability was not insured under the policy with Crown,[60] ACBF 2 did not otherwise maintain cash reserves for the purpose of paying fund members' claims. Instead, it relied on the policy with Crown for this purpose, and had no alternative source of funds to pay member claims.[61]

41. Once the premium paid by ACBF 2 was doubled, its projected cash position went from remaining positive indefinitely to $0 within four years.[62]

42. If ACBF 2 had been brought to an end, it would have had amounts available to pay creditors or fund members eligible for cancellation benefits.[63] If ACBF 2 had been wound up, there would have been surplus funds following the payment of debts and liabilities for eligible fund members to be repaid an amount up to the maximum amount of their cancellation benefit.[64] Similarly, if all fund members of ACBF 2 who were eligible for payment of a cancellation benefit validly cancelled their memberships, there would have been funds available for distribution both to those members and remaining members.[65]

43. At the time of the premium increase and continuing until 30 November 2018, there was a substantial risk that:[66]

    43.1. in the circumstances described in paragraphs 39 to 42 above, and paragraphs 46 to 47 below, the effect of the premium increase would be that ACBF 2 would become insolvent within approximately four or less years and would need to be wound up;

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57 SAFA at [86].
58 SAFA at [87.5].
59 SAFA at [87.3].
60 SAFA at [87.2].
61 SAFA at [87.4].
62 SAFA at [87.6.1].
63 SAFA at [87.6.2].
64 SAFA at [87.6.2].
65 SAFA at [87.6.2].
66 SAFA at [89].

43.2. if ACBF 2 was wound up in insolvency, ACBF 2's policy with Crown would be terminated and the remaining members of Fund 2 would not be able to recover all or part of any cancellation benefit they were owed; and

43.3. if fund members' cover was cancelled, they would be without funeral cover; and

43.4. the members of Fund 2 were never told, and therefore could not and did not know or understand, the matters referred to in subparagraphs 43.1 to 43.3 above, and had no way of knowing them unless explained to them by information provided by ACBF 2.

Options available to ACBF 2

44. Mr Clayton failed to consider properly or at all any alternatives to the premium increase or the arrangement with Crown.

45. Between April 2018 and September 2018, Mr Clayton was aware of concerns that NSW Fair Trading had in relation to whether the Crown arrangement was in the best interests of fund members.[67] Despite this, nothing was done by Mr Clayton.[68]

46. Had Mr Clayton done so, he would have identified the options that Fund 2 had available to it rather than continuing the insurance arrangement with Crown. In particular, Fund 2's options were:[69]

46.1. paying the Crown higher premium rates but with mitigation by attempting to increase contribution rates or negotiating lower administration fees;

46.2. negotiating and agreeing alternative terms with Crown;

46.3. finding an alternative insurer;

46.4. moving to a self-insurance arrangement;

46.5. negotiating lower administration fees;

46.6. attempting to increase contribution rates; and

46.7. winding up.

47. If calculations were performed at the time by Mr Clayton, the result of those calculations would have been:[70]

47.1. ACBF 2 could have withstood a 33% premium increase by Crown and remained solvent for 15 years.

47.2. ACBF 2 could have paid the Crown premium increase and remained solvent considerably longer with administration fee reductions and contribution increases.

47.3. ACBF 2 could have self-insured and remained solvent for seven years, and for considerably longer with administration fee reductions and contributions increases.

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67 SAFA at [93]-[95].

68 SAFA at [96].

69 SAFA at [87.7].

70 SAFA at [88].

47.4. If ACBF 2 had been wound up, it would have had sufficient funds to pay out all cancellation benefits and pay a further amount to all members.

48. Mr Clayton ought to have known the fact described at paragraph 43.1 above because it would have been revealed had he asked for analysis to be undertaken of the effect of the 100% premium increase on ACBF 2's financial position, which he did not do but ought to have done.[71]

Effect of the premium increase on ACBF Plans and ACBF Community

Effect of the increase

49. The premium increase for ACBF 2 revealed vulnerabilities in the Crown arrangements in respect of ACBF Plans and ACBF Community.

50. This was that ACBF Plans and ACBF Community were also vulnerable to unaffordable premium increases by Crown because they were also not accumulating, or attempting to accumulate, amounts from which to pay claims by fund members.[72] They were entirely dependent on the insurance arrangement with Crown to pay claims made by members as they had no alternative source of funds to pay member claims.[73]

51. This was so in circumstances where under the insurance policies with Crown, Crown had the right to increase the premium payable by ACBF Plans and ACBF Community.[74]

52. Accordingly, if Crown had increased premiums during the Relevant Period, whether by doubling those premiums as it had done for ACBF 2 or by increasing the premiums at all, the effect of the premium increase would be, in each case, that ACBF Plans and ACBF Community would immediately become insolvent.[75]

53. This is to be contrasted with the fact that, if ACBF Plans and ACBF Community self-insured, both could have remained solvent indefinitely.[76] Further, in these circumstances if ACBF Plans and ACBF Community had been brought to an end, both would have had amounts available to pay creditors or fund members.[77]

54. Mr Clayton ought to have known the facts described at paragraphs 50 to 53 above because it would have been revealed to him had he asked for analysis to be undertaken of the relationship between Crown's premiums and ACBF Plans' and ACBF Community's financial positions, which he did not do but ought to have done.[78]

55. If ACBF Plans and ACBF Community were wound up in insolvency, their respective fund members' cover would be cancelled and they would be without funeral cover.[79]

56. The members of Funds 3 and 4 were never told, and therefore could not and did not know or understand, the matters referred to in subparagraphs 50 to 55 above, and had

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71 SAFA at [90].
72 SAFA at [91.3].
73 SAFA at [91.2]
74 SAFA at [91.1].
75 SAFA at [91.4].
76 SAFA at [91.4].
77 SAFA at [91.5].
78 SAFA at [91.6].
79 SAFA at [91.7].

no way of knowing them unless explained to them by information provided by ACBF Plans and ACBF Community.[80]

Options available to ACBF Plans and ACBF Community

57. Funds 3 and 4 had options available to them in lieu of continuing the Crown arrangements, namely:[81]

57.1. negotiating and agreeing alternative terms with Crown;

57.2. attempting to find an alternative insurer;

57.3. moving to a self-insurance arrangement;

57.4. negotiating lower administration fees;

57.5. attempting to increase contribution rates; and

57.6. winding up.

B2. SECTION 180

Principles

58. Section 180(1) of the Corporations Act provides:

> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

59. The test under s 180(1) is an objective one and is measured by what an ordinary person, with the knowledge and experience of the relevant director, would have done.[82] This objective standard requires the court to consider what an ordinary person, with the knowledge and experience of the defendant, must be expected to have done in the circumstances if he or she was acting on his or her own behalf.[83]

60. Directors and officers are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company.[84] A director or officer should become familiar with the fundamentals of the business in which the corporation is engaged, and he or she is under a continuing obligation to keep informed about the activities of the corporation.[85]

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80 SAFA at [91.8].

81 SAFA at [91.9].

82 *Shafron v ASIC* (2012) 247 CLR 465; [2012] HCA 18 at [18]; *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1397].

83 *ASIC v Green County Pty Ltd* [2025] FCA 367 at [374].

84 *ASIC v Noumi Ltd (No 4)* [2024] FCA 1192 at [24].

85 *ASIC v Noumi Ltd (No 4)* [2024] FCA 1192 at [24].

61. There are two elements to the content of the duty of reasonable care and diligence: (a) the circumstances of the company; and (b) the position and responsibilities of the officer.[86]

62. In relation to the circumstances of the company, this includes: the type of company; the provisions of its constitution; the size and nature of the company's business; the composition of the board.[87]

63. In considering the acts or omissions of a particular director, the Court will consider factors including the director's position and responsibilities, the director's experience and skills, the terms and conditions on which he had undertaken to act as a director, how the responsibility for the company's business has been distributed between the directors and the company's employees, the informational flows and systems in place and the reporting systems and requirements within the company.[88]

64. The word "responsibilities" in s 180(1) directs attention to the factual arrangements operating within the company and affecting the director or officer in question, as opposed to the legal duty of care arising in particular circumstances. The director's responsibilities are not confined to statutory responsibilities and include whatever responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.[89] It does not refer to only specific tasks delegated to the relevant director or officer by the corporate constitution or a board or members' resolution or otherwise. It is a wider concept referring to the acquisition of responsibilities not only through specific delegation, but also through the way in which work is in fact distributed within the corporation and the expectations placed by those arrangements on the shoulders of the individual director or officer.[90]

65. In order for an act or omission of the director to be capable of constituting a contravention of s 180, there must be reasonably foreseeable harm to the interests of the company caused thereby.[91] Liability under s 180(1) may be triggered where a director's failure to exercise reasonable care and diligence has caused or allowed the company to contravene the law, at least where it was reasonably foreseeable that such contravention might harm the company's interests.[92] It is the failure to guard against the foreseeable harm flowing from the company's contraventions that leads to the conclusion that the directors or officers did not discharge the degree of care and diligence required of them by s 180(1).[93] The reference to "harm" is best understood as "referencing harm to any of the interests of the corporation"; it is not confined to financial harm.[94]

66. Accordingly, relevant to the question of breach of duty is the balance between the foreseeable risk of harm to the company flowing from the contravention on the one hand,

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86 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1397]; *ASIC v Noumi Ltd (No 4)* [2024] FCA 1192 at [20].

87 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1397]; *ASIC v Noumi Ltd (No 4)* [2024] FCA 1192 at [21]; *ASIC v Maxwell* (2006) 59 ACSR 373; [2006] NSWSC 1052 at [100].

88 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1397].

89 *ASIC v Green County Pty Ltd* [2025] FCA 367 at [375].

90 *ASIC v Rich* (2009) 236 FLR 1; [2009] NSWSC 1229 at [7202].

91 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1430].

92 *ASIC v Noumi Ltd (No 4)* [2024] FCA 1192 at [26]-[27].

93 *ASIC v Noumi Ltd (No 4)* [2024] FCA 1192 at [27].

94 *ASIC v Green County Pty Ltd* [2025] FCA 367 at [379].

and on the other the potential benefits that could reasonably be expected to have accrued to the company from that conduct.[95] Not only must the court consider the nature and magnitude of the foreseeable risk of harm and degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action, but the court must balance the foreseeable risk of harm against the potential benefits that could reasonably be expected to accrue from the conduct in question.[96] Such a question is to be answered having close regard to the "circumstances existing at the relevant time, without the benefit of hindsight, and with the distinction between negligence and mistakes or errors of judgment firmly in mind".[97]

67. Where there is a transaction involving the potential for conflict between interest and duty, the duty of care and diligence falls to be exercised in a context requiring special vigilance, calling for scrupulous concern on the part of those officers who become aware of that transaction to ensure that any necessary corporate approvals are obtained and safeguards are put in place.[98]

68. In assessing whether a director has met the requisite standard of care and skill, it may be relevant to have regard to expert evidence.[99]

Mr Clayton acting as a director or officer

69. Mr Clayton admits that, during the period when he was not an appointed director of the ACBF Entities, he was acting in the position of a director or officer of the ACBF Entities for the purposes of s 9 of the Corporations Act, by reason of the functions he performed in relation to the ACBF Entities during those periods.[100] As such the obligations of s 180 (and ss 181 to 182) attached.[101]

70. During the Relevant Period, the definition of "director" was contained in s 9(1) of the Corporations Act and relevantly provided:

> …
>
> (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
>
> …
>
> (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.
>
> Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.
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> Note: Paragraph (b)—Contrary intention—Examples of provisions for which a person referred to in paragraph (b) would not be included in the term "director" are:
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> section 249C (power to call meetings of a company's members)

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95 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1430].

96 *ASIC v Mariner Corporation Ltd* (2015) 241 FCR 502; [2015] FCA 589 at [451].

97 *ASIC v Rich* (2009) 236 FLR 1; [2009] NSWSC 1229 at [7242].

98 *ASIC v Adler* (2002) 168 FLR 253; [2002] NSWSC 171 at [372(14)].

99 *ASIC v Green County Pty Ltd* [2025] FCA 367 at [381].

100 SAFA at [68].

101 *Shafron v ASIC* (2012) 247 CLR 465; [2012] HCA 18 at [19].

subsection 251A(3) (signing minutes of meetings)

section 205B (notice to ASIC of change of address).

71. During the Relevant Period, the definition of "officer" in s 9(1) of the Corporations Act relevantly provided:

> ***officer*** of a corporation means:
>
> (a) a director or secretary of the corporation; or
>
> (b) a person:
>
> (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
>
> (ii) who has the capacity to affect significantly the corporation's financial standing; or
>
> (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); …

72. In *ASIC v King*,[102] Kiefel CJ, Gageler and Keane JJ considered the principles for whether a person is an "officer" for the purpose of the definition in s 9(1) as follows:

72.1. The definition of "officer" in paragraph (b) of the definition in s 9(1) indicates that s 180 of the Corporations Act is not confined in its operation to persons who hold an office formally recognised in the corporation as contemplated by paragraph (a) of the definition in s 9(1).

72.2. Section 180 imposes duties on persons who are officers by reason of paragraph (b) of the definition by requiring that they perform their functions and exercise their capacities within the corporation with the same degree of care and skill that a reasonable person would exercise if the reasonable person was, in fact, within any one or more of the descriptions in paragraph (b).

72.3. The inquiry required by the definition in paragraph (b)(i) and (ii) is directed to what role the person in question plays in the corporation and whether the facts show that a putative officer has played a role in the corporation and the nature and extent of that role, not to some a priori classification of his or her position.

72.4. Paragraph (b)(ii) does not refer to a person who has the relevant capacity as a third party but is not involved in the management of the corporation's affairs. While advisors and consultants may give advice which, if implemented, can significantly affect the financial standing of the corporation, it does not follow that it is the advisor or consultant who, in that circumstance, has the capacity to affect significantly the financial standing of the corporation.

73. Similarly, Nettle and Gordon JJ held in that case:[103]

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102 (2020) 270 CLR 1 at [34], [35], [40], [42].

103 *ASIC v King* (2020) 270 CLR 1; [2020] HCA 4 at [90], [185].

73.1. The question of how significant a role a person played is one of fact and degree. The person's contribution to the making of a decision must be assessed, and that decision must be one which affects the whole or a substantial part of the business of the corporation.

73.2. A conclusion that a person has to hold or occupy a named office, or a recognised position with rights and duties attached to it to be an "officer" would be contrary to the text of the definition of that term. Such a construction would also be contrary to the extension of the definition of "officer" over time to those who are concerned in, or who take part in, the "management" of the corporation.

74. During the periods Mr Clayton was not an appointed director of the ACBF Entities, he was a named officer (as COO) and was involved or participated in making decisions concerning the ACBF Entities (as well as the day to day running of the ACBF Entities).[104] The "management of the corporation" relates to the formulation of policy and decision-making, which has a substantial effect upon the business of the corporation.[105]
Mr Clayton was involved in this aspect of the ACBF business (and ACBF Entities), as described in paragraph 27 above.

Contraventions – ACBF 2

75. Section 180(1) applies to Mr Clayton as during the Relevant Period:

75.1. he was a director and the secretary of ACBF Community between 23 October 2017 until 20 November 2018;[106]

75.2. he was the COO of the ACBF business from 5 October 2017 to at least 30 November 2018;[107]

75.3. he acted in the position of a director, within the meaning of s 9(1) of the Corporations Act, of ACBF 2 and ACBF Plans between 5 October 2017 and 30 November 2018;[108]

75.4. he acted in the position of a director, within the meaning of s 9(1) of the Corporations Act, of ACBF Community between 5 October 2017 and 23 October 2017, and 20 November 2018 to 30 November 2018;[109] and

75.5. he made or participated in making decisions that affected the whole or a substantial part of the business of the ACBF Entities as an officer, within the meaning of s 9(1) of the Corporations Act, of each ACBF Entity between 5 October 2017 and 30 November 2018.[110]

76. This was so in circumstances where, during the Relevant Period, Mr Clayton:[111]

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104 See SAFA [67], [68] and [95].

105 *ASIC v Daly (Liability Hearing)* [2023] FCA 290 at [248]-[249].

106 SAFA at [67.1]-[67.2].

107 SAFA at [67.3].

108 SAFA at [68.1.1].

109 SAFA at [68.1.2].

110 SAFA at [68.2].

111 SAFA at [97].

76.1. knew or ought to have known Mr Pattenden and Mr Law were the ultimate co-owners and co-controllers of Crown, had a direct or indirect financial interest in Crown, and benefitted financially from ACBF 2 insuring with Crown;

76.2. knew or ought to have known that ACBF 2 maintained its policy with Crown at the increased premium;

76.3. ought to have known that maintaining the increased premium of 100% would have a significant negative impact on ACBF 2's financial position;

76.4. ought to have known, and from 30 October 2017 knew or ought to have known, that on 4 September 2017, Mr Pattenden, Mr Law and Mr Wilson had agreed that the premium paid by ACBF 2 to Crown would increase by 100% effective from 1 August 2017 at Mr Pattenden's direction;

76.5. knew or ought to have known that ACBF 2 paid Crown premiums in amounts that were double the amount of the premium that had previously been paid;

76.6. ought to have known that the effect of maintaining the premium increase would be that ACBF 2 would become insolvent within approximately four or less years and would need to be wound up;

76.7. ought to have known that there was a substantial risk that if ACBF 2 was wound up in insolvency, the remaining members of Fund 2:

(a) would not be able to recover all or part of any cancellation benefit they were owed; and

(b) would be without funeral cover;

76.8. ought to have known that the members of Fund 2 did not know or understand the matters referred to in paragraphs 76.6 and 76.7 above, and had no way of knowing them unless explained to them by information provided by ACBF 2;

76.9. ought to have known that there was a reasonable chance that if the members of Fund 2 understood the matters referred to in paragraphs 76.6 and 76.7 above, they would cancel their membership with Fund 2;

76.10. ought to have known that by causing ACBF 2 to maintain its policy with Crown at the increased premium:

(a) Mr Pattenden and Mr Law (through Crown) benefitted financially from ACBF 2 continuing to pay premiums; and

(b) he preferred the financial interests of Crown, Mr Pattenden and Mr Law over the financial interests of ACBF 2 and fund members.

77. A reasonable director or officer of a corporation in ACBF 2's circumstances and who occupied the office held by Mr Clayton and had the same responsibilities, and who had knowledge of the risks to ACBF 2 and its fund members referred to in paragraph 76 above, in acting with care and diligence when considering whether to continue to maintain ACBF 2's policy with Crown at the increased premium, would have taken all necessary steps to:[112]

77.1. consider whether the Crown policy was in the interests of ACBF 2;

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112 SAFA at [98].

77.2. pursue alternatives to ACBF 2's insurance arrangements with Crown, including considering whether to:

(a) renegotiate the Crown insurance policy;

(b) cancel the Crown insurance policy and transition to self-insurance (and whether and how to amend the trust deed to allow for this);

(c) find a cheaper external insurer;

(d) increase reserves from which to pay Crown;

(e) notify members of the risks to Fund 2 inherent in the arrangements with Crown; and

(f) wind up the trust and pay eligible members who were entitled to it a cancellation benefit.

78. At all times from 5 October 2017 and continuing until 30 November 2018, Mr Clayton:[113]

78.1. failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF 2;

78.2. failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF 2 and its fund members;

78.3. failed to consider properly or at all whether there were alternative options available to ACBF 2, as described in paragraph 77.2 above, that would have been in the best interests of ACBF 2 and its fund members;

78.4. failed to pursue properly or at all any of the alternative options described in paragraph 77.2 above;

78.5. preferred Mr Pattenden's, Mr Law's and Crown's financial interests in causing ACBF 2 to maintain its Crown arrangements;

78.6. preferred Mr Pattenden's, Mr Law's and Crown's financial interests in causing or allowing ACBF 2 to accept to pay the increased premium, payment of which occurred on 13 occasions between 5 October 2017 and 30 November 2018; and

78.7. failed to ensure properly or at all that ACBF 2, as trustee for Fund 2, took all necessary and reasonable steps to protect the Fund (contrary to cl 13.9 of the trust deed).

79. Mr Clayton, for each of the acts and omissions described in paragraph 78 above, between 5 October 2017 and 30 November 2018:[114]

79.1. failed to discharge his duties to ACBF 2 with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF 2's circumstances, and occupied the offices held by Mr Clayton, and had the same responsibilities within the corporation; and

79.2. as a result, breached s 180(1) of the Corporations Act.

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113 SAFA at [99].

114 SAFA at [100].

Contravention – ACBF Plans

80. By 5 October 2017, and until 30 November 2018, Mr Clayton:[115]

80.1. ought to have known that ACBF Plans was vulnerable to an increase in premiums by Crown in that the effect of any premium increase would be that ACBF Plans would immediately become insolvent;

80.2. ought to have known that there was a substantial risk that if ACBF Plans was wound up in insolvency, the members of ACBF Plans:

(a) would have their cover cancelled; and

(b) would be without funeral cover;

80.3. ought to have known that the members of Fund 3 did not know or understand the matters referred to in subparagraphs 80.1 and 80.2 above, and had no way of knowing them unless explained to them by information provided by ACBF Plans;

80.4. knew or ought to have known that ACBF Plans maintained its policy with Crown; and

80.5. ought to have known that, by ACBF Plans maintaining its policy with Crown giving rise to the vulnerability described in paragraph 80.1 above:

(a) Mr Pattenden and Mr Law (through Crown) benefitted financially from ACBF Plans continuing to pay premiums; and

(b) he preferred the financial interests of Crown, Mr Pattenden and Mr Law over the financial interests of ACBF Plans and fund members.

81. A reasonable director or officer of a corporation in ACBF Plans' circumstances and who occupied the office held by Mr Clayton and had the same responsibilities, and who had knowledge of the risks to ACBF Plans and its fund members referred to in paragraph 80 above, in acting with care and diligence when considering whether to continue to maintain ACBF Plans' policy with Crown, would have taken all necessary steps to:[116]

81.1. consider whether the Crown policy was in the interests of ACBF Plans; and

81.2. pursue alternatives to ACBF Plans' insurance arrangements with Crown, including considering whether to:

(a) renegotiate the Crown insurance policy;

(b) cancel the Crown insurance policy and transition to self-insurance (and whether and how to amend the plan rules to allow for this);

(c) find a cheaper external insurer;

(d) increase reserves from which to pay Crown;

(e) notify members of the risks to Fund 3 inherent in the arrangements with Crown; and

(f) wind up the company and pay the remaining funds to members.

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115 SAFA at [105].

116 SAFA at [106].

82. At all times from 5 October 2017 until 30 November 2018, Mr Clayton:[117]

82.1. failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF Plans;

82.2. failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF Plans and its fund members;

82.3. failed to consider properly or at all whether there were alternative options available to ACBF Plans, as described in paragraph 81.2 above, that would have been in the best interests of ACBF Plans and its fund members;

82.4. failed to pursue properly or at all any of the alternative options described in paragraph 81.2 above; and

82.5. preferred Mr Pattenden's, Mr Law's and Crown's financial interests in causing ACBF Plans to maintain its Crown arrangements.

83. Mr Clayton, for each of the acts and omissions described in paragraph 82 above, including when ACBF 2 paid the increased premium from 5 October 2017 until 30 November 2018 and thus presented the vulnerability for ACBF Plans described in paragraph 80.1 above, Mr Clayton:[118]

83.1. failed to discharge his duties to ACBF Plans with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF Plans' circumstances, and occupied the offices held by Mr Clayton and had the same responsibilities within the corporation; and

83.2. as a result, breached s 180(1) of the Corporations Act.

Contravention – ACBF Community

84. By 5 October 2017, and until 30 November 2018, Mr Clayton:[119]

84.1. ought to have known that ACBF Community was vulnerable to an increase in premiums by Crown in that the effect of any premium increase would be that ACBF Community would immediately become insolvent;

84.2. ought to have known that there was a substantial risk that if ACBF Community was wound up in insolvency, the members of ACBF Community:

(a) would have their cover cancelled; and

(b) would be without funeral cover;

84.3. ought to have known that the members of Fund 4 did not know or understand the matters referred to in subparagraphs 84.1 and 84.2 above, and had no way of knowing them unless explained to them by information provided by ACBF Community;

84.4. knew or ought to have known that ACBF Community maintained its policy with Crown; and

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117 SAFA at [107].

118 SAFA at [108].

119 SAFA at [113].

84.5. ought to have known that, by ACBF Community maintaining its policy with Crown giving rise to the vulnerability described in subparagraph 84.1 above:

(a) Mr Pattenden and Mr Law (through Crown) benefitted financially from ACBF Community continuing to pay premiums; and

(b) he preferred the financial interests of Crown, Mr Pattenden and Mr Law over the financial interests of ACBF Community and fund members.

85. A reasonable director or officer of a corporation in ACBF Community's circumstances and who occupied the office held by Mr Clayton and had the same responsibilities, and who had knowledge of the risks to ACBF Community and its fund members referred to in paragraph 84 above, in acting with care and diligence when considering whether to continue to maintain ACBF Community's policy with Crown, would have taken all necessary steps to:[120]

85.1. consider whether the Crown policy was in the interests of ACBF Community; and

85.2. pursue alternatives to ACBF Community's insurance arrangements with Crown, including considering whether to:

(a) renegotiate the Crown insurance policy;

(b) cancel the Crown insurance policy and transition to self-insurance (and whether and how to amend the plan rules to allow for this);

(c) find a cheaper external insurer;

(d) increase reserves from which to pay Crown;

(e) notify members of the risks to Fund 4 inherent in the arrangements with Crown; and

(f) wind up the company and pay the remaining funds to members.

86. At all times from 5 October 2017 until 30 November 2018, Mr Clayton:[121]

86.1. failed to consider properly or at all the effect of the Crown arrangements on the financial position of ACBF Community;

86.2. failed to consider properly or at all whether continuing the policy with Crown was in the best interests of ACBF Community and its fund members;

86.3. failed to consider properly or at all whether there were alternative options available to ACBF Community, as described in paragraph 85.2 above, that would have been in the best interests of ACBF Community and its fund members;

86.4. failed to pursue properly or at all any of the alternative options described in paragraph 85.2 above; and

86.5. preferred Mr Pattenden's, Mr Law's and Crown's financial interests in causing ACBF Community to maintain its Crown arrangements.

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120 SAFA at [114].

121 SAFA at [115].

87. Mr Clayton, for each of the acts or omissions described in paragraph 86 above, including when ACBF 2 paid the increased premium from 5 October 2017 until 30 November 2018, and thus presented the vulnerability for ACBF Community described in paragraph 84.1 above, Mr Clayton:[122]

87.1. failed to discharge his duties to ACBF Community with the degree of care and diligence that a reasonable person would exercise, if they were a director or officer of a corporation in ACBF Community's circumstances, and occupied the offices held by Mr Clayton and had the same responsibilities within the corporation; and

87.2. as a result, breached s 180(1) of the Corporations Act.

B3. SECTIONS 181(1) AND 182(1)

Principles – s 181

88. Section 181(1) of the Corporations Act provides as follows:

> A director or other officer of a corporation must exercise their powers and discharge their duties:
>
> (a) in good faith in the best interests of the corporation; and
>
> (b) for a proper purpose.

89. The requirements of a duty to act in good faith include that the officer must (a) exercise their powers in the interests of the company; (b) not misuse or abuse their power; (c) avoid conflict between their personal interests and those of the company; (d) not take advantage of their position to make secret profits; and (e) not misappropriate the company's assets for themselves.[123]

90. The case law remains unsettled as to whether establishing a contravention of s 181(1)(a) requires establishing that a director engaged deliberately in conduct which he or she knew was not in the company's best interests or whether it is determined objectively, involving an assessment by the court of what is reasonable in the circumstances.[124]

91. It is nevertheless well established that an allegation of breach involves both subjective and objective elements: subjective in the enquiry as to the director's subjective purpose, and objective in the assessment of whether that purpose was improper.[125]

92. In respect of s 181(1)(b), directors must exercise their powers for the purpose for which they were conferred, and not for any collateral or improper purpose.[126] A director will act for an improper purpose if the substantial purpose for the director's conduct was improper.[127] A director can make improper use of his or her position even if the director has the purpose or intention or belief that the conduct is in the interests of the

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122 SAFA at [116].

123 *ASIC v Bettles* (2023) 169 ACSR 244; [2023] FCA 975 at [441(1)].

124 *ASIC v Bettles* (2023) 169 ACSR 244; [2023] FCA 975 at [441(2)]; *Special Gold Pty Ltd (in liq) v Dyldam Developments Pty Ltd (subject to a Deed of Company Arrangement) (No 2)* [2025] FCA 825 at [76].

125 *ASIC v Bettles* (2023) 169 ACSR 244; [2023] FCA 975 at [441(3)].

126 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324; [2018] VSC 347 at [640].

127 *ASIC v iSignthis Ltd* [2024] FCA 669 at [591].

company.[128] Mere disclosure of a conflict between interest and duty and abstaining from voting may be insufficient as the director may also be under a positive duty to take steps to protect the company's interest such as by using such power and influence as he or she had to prevent the transaction going ahead.[129]

93. In considering whether s 181(1) has been breached, the court (as with s 180(1)) seeks to balance "the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question".[130]

94. Where a director acts in relation to a transaction in which he or a party to whom the director owes a fiduciary duty stands to gain a benefit without making adequate disclosure of his interest, that director acts "improperly" within the meaning of s 182(1).[131] Where a director has sought to obtain the consent of other directors of the company in respect of a conflicted transaction in a manner that keeps other directors "in the dark" is strong evidence that the benefits derived from that transaction are unreasonable, as is the lack of any evidence as to what the director did for the company in return.[132]

Principles – s 182

95. Section 182(1) provides as follows:

> A director, secretary, other officer or employee of a corporation must not improperly use their position to:
>
> (a) gain an advantage for themselves or someone else; or
>
> (b) cause detriment to the corporation.

96. In order to prove a contravention of s 182(1), the following must be established: (a) that the officer "used" the position he or she held as an officer; (b) such use was improper; and (c) such conduct was for the purpose of gaining an advantage or to cause a detriment to the company.[133] The prohibition against making improper use of a director's position is a reference to the purpose of the conduct, and not the effect.[134]

97. The test of whether conduct is improper is objective,[135] and looks at the character of the conduct of the director in question.[136] The relevant conduct would be improper if it amounted to a breach of the standards of conduct that would be expected of a person in the officer's position by reasonable persons with knowledge of the duties, powers and authority of his or her position as an officer and the circumstances of the case, including the commercial context.[137] In a practical sense, the inquiry is whether the defendant's

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128 *ASIC v iSignthis Ltd* [2024] FCA 669 at [591].

129 *ASIC v Adler* (2002) 168 FLR 253*;* [2002] NSWSC 171 at [735(4)].

130 *ASIC v Bettles* (2023) 169 ACSR 244; [2023] FCA 975 at [441(4)].

131 *ASIC v Adler* (2002) 168 FLR 253*;* [2002] NSWSC 171 at [458(5)].

132 *ASIC v Adler* (2002) 168 FLR 253*;* [2002] NSWSC 171 at [458(3)].

133 *ASIC v Bettles* (2023) 169 ACSR 244; [2023] FCA 975 at [442(1)].

134 *ASIC v iSignthis Ltd* [2024] FCA 669 at [591].

135 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1516].

136 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1518].

137 *ASIC v Bettles* (2023) 169 ACSR 244; [2023] FCA 975 at [442(2)]; *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1517].

behaviour breached the norms of conduct thought necessary for the proper conduct of commercial life.[138]

98. A contravention of s 182(1) will be established if the defendant made improper use of his position for the purpose of gaining an advantage for himself or for some other person.[139] It is not necessary to show that the conduct brought about that advantage.[140]

99. Further, a director may act improperly with no intention of acting dishonestly or otherwise than in the best interests of the company as a whole. Where a director does something by the use of his position that is for an impermissible purpose, it will amount to an improper use of that position, even if the director honestly believes it to be in the interests of the company and where there was no personal advantage for the director.[141] That is, a director cannot escape a finding of improper use of position merely because he or she believed what he or she was doing was in the interests of the corporation.[142]

100. A director can act with a personal interest where the director has not freed their mind of that personal interest, provided that the director's personal interest was not the "actuating motive" rather than some bona fide concern for the benefit of the company.[143] Where a director's conduct is attributable to a range of different purposes, the "but for" test is ordinarily used to determine what the relevant purpose was, consideration being given to whether the director would still have acted in that way if the collateral purpose had not existed.[144]

Contraventions – ACBF 2

101. By reason of the matters described in paragraph 76 above, and Mr Clayton's positions within the ACBF business as set out in paragraph 27 above, Mr Clayton:[145]

101.1. caused ACBF 2 to maintain the arrangements with Crown from 5 October 2017 until 30 November 2018 without taking any or all necessary steps to consider and pursue the matters in paragraph 77.2 above;

101.2. caused ACBF 2 to pay an increase in premium of 100% without taking any or all necessary steps to consider and pursue the matters in paragraph 77.2 above; and

101.3. failed to take all necessary steps to manage the conflict of interest that arose between Mr Pattenden and Mr Law's duties to ACBF 2 and Mr Pattenden and Mr Law's interest in Crown;

101.4. used his position as a director or officer of ACBF 2 to:

(a) obtain an advantage for Mr Pattenden, Mr Law and Crown; and,

(b) cause a detriment to ACBF 2.

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138 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1517].

139 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1525].

140 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1525]-[1526].

141 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1527].

142 *ASIC v Mitchell (No 2)* (2020) 382 ALR 425; [2020] FCA 1098 at [1535].

143 *ASIC v iSignthis Ltd* [2024] FCA 669 at [592].

144 *ASIC v iSignthis Ltd* [2024] FCA 669 at [598].

145 SAFA at [101].

102. Mr Clayton's conduct referred to in paragraph 101 above:[146]

102.1. was not in good faith in the best interests of ACBF 2;

102.2. was done for the improper purpose of gaining an advantage for Mr Pattenden, Mr Law and Crown; and

102.3. resulted in Mr Clayton:

(a) gaining an advantage for Mr Pattenden, Mr Law and Crown; and,

(b) causing detriment to ACBF 2.

103. For each of the acts or omissions described in paragraphs 101 and 102 above, between 5 October 2017 and 30 November 2018, Mr Clayton:[147]

103.1. failed to exercise his powers and discharge his duties in good faith in the best interests of any of ACBF 2 and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

103.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

Contravention – ACBF Plans

104. By reason of the matters described in paragraph 80 above, and Mr Clayton's positions within the ACBF business as set out in paragraph 27 above, Mr Clayton:[148]

104.1. caused ACBF Plans to maintain the arrangements with Crown from 5 October 2017 until 30 November 2018 without taking any or all of the necessary steps to consider and pursue the matters in paragraph 81.2 above;

104.2. failed to take all necessary steps to manage the conflict of interest that arose between his duties to ACBF Plans and his interest in Crown, or Mr Law's duties to ACBF Plans and Mr Law's interest in Crown; and

104.3. used his position as a director or officer of ACBF Plans to:

(a) obtain an advantage for Mr Pattenden, Mr Law and Crown; and,

(b) cause a detriment to ACBF Plans.

105. Mr Clayton's conduct described in paragraph 104 above:[149]

105.1. was not in good faith in the best interests of ACBF Plans;

105.2. was done for the improper purpose of gaining an advantage for Mr Pattenden, Mr Law and Crown; and

105.3. resulted in Mr Clayton:

(a) gaining an advantage for Mr Pattenden, Mr Law and Crown; and

(b) causing detriment to ACBF Plans.

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146 SAFA at [102].

147 SAFA at [103].

148 SAFA at [109].

149 SAFA at [110].

106. For each of the acts or omissions described in paragraphs 104 and 105 above, including when ACBF 2 paid the increased premium from 5 October 2017 until 30 November 2018 and thus presented the vulnerability for ACBF Plans described in paragraph 80.1 above, Mr Clayton:[150]

106.1. failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF Plans and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

106.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

Contravention – ACBF Community

107. By reason of the matters described in paragraph 84 above, and Mr Clayton's positions within the ACBF business as set out in paragraph 27 above, Mr Clayton:[151]

107.1. caused ACBF Community to maintain the arrangements with Crown from 5 October 2017 until 30 November 2018 without taking any or all of the necessary steps to consider and pursue the matters in paragraph 85.2 above;

107.2. failed to take all necessary steps to manage the conflict of interest that arose between Mr Pattenden's duties to ACBF Community and Mr Pattenden's interest in Crown, or Mr Law's duties to ACBF Community and Mr Law's interest in Crown; and

107.3. used his position as a director or officer of ACBF Community to:

(a) obtain an advantage for Mr Pattenden, Mr Law and Crown; and,

(b) cause a detriment to ACBF Community.

108. Mr Clayton's conduct described in paragraph 107 above:[152]

108.1. was not in good faith in the best interests of ACBF Community;

108.2. was done for the improper purpose of gaining an advantage for Mr Pattenden, Mr Law and Crown; and

108.3. resulted in Mr Clayton:

(a) gaining an advantage for Mr Pattenden, Mr Law and Crown; and,

(b) causing detriment to ACBF Community.

109. For each of the acts or omissions described in paragraphs 107 and 108 above, including when ACBF 2 paid the increased premium from 5 October 2017 until 30 November 2018 and thus presented the vulnerability for ACBF Community described in paragraph 84.1 above, Mr Clayton:[153]

109.1. failed to exercise his powers and discharge his duties in good faith in the best interests of ACBF Community and for a proper purpose, and as a result contravened s 181(1) of the Corporations Act; and

150 SAFA at [111].

151 SAFA at [117].

152 SAFA at [118].

153 SAFA at [119].

109.2. used his position contrary to and in contravention of s 182(1) of the Corporations Act.

C DECLARATIONS

110. As the Corporations Act stood at the time of the Relevant Period, s 1317E(1) provided that if a Court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention. At all times during the Relevant Period, ss 180(1), 181(1) and 182(1) were civil penalty provisions.[154]

111. The declarations sought in the Agreed Proposed Orders ought to be made because the facts and admissions contained in the SAFA establish that the contraventions set out in the Agreed Proposed Orders have occurred.

D DISQUALIFICATION ORDERS

112. For the following reasons, ASIC submits that it is appropriate for the Court to make an order under s 206C(1)(a)(i) and/or s 206E(1)(a)(ii) of the Corporations Act that Mr Clayton be disqualified from managing corporations for 5 years.

D1. RELEVANT PROVISIONS

113. Section 206C(1) is engaged where the Court declares that Mr Clayton contravened ss 180(1), 181(1) and/or 182(1) of the Corporations Act.[155] It provides that, on application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if (a) a declaration is made under, relevantly, s 1317E (para (a)(i)); and (b) the Court is satisfied that the disqualification is justified.

114. Section 206E(1)(a)(ii) is engaged where the Court has declared that Mr Clayton has contravened the Corporations Act more than once, such as by contravening ss 180(1), 181(1) and/or 182(1) in the ways admitted in the SAFA and outlined above.[156] It provides that, on application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if the person has, relevantly, at least twice contravened the Corporations Act (para (a)(ii)); and (b) the Court is satisfied that the disqualification is justified.

115. Sections 206C(2) and s 206E(2) provide that, in determining whether the disqualification is justified, the Court may have regard to (a) the person's conduct in relation to the management, business or property of any corporation; and (b) any other matters that the Court considers appropriate.

116. As the criteria relevant to the exercise of the Court's discretion under ss 206C and 206E are the same, nothing turns on whether disqualification is made under one or the other provision.[157]

D2. PRINCIPLES

117. The principles relevant to the Court's discretion to make orders as to pecuniary penalties and disqualification were recently restated by McEvoy J in *ASIC v iSignThis Ltd*.[158]

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154 Item 1 in the table at s 1317E(1) of the Corporations Act.

155 *ASIC v iSignthis Ltd* [2025] FCA 917 at [12].

156 *ASIC v iSignthis Ltd* [2025] FCA 917 at [12].

157 *ASIC v iSignthis Ltd* [2025] FCA 917 at [13].

158 *ASIC v iSignthis Ltd* [2025] FCA 917 at [14]-[26].

118. **First**, the Court has an established practice of considering the period of disqualification before considering whether any pecuniary penalty should be awarded, or the amount of that penalty.[159] In an appropriate case, the court may make a pecuniary penalty order in addition to a disqualification order, having regard to the purposes for which such orders are made.[160]

119. **Second**, while the primary purpose of a pecuniary penalty order is to act as a specific and general deterrent against repetition of like conduct, the primary aim of disqualification orders is the protection of the public from the harmful use of the corporate structure, or from use that is contrary to proper commercial standards.[161] Protection of the public also extends to protection of individuals who deal with companies, including consumers, creditors, shareholders and investors. However, disqualification must not be excessive and no one should be "sacrificed for the public interest".[162]

120. **Third**, it is the different purposes of disqualification orders and pecuniary penalty orders that justify the long-standing practice of considering the imposition of a pecuniary penalty only after a disqualification order is considered.[163]

121. **Fourth**, the length of the period of disqualification and the seriousness of the contraventions in question are correlative. In assessing the appropriate length of disqualification, consideration is to be given to the degree of seriousness of the contraventions, the propensity that the defendant may have to engage in similar conduct in the future, and the likely harm that may be caused to the public. Longer periods of disqualification are reserved where contraventions have been of a serious nature such as those involving dishonesty and large financial losses.[164] Whether a contravention is "serious" is ultimately a question of fact.[165]

122. **Fifth**, a number of factors have been identified in the authorities as relevant to an assessment of the length of a period of disqualification, including the following:[166]

    122.1. whether the conduct was inadvertent or deliberate or continued, knowing and wilful or whether the director had acted dishonestly;

    122.2. whether the director has expressed any contrition or remorse;

    122.3. the experience and age of the director;

    122.4. the relevance of the contraventions to the company's business;

    122.5. the consequences of the contraventions committed by the director.

123. **Sixth**, previous cases will only provide general guidance for determining a penalty or length of disqualification.

124. **Seventh**, cooperation with ASIC may also be a mitigating factor (but likely to a lesser degree) where cooperation has spared the community the expense of a contested trial

159 *ASIC v iSignthis Ltd* [2025] FCA 917 at [15].

160 See also *ASIC v GetSwift Ltd* (2023) 167 ACSR 178; [2023] FCA 100 at [64]-[65].

161 *ASIC v iSignthis Ltd* [2025] FCA 917 at [16].

162 *ASIC v iSignthis Ltd* [2025] FCA 917 at [16].

163 *ASIC v iSignthis Ltd* [2025] FCA 917 at [17].

164 *ASIC v iSignthis Ltd* [2025] FCA 917 at [18].

165 *ASIC v GetSwift Ltd* (2023) 167 ACSR 178; [2023] FCA 100 at [54].

166 *ASIC v iSignthis Ltd* [2025] FCA 917 at [19].

and enabled the resources of the regulator to be allocated to other investigations.[167] But this should only be where it can fairly be said that an admission of liability (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice.[168]

125. **Eighth**, the principles of totality, course of conduct and parity also inform the court's consideration of disqualification. When determining the disqualification period to be imposed for multiple contraventions, the Court should impose a disqualification period for each individual contravention and then take into account the totality principle to adjust that period to arrive at a total effective disqualification.[169]

126. Further, the principles on agreed relief (set out below in section E2) are not confined to agreement on pecuniary penalty, but apply equally to agreement on other forms of relief such as disqualification.[170]

E PECUNIARY PENALTIES

127. If the declarations of contravention sought in the Agreed Proposed Orders are made, the Court may order Mr Clayton to pay a pecuniary penalty: s 1317G(1). ASIC submits that a penalty of **$20,000** is appropriate, for the reasons set out below.

E1. RELEVANT PROVISIONS

128. A Court may order a person to pay the Commonwealth a pecuniary penalty of up to $200,000 if a declaration of contravention has been made under s 1317E, the contravention is of a corporate/scheme civil penalty provision and the contravention materially prejudices the interests of the corporation, materially prejudices the ability of the corporation to pay its creditors or is serious: s 1317G(1).

129. Accordingly, during the Relevant Period, the maximum penalty for a contravention of ss 180(1), 181(1) and 182(1) was $200,000.

130. ASIC submits that, if the Court makes the declarations sought, the Court's discretion is enlivened in this case given the admissions made by Mr Clayton.[171]

131. The Court may act upon the admission of fact that the conduct in this case is serious.[172] In any event, conduct will be considered "serious" for the purposes of s 1317G(1)(b) if the default or neglect is "grave", "not trifling", "weighty", "important" or "significant" by reference to the potential or actual consequences of the contravention.[173] The potential or actual risks that Mr Clayton's contravening conduct presented to the ACBF Entities and their respective members were significant and should be considered serious by the Court.

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167 *ASIC v iSignthis Ltd* [2025] FCA 917 at [23].

168 *ASIC v iSignthis Ltd* [2025] FCA 917 at [24] citing *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383; [2008] FCAFC 70 at [76].

169 *ASIC v iSignthis Ltd* [2025] FCA 917 at [26].

170 *ASIC v Hawkins* [2025] FCA 121, Annexure A at [140], adopted as the reasoning of the Court at [3].

171 SAFA at [104], [112], [120].

172 *ASIC v Hawkins* [2025] FCA 121, Annexure A at [163], adopted as the reasoning of the Court at [3]. *ASIC v Newcrest Mining Ltd* (2014) 101 ACSR 46; [2014] FCA 698 at [57].

173 *ASIC v Hawkins* [2025] FCA 121, Annexure A at [164], adopted as the reasoning of the Court at [3]; *ASIC v Hochtief Aktiengesellschaft* (2016) 117 ACSR 589; [2016] FCA 1489 at [97].

E2. AGREED PENALTY

132. The proper approach to civil regulatory orders that are sought on an agreed basis has recently been restated by this Court in *Australian Securities and Investments Commission v FIIG Securities Limited*[174] (***ASIC v FIIG***) and *Clean Energy Regulator v E Connect Solar & Electrical Pty Ltd*[175] and ASIC adopts those principles.

133. In summary:

133.1. the High Court in *Commonwealth v Director, Fair Work Building Industry Inspectorate* reaffirmed the practice of acting upon agreed penalty submissions stating:[176]

> Subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and … highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty.

133.2. Where the Court is sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences and to the appropriateness of the penalty, it is highly desirable for the Court to accept the parties' proposal and to impose the proposed penalty.[177] There is an important public policy interest in giving effect to agreements as to penalty, particularly where such agreements encourage corporations to acknowledge contraventions and thereby avoid lengthy and complex litigation and promote predictability of outcomes in civil penalty proceedings.[178]

133.3. Further, the Court may assume that ASIC, as a specialist regulatory body, will fashion penalty submissions with an overall view to achieving compliance and will be in a position to offer informed submissions as to the effect of contraventions on the industry and the level of penalty necessary to achieve compliance.[179] Accordingly, while submissions of a regulator will be considered on their merits in the ordinary way, ASIC's views as to the appropriate penalty to achieve the necessary deterrent effect should be highly persuasive in the Court's consideration of the appropriate penalty.[180]

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174 [2026] FCA 92 at [55]-[58].

175 (2023) 171 ACSR 216; [2023] FCA 1082 at [33]-[40].

176 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46 (***FWBII***) at [58].

177 *FWBII* (2015) 258 CLR 482; [2015] HCA 46 at [58]; *ASIC v ANZ (No 3)* [2020] FCA 1421 at [78]; *ASIC v MLC Nominees* (2020) 147 ACSR 266; [2020] FCA 1306 at [114]; *ACCC v Coles* [2014] FCA 1405 at [72]; *ASIC v MobiSuper* [2021] FCA 855 at [28].

178 *ASIC v Allianz Australia Insurance Ltd* (2021) 156 ACSR 638; [2021] FCA 1062 at [128] (***ASIC v Allianz***); *FWBII* (2015) 258 CLR 482; [2015] HCA 46 at [28], [46]; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 290 (***NW Frozen Foods v ACCC***); *Volkswagen v ACCC* (2021) 284 FCR 24; [2021] FCAFC 49 at [126]; *ASIC v ANZ (No 3*) [2020] FCA 1421 at [78]; *ASIC v MLC Nominees* (2020) 147 ACSR 266; [2020] FCA 1306 at [114].

179 *FWBII* (2015) 258 CLR 482; [2015] HCA 46 at [60].

180 See *ASIC v Allianz* (2021) 156 ACSR 638; [2021] FCA 1062 at [127]; *FWBII* (2015) 258 CLR 482; [2015] HCA 46 at [61].

133.4. Accordingly, where the penalty proposed by the parties is within the permissible range, the Court will not depart from the submitted figure merely because it might otherwise have been disposed to select some other figure.[181]

134. These principles are not confined to agreed submissions on pecuniary penalties but apply equally to agreement on other forms of relief. The High Court's conclusions as to the desirability of acting upon agreed penalty submissions were made in the context of its broader recognition that civil penalties are but one of numerous forms of relief which regulators could choose and pursue as a civil litigant in civil proceedings, including by making submissions as to that relief.[182] This is consistent with the long-standing judicial support for agreed positions on declarations, injunctions and the like in civil regulatory proceedings, having regard to the public interest. [183]

E3. PRINCIPLES ON PENALTY ASSESSMENT

135. Under s 1317G, the Parliament has left it to the Court to decide what penalty is appropriate in all the circumstances having regard to the Court's own independent opinion.[184]

136. The fundamental principles may be summarised as follows.

137. **First**, the Court's discretion to impose a penalty must be exercised judicially; that is, fairly and reasonably.[185]

138. **Second**, the primary or sole purpose of civil penalties is to achieve deterrence.[186]

139. **Third**, the penalty must be "proportionate" and "appropriate" in the sense that it strikes a reasonable balance between oppressive severity and deterrence in the circumstances of the case.[187] The Court's task is to identify and balance all of the relevant factors and make a value judgment as to the appropriate penalty, a process described as "instinctive synthesis".[188] Having taken into account all relevant circumstances and discussed their significance, the court makes a value judgment as to what is the appropriate amount of penalty.[189]

140. **Fourth**, the Court should have regard to the prescribed maximum penalty and there should be some reasonable relationship between the maximum penalty and that imposed. The maximum provides a "yardstick" to be balanced with all other relevant

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181 *ASIC v Hawkins* [2025] FCA 121, Annexure A at [142] citing *FWBII* (2015) 258 CLR 482; [2015] HCA 46 at [47], adopted as the reasoning of the Court at [3].

182 See *FWBII* (2015) 258 CLR 482; [2015] HCA 46 at [24], [57]-[59], [63], [103], [107].

183 See *NW Frozen Foods v ACCC* (1996) 71 FCR 285 at 290; *ACCC v Coles* [2014] FCA 1405 at [74]-[76]; *ASIC v MobiSuper* [2021] FCA 855 at [37].

184 *ASIC v MLC Nominees* (2020) 147 ACSR 266; [2020] FCA 1306 at [117].

185 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 at [40]; *ASIC v iSignthis Ltd* [2025] FCA 917 at [30].

186 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 at [9]-[10], [15]; *ASIC v iSignthis Ltd* [2025] FCA 917 at [31]; *ASIC v Commonwealth Bank of Australia* [2021] FCA 423 at [4]; *ASIC v Westpac* [2019] FCA 2147 at [255].

187 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 at [40]-[41], [46]; *ASIC v iSignthis Ltd* [2025] FCA 917 at [32].

188 *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25; [2016] FCAFC 181 at [44].

189 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 at [46]-[48]; *ASIC v Mercer Financial Advice (Australia) Pty Ltd* [2023] FCA 1453 at [69]-[72]; *ASIC v GetSwift Ltd* (2023) 167 ACSR 178; [2023] FCA 100 at [64]-[65].; *ASIC v MLC Nominees* (2020) 147 ACSR 266; [2020] FCA 1306 at [117]; *ASIC v iSignthis Ltd* [2025] FCA 917 at [35]-[36].

factors, and the Court should not simply start with the maximum penalty and proceed by making proportional deductions to that amount.[190]

141. **Fifth**, in determining the pecuniary penalty, the Court must take into account all relevant matters.[191] Facts prior to the period being penalised may be taken into account in determining the penalty in the instinctive synthesis performed by the Court.[192]

142. **Sixth**, additional factors may be taken into account as relevant considerations, insofar as they inform the penalty necessary to secure the objects of deterrence. However, not all factors that have been identified in previous cases will necessarily be relevant or important in every case, and they are not to be applied as a "rigid catalogue".[193]

143. **Seventh**, criminal law principles of totality, course of conduct and parity also inform the court's determination of penalty.[194] The course of conduct principle will apply where there is a sufficient interrelationship in the legal and factual elements of the acts or omissions constituting the contravening conduct.[195] In these circumstances, the court may, in its discretion, penalise the acts or omissions as a single course of conduct.[196] The Court may also apply the totality principle to consider the entirety of the underlying contravening conduct to determine whether the "total" or aggregate penalty is just and appropriate.[197] Parity of penalty will be an important consideration where there are several defendants involved in the same events,[198] such as in this case. In this respect, where other things are equal, persons concerned in the same contravention should receive the same punishment; and where other things are not equal, a due discrimination should be made.[199] Where there is a difference in the disqualification period or penalty between different defendants, there must be a persuasive rationale, such as the part in which the defendant played in the contravention.[200]

F APPLICATION

144. For the following reasons, the proposed disqualification period and pecuniary penalty are appropriate having regard to the circumstances of the conduct and the relevant principles in relation to disqualification and pecuniary penalties set out above. Given the

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190 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 at [10], [52]-[55]; *ASIC v Mercer Financial Advice (Australia) Pty Ltd* [2023] FCA 1453 at [68]; *ASIC v iSignthis Ltd* [2025] FCA 917 at [33].

191 *ASIC v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585; [2018] FCA 1701 at [49].

192 *ASIC v MLC Ltd* (2023) 168 ACSR 122; [2023] FCA 539 at [96] citing *ASIC v Commonwealth Bank of Australia* [2020] FCA 790 at [9].

193 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 at [19]; *Australian Building and Construction Commissioner v CFMEU* (2017) 254 FCR 68; [2017] FCAFC 113 at [101]; *ASIC v Hawkins* [2025] FCA 121, Annexure A at [176], adopted as the reasoning of the Court at [3].

194 *ASIC v iSignthis Ltd* [2025] FCA 917 at [39]; *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 at [45]; *ASIC v Mercer Financial Advice (Australia) Pty Ltd* [2023] FCA 1453 at [69]-[70], [80].

195 *ASIC v MLC Nominees* (2020) 147 ACSR 266; [2020] FCA 1306 at [128].

196 *ASIC v MLC Nominees* (2020) 147 ACSR 266; [2020] FCA 1306 at [128].

197 *ASIC v MLC Nominees* (2020) 147 ACSR 266; [2020] FCA 1306 at [131]; *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383; [2008] FCAFC 70 at [5]-[7]; *Mill v The Queen* (1988) 166 CLR 59 at 62-63.

198 *ASIC v Australian Property Custodian Holdings Ltd* (2014) 322 ALR 45; [2014] FCA 1308 at [107]-[109]; *ASIC v Commonwealth Bank of Australia* [2020] FCA 790 at [77].

199 *ASIC v Australian Property Custodian Holdings Ltd* (2014) 322 ALR 45; [2014] FCA 1308 at [109];

200 *ASIC v MacDonald (No 12)* (2009) 259 ALR 116; [2009] NSWSC 714 at [320], [322]; *Gillfillan v ASIC* [2012] NSWCA 370 at [206].

overlap, below we consider together the factors relevant to assessing pecuniary penalties and disqualification.

145. **Circumstances of the contravention**: As COO, Mr Clayton occupied a senior position within the ACBF business. He had oversight of the financials of the ACBF Entities and processed the premium payments and claims for Crown, as well as approved the accounts receivable, dealt with the accountant and auditor.[201] He was therefore aware of ACBF 2's financial position and knew or ought to have known that each of the ACBF Entities was vulnerable to price increases by Crown.[202]

146. From December 2017 until the end of the Relevant Period, Mr Clayton sent emails to Mr Pattenden (with information relevant to the previous month) with details of the premiums paid to Crown, the claims received, total claims paid by Crown and the amount of profit share paid by Crown.[203]

147. On 30 October 2017, Mr Clayton received an email from Mr Wilson with a copy of the Crown increase premiums letter received from Mr Law on 4 September 2017 (referred to at paragraph 79 of the SAFA). The SAFA does not say anything about whether Mr Clayton saw or understood this letter. Even if Mr Clayton did not see it, Mr Clayton admits that a reasonable director or officer in Mr Clayton's position (as described in paragraphs 145 and 146 above) would have reviewed and been familiar with the FY2017 accounts to identify the increased premiums paid by ACBF 2, and that by reason of his involvement in sending the premium information to Mr Pattenden each month (described in paragraph 146 above), he knew or ought to have known of the increased premium paid by ACBF 2 to Crown.[204]

148. Further, Mr Clayton admits that he knew or ought to have known that Crown was related to Mr Pattenden and Mr Law, in that it was owned and operated by them or that they were directors or shareholders of Crown, and that Mr Pattenden and Mr Law financially benefited from the ACBF Entities insuring with Crown.[205]

149. At various times between April 2018 and September 2018, Mr Clayton (with Mr Jones) communicated with the Office of NSW Fair Trading about whether the Crown arrangement was in the best interests of members.[206]

150. Despite each of the matters above, at no point during the Relevant Period did Mr Clayton ask for analysis to be undertaken of the effect of the 100% increase on ACBF 2's financial position. Mr Clayton admits he ought to have done this.[207] Further, despite the above, Mr Clayton took no steps during the Relevant Period to consider the effect of the Crown arrangements on the financial position of the ACBF Entities and whether continuing the policy with Crown was in the best interests of ACBF Entities and their fund members.[208]

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201 SAFA at [69].

202 SAFA at [91], [105.1], [113.1].

203 SAFA at [83].

204 SAFA at [82].

205 SAFA at [92.3], [92.4], [84].

206 SAFA at [93]-[96].

207 SAFA at [90].

208 SAFA at [99.1], [99.2], [107.1], [107.2], [115.1], [115.2].

151. **Nature and extent of any loss or damage suffered**: the premium increase had a significant negative effect on the financial position of ACBF 2.[209] The impact of the premium increase, and Mr Clayton's conduct in allowing it to continue until the end of the Relevant Period in the circumstances where the conflict existed and ACBF 2 had no other source of funds to pay member claims without insurance from Crown,[210] was that it created a substantial risk that ACBF 2 would become insolvent within approximately four or less years and would need to be wound up.[211]

152. If ACBF 2 had been wound up in insolvency in the future, ACBF 2's policy with Crown would be terminated and the remaining members of Fund 2 would not be able to recover all or part of any cancellation benefit they were owed.[212] In those circumstances, if fund members' cover was cancelled, they would be without funeral cover.[213] The members of Fund 2 were not told information concerning this, see paragraph 43.4 above, and had no way of knowing this information unless it was explained to them by ACBF 2.[214]

153. On 14 December 2018, Mr Clayton raised the issue of the doubled premium for the first time in an email to Mr Law and Mr Pattenden, stating that the doubled premium for ACBF 2 had been reversed following investigation of a query raised by Steve Adams of JKA.[215] No payments were made by Crown regarding the doubled premium for ACBF 2.[216]

154. Further, the premium increase for ACBF 2 demonstrated ACBF Plans and ACBF Community's vulnerability to price increases from Crown. If Crown had increased premiums for ACBF Plans or ACBF Community during the Relevant Period, whether by doubling those premiums as it had done for ACBF 2 or by increasing the premiums at all, the effect of the premium increase would be, in each case, that ACBF Plans and ACBF Community would immediately become insolvent.[217]

155. If ACBF Plans and ACBF Community were wound up in insolvency, their respective fund members' cover would be cancelled and they would be without funeral cover.[218] The members of Funds 3 and 4 were not told information concerning this, see paragraph 56 above, and had no way of knowing this information unless it was explained to them by ACBF Plans or ACBF Community.[219]

156. **Deliberateness**: ASIC accepts that Mr Clayton's conduct was not deliberate. At its highest, Mr Clayton's conduct (in being aware of the ACBF Entities' financial positions, the Crown arrangement and the conflict between Mr Pattenden's and Mr Law's interests in Crown and their duties as directors of the ACBF Entities) was reckless as to whether the Crown arrangement was in the interests of members of the ACBF Entities.

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209 SAFA at [87.6], [87.7], [128].
210 SAFA at [87.3]-[87.4].
211 SAFA at [89.1].
212 SAFA at [89.2].
213 SAFA at [89.3].
214 SAFA at [89.4].
215 SAFA at [121].
216 SAFA at [121]-[122].
217 SAFA at [91.4].
218 SAFA at [91.7].
219 SAFA at [91.8].

157. **Extent of profit from the contraventions**: Mr Clayton did not profit from the contraventions.

158. **General deterrence**: A period of disqualification is necessary in this case not only for specific deterrence but also as a general deterrent.[220] By ordering a period of disqualification, the public will be protected from (and send a signal to others about) Mr Clayton's conduct in favouring the interests of Mr Pattenden, Mr Law and Crown in a way that is harmful or contrary to proper commercial standards.[221] Notwithstanding that Mr Clayton is no longer a director of the ACBF Entities and the entities are in liquidation there is still a need for specific deterrence and protection of the public to ensure that he does not act in a similar way.[222] Further, the disqualification period is appropriate to further the requirements of general deterrence.[223]

159. **Seriousness of the conduct**: A disqualification period of 5 years correlates to the seriousness of the conduct. The parties agree that the conduct was serious and continued throughout the Relevant Period.[224]

160. **Relevance of contraventions to the entity's business**: The contraventions were central to the business of the ACBF Entities as the ACBF Entities could not pay members' claims without insurance from Crown.[225]

161. **Cooperation**: Mr Clayton has engaged constructively with ASIC and has agreed to a detailed SAFA setting out the underlying facts and admissions going to his liability and penalty, and agreed to the declarations set out in the Agreed Proposed Orders.[226] Through the SAFA, Mr Clayton has acknowledged and accepted responsibility for his conduct. The result is that some of the cost to the public of a fully contested hearing has been avoided, even if the admissions were made after the commencement of the hearing of this proceeding.[227] Mr Clayton's admissions and co-operation also demonstrate contrition and insight into his conduct.

162. **Parity**: The decision to increase the premium for ACBF 2 pre-dates the Relevant Period for Mr Clayton's conduct. That is, Mr Clayton was not involved in the decision to increase ACBF 2's premium (which is the case for Mr Pattenden, Mr Law and Mr Wilson). This justifies imposing a lower penalty and disqualification period than Mr Pattenden and Mr Law in this proceeding.

163. **Course of conduct**: There should be three courses of conduct, one for each ACBF Entity, as the factual substratum is "unitary" for each entity and can be traced back to a single homogenous cause.[228] ASIC submits that there were three contraventions of each

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220 *ASIC v Citrofresh International Ltd (No 3)* (2010) 268 ALR 303; [2010] FCA 292 at [41].

221 *ASIC v Adler* (2002) 42 ACSR 80; [2002] NSWSC 483 at [56(i)]; *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528 at [26(a)]; *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd (No 2)* [2013] FCA 1267 at [170].

222 *ASIC v GetSwift Ltd* (2023) 167 ACSR 178; [2023] FCA 100 at [93], [103].

223 *ASIC v GetSwift Ltd* (2023) 167 ACSR 178; [2023] FCA 100 at [102].

224 SAFA at [104], [112], [120].

225 SAFA at [87.2]-[87.4], [91.2]-[91.3].

226 SAFA at [136].

227 SAFA at [136]-[137].

228 *Australian Competition and Consumer Commission v Murray Goulburn Co-Operative Co Ltd* [2018] FCA 1964 at [29]; *ASIC v MLC Nominees* (2020) 147 ACSR 266; [2020] FCA 1306 at [176]; *ASIC v iSignthis Ltd* [2025] FCA 917 at [241].

of ss 180(1), 181(1) and 182(1), one for each ACBF Entity, with 9 contraventions in total.[229]

164. **Totality**: The principle of totality should be applied, which requires the Court to look at the entirety of the offending and determine the most appropriate sentence for all of the contraventions taken together.[230]

G COSTS AND OTHER ORDERS

165. The Court's powers to award costs are found in:

165.1. s 43 of the *Federal Court Act* 1976 (Cth), which provides that the award of costs is in the discretion of the Court (s 43(2)); and

165.2. r 40.02 of the *Federal Court Rules 2011* (Cth), which allows costs to be awarded in a lump sum instead of, or in addition to, any taxed costs.

166. Mr Clayton consents to an order that he pay $2,000 towards ASIC's costs of and incidental to the proceedings.

Date: 2 April 2026

Caspar Conde

Jacqui Fumberger

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229 See, eg, *ASIC v Sino Australia Oil and Gas Ltd (in liq)* (2016) 118 ACSR 43; [2016] FCA 1488 at [21].

230 *ASIC v GetSwift Ltd* (2023) 167 ACSR 178; [2023] FCA 100 at [46].