Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: Taxation and Commercial Division

File Number(s): **2020/1564**

Re: **Olive Financial Markets Pty Ltd**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

DECISION

Tribunal: **Deputy President Bernard J McCabe**
Member R Reitano

Date: **21 December 2022**

Place: **Sydney**

The cancellation decision is affirmed.

.....

Deputy President Bernard J McCabe

CATCHWORDS

COPORATIONS - obligations set out in s 912A(1) of the Corporations Act 2001 not met - cancellation decision - discretionary power to suspend or cancel a licence - historical contraventions - decision affirmed.

LEGISLATION

Administrative Appeals Tribunal Act 1975
Australian Securities and Investments Commission Act 2001
Corporations Act 2001
Trade Practices Act 1974

CASES

Domain Administration Ltd v Domain Names Australian Pty Ltd [2004] FCA 424
Masu Financial Management Pty Ltd and Australian Securities and Investments Commission [2017] AATA 97
Sovereign Capital and Australian Securities and Investments Commission [2008] AATA 901 ('Sovereign Capital')

SECONDARY MATERIALS

Regulatory Guide 165: Licensing: internal and External Dispute Resolution

REASONS FOR DECISION

1. This case requires the Tribunal to consider the appropriate regulatory response where the holder of an Australian Financial Services Licence has not met the obligations set out in s 912A(1) of the *Corporations Act 2001* (Cth). As we shall see, there is also a question over the licensee's ability to meet those obligations in the future.

2. The case arises out of the reviewable decision by the Australian Securities and Investments Commission ('ASIC') to cancel the Australian Financial Services Licence ('AFSL', or 'the licence') of Olive Financial Markets Pty Ltd ('Olive'). The cancellation decision was made under s 915C of the Corporations Act on 13 March 2020. That provision gives ASIC a discretionary power to suspend or cancel a licence after a hearing if ASIC is satisfied the statutory criteria have been met. Olive, the licensee, has had the benefit of a conditional stay while the review proceeds.

3. ASIC's delegate found (and ASIC presses) a range of historical contraventions that occurred over an extended period. ASIC also says it (or the Tribunal, on review) has reason to believe Olive is likely to contravene its obligations in the future. ASIC argues the Tribunal should affirm the decision to cancel Olive's AFSL in all the circumstances.

4. Olive said at the hearing that it does not contest the findings made in relation to most of the historical contraventions. Olive argues the licence should not be cancelled in any event because the organisation has learned from its mistakes and made significant changes to its personnel, structure, and operations. Olive says those changes mean the problems are unlikely to reoccur. Olive argues cancellation is neither necessary nor appropriate in all the circumstances because, as it explained in written submissions:

> *The nature of the Tribunal's jurisdiction requires it to make its decision afresh, by reference to Olive's contemporary business, its structures, management, and practices; not by reference to its position between about 3 and 4 ½ years ago.*

5. We accept there have been substantial changes to Olive's business, and further changes may yet be made which will improve the chances of it complying with its obligations. Yet, even if we accept those improvements are sufficient to reduce the risk of future contraventions should Olive remain licensed, we are satisfied cancellation of the licence is appropriate having regard to the historical contraventions which are uncontested. As we shall explain, those contraventions are so serious and extensive that cancellation is a necessary and proportionate response that will deter similar conduct by other licence-holders. Cancellation will also promote confidence amongst consumers. We set out our reasons for that decision below.

THE LEGISLATIVE FRAMEWORK

6. Our discussion of the facts will make more sense if one understands the legislative basis of the regulatory action under consideration in this case.

7. Most of the relevant provisions are found in Chapter 7 of the Corporations Act. The object of that chapter is set out in s 760A. The object includes promoting:

- confident and informed decision-making by consumers of financial products;
- the provision of suitable financial products to consumers of financial products; and
- fairness, honesty and professionalism by those who provide financial services.

8. The importance of the aspirational goals of the regulatory regime was underlined in the 2019 report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

9. ASIC is also required to have regard to the objectives in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) as it administers the provisions of the Corporations Act. Those objectives are relevant here because the Tribunal steps into ASIC's shoes on review. Section 1(1) of the ASIC Act refers to ASIC's objectives and s 1(2) instructs ASIC on the way it performs its role. Relevantly, s 1(2) requires that ASIC must strive to:

> *(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and*
>
> *(b) promote the confident and informed participation of investors and consumers in the financial system;…*

10. The power to suspend or cancel an AFSL following a hearing before the delegate is found in s 915C(1) of the Corporations Act. The grounds for suspension or cancellation (as the case may be) include, relevantly:

> *(a) the licensee has not complied with their obligations under section 912A;*
>
> *(aa) ASIC has reason to believe that the licensee is likely to contravene their obligations under section 912A…*

11. Section 912A(1) requires that a financial services licensee must, amongst other things:

> *(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and*
>
> *….*
>
> *(c) comply with the financial services law; and*
>
> *(ca) take reasonable steps to ensure that its representatives comply with the financial services laws, except to the extent that:*
>
> *(i) those representatives are insurance fulfilment providers; and*
>
> *(ii) the financial services laws relate to the provision of claims handling and settling services by those representatives; and*
>
> *…*
>
> *(d) subject to subsection (4)–have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and*
>
> *…*
>
> *(f) ensure that its representatives are adequately trained (including by complying with the CPD provisions), and are competent, to provide those financial services; and*
>
> *(g) if those financial services are provided to persons as retail clients:*
>
> *(i) have a dispute resolution system complying with subsection (2); and*
>
> *(ii) give ASIC the information specified in any instrument under subsection (2A); …*

12. Section 912A(2), which is referred to in s 912A(1)(g)(i), deals with dispute resolution systems. The sub-section provides:

> *(2) To comply with this subsection, a dispute resolution system must consist of:*
>
> *(a) an internal dispute resolution procedure that:*
>
> *(i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and*
>
> *(ii) covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and*
>
> *(c) membership of the AFCA scheme.*

13. The *financial services laws* referred to in s 912A(1)(c) and (ca) that are relevant in this case are found in:

- ss 961B and 961G of the Corporations Act, which deal with the adequacy of financial advice;
- ss 992A and 992AA of the Corporations Act (as s 992AA was drafted at the relevant time), which proscribe hawking,
- ss 1041E and 1041H of the Corporations Act, which deal with misleading or deceptive conduct;
- s 12CB of the ASIC Act, which deals with unconscionable conduct.[1]

14. Section 961B says a person who provides personal advice to a retail client must act in the best interests of the client in relation to the advice. 'Personal advice' for the purpose of s 961B involves the 'financial product advice' that is given to a person "in circumstances where… the provider of the advice has considered one or more of the person's objectives, financial situation and needs" or "where a reasonable person might expect the provider to have considered one or more of those matters": ss. 766B(1) and (3).

15. Section 961G deals with the appropriateness of the advice for a particular client. The section provides:

> *The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client.*

16. Section 992A (as it was drafted at 13 March 2020) prohibited hawking in relation to financial products apart from managed investment schemes. The hawking of interests in managed investment schemes was dealt with in a parallel provision in s 992AA that has subsequently been amended. (The hawking of interests in managed investment schemes is now covered by an amended s 992A.)

17. Section 992A(3) provided (as at 13 March 2020) "A person must not make an offer to issue or sell a financial product in the course of, or because of …(aa) an unsolicited telephone

[1] Section 761A contains a definition of 'financial services laws' that extends to provisions found in Chapter 7 of the Corporations Act and Division 2 of Part 2 of the ASIC Act, which includes s 12CB.

call to another person…" unless a series of conditions are met. As we shall see, there is a dispute between the parties over whether Olive's representatives contravened this prohibition in the course of its superannuation business. The expression 'unsolicited telephone call' was also used in s 992AA as it was drafted at the relevant time. Section 992AA(1) said:

> *(1) A person must not offer interests in managed investment schemes for issue or sale in the course of, or because of:*
>
> *(a) an unsolicited meeting with another person; or*
>
> *(b) An unsolicited telephone call to another person;*
>
> *unless the offer is exempted…*

18. There is also a dispute on the facts over whether Olive contravened s 992AA in its managed discretionary account business.

19. Section 1041E deals with false or misleading statements. It provides:

> *(1) A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:*
>
> *(a) the statement or information is false in a material particular or is materially misleading; and*
>
> *(b) the statement or information is likely:*
>
> *(i) to induce persons in this jurisdiction to apply for financial products; or*
>
> *(ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or*
>
> *(iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and*
>
> *(c) when the person makes the statement, or disseminates the information:*
>
> *(i) the person does not care whether the statement or information is true or false; or*
>
> *(ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.*

20. ASIC found that Olive, through its representatives, made false or misleading statements in the marketing of the superannuation and managed discretionary account businesses. ASIC also concluded Olive engaged in misleading or deceptive conduct. Section 1041H contains the general prohibition on misleading or deceptive conduct which parallels the provisions in the Australian Consumer Law. Section 1041H(1) provides:

> *(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.*

21. Sections 12CA and 12CB of the ASIC Act deal with unconscionable conduct in connection with financial services. Section 12CB establishes a statutory form of unconscionability which is relevant in this case. The section provides:

> *(1) A person must not, in trade or commerce, in connection with:*
>
> *(a) the supply or possible supply of financial services to a person; or*
>
> *(b) the acquisition or possible acquisition of financial services from a person;*
>
> *engage in conduct that is, in all the circumstances, unconscionable.*

22. Section 12CA refers to the general law concept of unconscionability but s 12CA(2) makes clear the general law does not apply to actions in connection with financial services that are amenable to s 12CB. ASIC has made allegations in this case about unconscionability within the meaning of s 12CB.

WHAT HAPPENED?

A note about our approach to fact-finding in these reasons

23. Before we address what happened, it is important to say something about our approach to fact-finding. Section 43(2B) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) requires that we make findings on material questions of fact and refer to the evidence *or other material* on which those findings were based. This case is unusual in that the factual controversy between the parties was at least partly resolved prior to the hearing when Olive agreed it would not contest many of the allegations of fact that ASIC had put against Olive

in ASIC's statement of facts, issues and contentions. Olive expressly adopted this approach to avoid the need for a much longer hearing in which the Tribunal was provided with the details in support of ASIC's allegations of fact. Olive plainly took the view that its interests were best served by focusing on the changes that have been made to the business more recently. It made a forensic choice to run a more 'forward looking' case rather than contest most of the evidence about what had transpired.

24. For the avoidance of doubt, ASIC filed a further amended statement of facts, issues and contentions which highlighted the paragraphs alleging conduct that was not contested. ASIC helpfully included detailed footnotes referring to the evidence which provided an evidentiary basis for those factual propositions. The evidence referred to in the footnotes includes transcripts of witness interviews and other documents that had been collected during the investigation and afterwards.

25. We are conscious of what is at stake for Olive as we go about the fact-finding process. Olive was certainly on notice of the potential consequences when it agreed it did not contest the highlighted paragraphs of ASIC's further amended statement of facts, issues and contentions. While that document was not described as an agreed statement of facts, we have no proper basis for rejecting the material it identifies as being uncontested. We are satisfied we can rely on the highlighted paragraphs (supported, as they are, by detailed references to evidence) as material that provides an appropriate basis for making findings. We reference the relevant passages of the further amended statement of facts, issues and contentions as we set out our narrative and make findings of fact. That factual narrative in our reasons necessarily cleaves closely to the uncontested narrative in the further amended statement of facts, issues and contentions. We have done that to reduce the risk of misrepresenting that which is uncontested. Where it is necessary to make factual findings about matters that remain in contest between the parties, we refer to and weigh the evidence that was before us in the usual way.

A brief introduction to Olive's business and the people behind it

26. Olive provided a range of financial services under the terms of its AFSL. Olive's business was comprised of two principal parts during the period under consideration in the delegate's reviewable decision. The first part involved offering individuals the opportunity to invest in managed discretionary accounts operated by Olive and its representatives (hereinafter 'the

MDA business'). The second part of the Olive business provided what was described as a managed superannuation service to clients that included the provision of advice. As it happens, the client was usually advised to roll-over their existing superannuation assets into a model portfolio managed by Olive and its representatives. That business will be referred to as 'the superannuation business'. It appears both parts of the business generated lucrative fees for Olive over an extended period. Both parts of the business were also rife with problems, as we shall explain.

27. The key characters in the organisation at the relevant time were:

- *Mr Scott Morrison*. Mr Morrison was the sole director and company secretary of Olive until he resigned from those roles on 13 November 2019. He had previously worked as head of broking for Aliom Group, another financial services business which was led at the time by Mr Justin Richmond (see below). Mr Morrison acquired control of Olive after he left Aliom. Olive already had an AFSL at that point. During the events referred to in the reviewable decision, Mr Morrison controlled 50% of the shares in Olive either directly or through a holding company. Mr Morrison's interest fell to 35% at some point between December 2018 and July 2020.
- *Mr Justin Richmond*. Mr Richmond was Olive's Chief Executive Officer throughout the period covered by the reviewable decision. He is a lawyer with a background in senior management of financial services businesses, including the Aliom Group. He left Aliom to work at Olive in 2013 when Mr Morrison invited him to join the business. Mr Richmond was not a shareholder of the Olive business, however his wife controlled 50% of the company either personally or through a holding company. On 11 November 2019 Mr Richmond became a director and company secretary of Olive, and from 13 November 2019 he was the sole director and sole secretary. At some point between December 2018 and July 2020 Mrs Richmond's shareholding increased to 65% after Olive issued additional shares.[2]

28. Before late 2018, Olive used corporate authorised representatives (CARs) in the operation of both businesses. The CARs would market products to clients and oversee the clients' investments and relationships under the terms of Olive's AFSL. There was some change to

[2] Transcript of Proceedings 241 [34].

these arrangements in the MDA business in October 2018 when Olive or one of its subsidiaries began to deal directly with clients rather than operating through CARs. A good deal of the problematic behaviour in both the MDA and superannuation businesses emanated from the CARs, but Olive was ultimately responsible for what occurred under its licence.

29. The important characters involved in the CARs included:

- Messrs Benjamin Rigby, Rhys Jones and Michael Lean who were managers in the MDA business;
- Mr Mitchell Cator, who played a central role in the superannuation business.

30. Messrs Rigby, Jones and Cator had all worked together at Aliom with Mr Richmond and Mr Morrison.

THE MDA BUSINESS

31. That brings us to the MDA business. Clients of Olive's MDA business would enter into an agreement with Olive to operate trades on their behalf using an account the client would open on a trading platform. As we shall see below, the client might come to that engagement through one of Olive's CARs or the client might (after 2018) deal directly with Olive. Clients paid a membership fee to participate in the scheme, and they also deposited $20,000 into the account.[3] Olive or the CAR would then use the invested amount to fund trades in leveraged financial products. In practice, the trades were conducted by either Mr Jones, Mr Rigby or Mr Lean. Olive would receive a rebate of brokerage fees paid by the clients in respect of those trades.[4] The business was lucrative. Between August 2013 and April 2017, Olive received over $9 million in brokerage rebates from one trading platform.[5]

32. From late 2014 until around October 2018, Olive conducted the MDA business through a series of CARs. The CARs were:

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[3] Respondent's Further Amended Statement of Facts, Issues, and Contentions, (15 March 2021), 11 [48] ('Respondent's SFIC').

[4] Ibid [47]-[49].

[5] Ibid [49].

- Share Express Pty Ltd from 28 November 2014 through the latter part of 2016, when Share Express ceased trading. (It subsequently went into liquidation.) Mr Rigby was the sole director and authorised representative during this period, and Mr Richard White and his wife were shareholders.[6]
- Markets Pty Ltd from October 2016 through May 2018 (although Markets stopped accepting new clients in September 2017). Mr Rigby was also the authorised representative and director throughout this period, and Mrs White was the controlling shareholder. That company was also placed in liquidation.[7]
- Investor Centre Pty Ltd became Olive's CAR on 14 May 2018 after concerns came to light over Mr White's involvement with the business. (Mr Richmond explained in his statement that Olive learned in April 2018 that Share Express and Markets had not been meeting their tax obligations and Markets had ceased paying its staff.[8] We note Mr White had also worked at Aliom along with the other Olive managers, although nothing ultimately turns on that fact.[9]) Mr Jones was the director of Investor Centre but the company was controlled by Mr Rigby, Mrs Rigby, Mr Morrison and Mrs Richmond.

33. From October 2018, Olive ceased using CARs and came to operate the MDA business itself. Olive ceased operating the MDA business in around September 2020.

34. The leveraged products in question included in particular **contracts for difference** (CFDs). A CFD is a financial derivative that allows an investor to speculate on the movement in price of an underlying asset. The underlying asset might be equities, indices, bonds, commodities, currency, or foreign exchanges. The respondent's further amended statement of facts, issues and contentions offers a convenient description of CFDs which Olive does not contest. ASIC says:[10]

> *A CFD is an agreement to exchange, at the closing of the contract, the difference between the opening and closing price of the underlying asset, multiplied by the number of units of that asset detailed in the agreement. A person may acquire a CFD contract to negate an adverse movement in the price of what they already hold,*

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[6] Ibid 8-9, [28]-[29], [31].

[7] Ibid 9, [34]-[38].

[8] Statement of Justin Richmond, dated 22 October 20196-7, 30, [32], [106] (Statement of Justin Richmond).

[9] Transcript of Proceedings, 239-240.

[10] Respondent's SFIC 10 [44]-[45]

for instance a financial product or a physical product such as currency. If a person in any other case acquires a CFD the person is speculating that the value of the underlying asset will increase or decrease over time.

A CFD allows an investor to expose themselves to movements in the value of the underlying asset without having to purchase that asset. They are highly leveraged and require the investor, initially, to pay only a fraction of the price of the underlying asset to open a position. The investor is exposed, however, to the total of the movement in the price of the underlying asset. While these products can be used to magnify profits, relative to the initial investment, they have a commensurate potential to magnify losses.

35. The footnotes accompanying the passages cited above reproduce information from ASIC's 'Moneysmart' website regarding CFDs which explain the extraordinary features – and risks – of CFDs in lay terms. The website says:

- Contracts for difference (CFDs) are a way of betting on the change in value of a share, foreign exchange rate or a market index.
- CFDs are generally highly geared products. This means the money you invest will generally only be a fraction of the market value of the shares (or other market asset) you're contracting for…
- You're effectively gambling a much larger amount of money than if you went to the casino or racetrack. You face potentially unlimited losses, so think carefully before investing in CFDs…
- Warning: CFDs are complex products. Even experienced investors struggle to understand the risks involved in trading them. You can lose more than your initial investment.

36. CFDs are typically acquired for one of two reasons. The first is to hedge against adverse movements in price of an asset the individual already owns. The second is to speculate on the movement of an underlying asset over time even though the investor has no interest in that asset. The CFD does not of itself confer an interest in the asset in question. One may speculate about movements in price of an asset that one does not own.

37. There are two main risks associated with CFDs: liquidity risks and leverage risks. Liquidity risks arise because investors may not be able to trade a CFD when they choose. That is a problem because the price of the underlying asset might change quickly in a volatile market. An investor who is unable to closely monitor the market for the underlying asset may be

exposed to margin calls, increasing the size of the loss on the investment in the event of an adverse movement. Leverage risks arise out of the fact the investor in a leveraged CFD only puts up a small amount when investing which is calculated by reference to a percentage of the value of the underlying asset. In those circumstances, unfavourable movements in the price of the underlying asset can mean investors lose more than their initial investment – and those losses can be magnified. Depending on the margin at which investors purchase the CFD, small movements in the wrong direction can wipe out an investor's initial deposit causing them significant loses simply due to day-to-day variations in the price of the underlying asset.

38. We have lingered over the description of CFDs to emphasise they are inherently risky and very complex. While these products have a place in finance, they are generally not suitable for inexperienced investors precisely because they can result in significant losses very quickly. Any responsible financial services business would take great care in the way these products were marketed, and it would hesitate before ever recommending them at all to retail investors.

39. Concern over the nature of these products prompted ASIC to issue formal guidance in the form of Regulatory Guide 227: *Over-the-counter contracts for difference: improving disclosure for retail investors* ('RG 227'). Amongst other things RG 227 lays down requirements for an issuer of a CFD to have a policy requiring prospective investors to hold minimum qualifications before agreeing to allow the investor to trade in CFDs. That requirement underlines the importance of marketing these products with care. Therein lies the problem in this case. Olive and its CARs did not provide adequate advice in connection with these products, and two key misrepresentations – about the extent of the risk and the past performance of trading activity – lay at the very heart of the marketing of the business over an extended period.

40. The traders in the MDA business claimed to rely on a trading model that was developed by Mr Jones in 2014. As ASIC said in this uncontested explanation in its further amended statement of facts, issues and contentions (at [50]), the model:

> *…used historical trading data for the previous eight years to identify hypothetical trades which met certain criteria, based on Mr Jones' and Mr Rigby's trading methodologies. They claimed that those trades were then backtested to generate hypothetical results that would have been achieved if those trades were executed at a time when the market performed in a particular way (Backtested Trading Model).*

The hypothetical results generated by the Backtested Trading Model showed profits every year back to 2004.

41. Mr Rigby and Mr Jones each had their own strategies when conducting trades but they tended to operate within parameters included in the Backtested Trading Model. Mr Lean had his own trading strategy which did not use the same parameters, but all the traders worked together and communicated with each other about their activities.[11]

42. The Backtested Trading Model was inherently problematic because the results were hypothetical, and subject to assumptions. The historical results suggested by the model over the period 2004-2014 were never actually achieved *because there was no trading*. But as we shall see, the Backtested Trading Model was central to the marketing of the products to potential investors.

Presentations to potential investors

43. The marketing process carried on by Share Express and Markets prior to 2018 began with websites dealing with shares and share prices that attracted persons who were potential investors. The sites were owned by Mr Rhys Jones through his own company, Aristotle Group Pty Ltd. ASIC says evidence provided by Mr Jones to investigators established individuals browsing those sites provided their names and contact details in return for information on the site that interested them.[12] The customer data was then provided to Share Express or Markets for use as leads for their telemarketers.

44. The telemarketers working for Share Express or Markets would use the data to call individuals. We acknowledge there is a live dispute over whether these contacts could be described as unsolicited. That question is relevant to determining whether Olive and its CARs breached the provisions prohibiting hawking. We shall return to that issue in due course.

45. The telemarketer would enquire whether the individual would like to receive a presentation regarding services that could be provided. If the individual was agreeable, the telemarketer would transfer the call to a salesperson employed by the CAR. The salesperson would have

[11] Respondent's SFIC (n 3) 11, [51].

[12] S 19 Examination of Rhys Jones (17 November 2017) 22 [3]-[22];.

an introductory discussion with the individual in which the salesperson talked about the company (presumably Olive and the CAR in question) and its approach to trading. It was accepted the salesperson would explain the company "took an active, short term approach to trading, generally in blue chip stocks".[13] If the individual was interested, the salesperson would arrange to provide a presentation to the individual – usually at a time agreed in the future, but occasionally during the call if that was the individual's preference.[14]

46. The presentation was delivered over the phone by the salesperson while the individual sat in front of their computer. The individual would use a password provided by the salesperson to access a restricted section of the CAR's website. The webpages contained trading information and a package of 10 slides which comprised the presentation.[15] The slides contained information about how trades were selected, example trades and historical performance.[16] The salesperson received training on what to say, as well as being provided with a script to use during the call. The script had been written by Mr Rigby. It was accepted that the salesperson often did not deliver the script verbatim: some of the salespeople had been involved in the business over a long period and were able to deliver a version of the pitch from memory.[17]

47. The first part of the presentation covered the approach of the CAR towards trade selection and management and discussed the 'active' strategy in which positions would be held on a short-term basis rather than a 'buy and hold' approach. The presentation also included a discussion of how trades were conducted, risk management strategies, and the fact CFDs were being used.[18] The explanations given in relation to CFDs are of crucial importance, so it is instructive to quote from uncontested assertions in the respondent's further amended statement of facts, issues and contentions (at [64]) about what transpired:

> *The nature of the financial products being traded in the MDA was not clearly explained to clients. Although all trades in the MDA used CFDs, the language used by the salespeople during the Presentation represented that trading was in "shares", "blue chip shares" or "blue chip stocks", that is, non-leveraged products. The fact that CFDs were used was explained in the middle of the call. Mr Sassen, one of the*

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[13] Respondent's SFIC (n 3) 12 [56].
[14] Ibid.
[15] Ibid 12-13 [58]-[59].
[16] Ibid 13 [59].
[17] Ibid 13 [60].
[18] Ibid 13-14 [63].

salespeople, said that this was because it gave them a "better rate because some people don't like CFDs and they would stop the phone call".

48. The salesperson also addressed risk associated with the use of CFDs. The salesperson said the CARs implemented risk management strategies, such as stop losses.[19] The salespersons apparently acknowledged the products were classified as 'highly risky' or 'risky' although there is a dispute over whether the salesperson would positively assert the products were suitable for conservative investors.[20]

49. Having discussed CFDs and offering what passed for an explanation of risk, the second part of the presentation covered historical performance of the product in absolute terms (ie the positive gains made in each year on an investment of $50,000 or $100,000) and relative to other products in each year from 2004-2015. The results were generally very positive.[21] Each slide included a disclaimer in small print in grey text against a black background at the foot of the slide which read:[22]

> *"IMPORTANT DISCLAIMER*
>
> *Trading may carry a high level of risk that may not be suitable for all investors. Leverage creates additional risk and loss exposure. Before you decide to use the ShareScope MDA, carefully consider your investment objectives and risk tolerance. All results shown on the ShareScope website although based on actual trading models are hypothetical in nature. Hypothetical performance results have many inherent limitations, some of which are described below. No representation is being made that any account will or is likely to achieve profits or losses similar to those shown. The ability to withstand losses or adhere to a particular trading model in spite of some trading losses are material points which can also adversely affect actual trading results. There are numerous other factors related to the markets in general or to the implementation of any specific trading model which cannot be fully accounted for in the preparation of hypothetical performance results and all of which can adversely affect actual trading results".*

50. Notwithstanding that disclaimer, transcripts of calls reproduced in the material establish salespersons would often represent to clients that the results on the 'performance' slides were *actual* results achieved over that period, and that a client would have achieved those results if they had placed trades.[23] The scripts produced by Markets also suggest the

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[19] Ibid 14 [65].

[20] Ibid 14 [66].

[21] Ibid 14-15 [67].

[22] Ibid 14 [64]

[23] Ibid 15-24 [71]- [72].

salesperson talked about the performance results as if they were actual rather than hypothetical results. The salesperson would say the (hypothetical) performance data could "give you an idea what a $100k account can bring in terms of income on a year to year basis."[24]

51. There is no doubt Olive was aware that salespeople were providing information about performance to potential clients in the course of their presentations. Whatever it knew from other sources, Olive learned from complaints lodged with it directly or with the Financial Ombudsman Service as early as September 2016 that problematic representations were being made about past performance.[25]

52. The transcripts also make clear the salesperson did not highlight or reinforce the message contained in the disclaimer about risk. Indeed, the emphasis on a successful (if hypothetical) track record of positive part performance undercuts the impact of the disclaimer.

53. A single call might run for an hour or more depending on the individual.[26] It was accepted that Mr Jones approved the script and the contents of the presentation on the websites used by Share Express and Markets.[27]

54. Olive did not contest that the objective of the salesperson in delivering the Presentation was to convince the individual to become a 'member' or client of the CAR. To become a 'member', the individual would pay a 'membership fee' of approximately $5,000.[28] The individual was told that the annual fee in future years would be waived for them (so they only paid the one-off fee) as part of a special promotion. That was just a marketing ruse: every potential client was told that, and none of the clients were ever charged an annual fee.[29] The salesperson also told the client about brokerage fees on relation to each trade.[30]

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[24] Ibid 24 [73]; Tribunal Document T7.108, *Markets script – 3rd party story & questions,* 4115.
[25] Respondent's SFIC (n 3) 24 [74].
[26] Ibid 13 [62].
[27] Ibid 13 [61].
[28] Ibid 12 [57].
[29] Ibid 26 [79].
[30] Ibid 27 [80].

55. The membership fees were a source of revenue, but they had a practical effect on the marketing process as well. A component of the remuneration of the salesperson was based on the amount of memberships they sold each month. While they also received a base salary paid by the CAR,[31] a salesperson's total remuneration was impacted if, for whatever reason, the 'member' were to drop out and the fee was refunded. It followed the salesperson had some incentive to assess whether the individual receiving the presentation had the wherewithal to participate.[32] The salesperson would routinely ask the individual during the call whether the individual was seeking capital growth or income. That enquiry likely suggested to the individual that their personal circumstances were being considered when offering the MDA product.[33] The salesperson would also ask 'vetting' questions designed to screen out individuals who might later be rejected from participating. The salesperson would ask questions about the individual's age, financial circumstances, experience with share trading (including any previous trading strategies) and their risk profile.[34] Importantly, though, that information was not recorded for use or analysis by the CARs.[35] The information was only used by the salesperson to assess whether it was worth proceeding with the call and signing up the individual to membership because the salesperson was worried about the prospect of a refund. If the salesperson formed the view that the individual was not suitable, the salesperson would terminate the call.[36]

56. If the individual wished to proceed, the salesperson completed an online membership application form while the individual remained on the phone. The application form outlined the terms and conditions of membership and included a paragraph describing risks. The client signed the form online using the Adobe Sign program.[37] The application form referred the client to the CAR's website which included Olive's financial services guide. The client was not provided with a copy of the financial services guide: they had to access the document on the website. In the meantime, by signing the membership application online while talking to the salesperson, they "acknowledged and accepted the terms and conditions, risk disclosure statement, privacy policy and Financial Services Guide" which

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[31] Ibid 30 [98].
[32] Ibid 27 [82].
[33] Ibid 27 [81].
[34] Ibid 27 [82].
[35] Ibid 27 [83].
[36] Ibid 27 [84].
[37] Ibid 28 [85].

were not before them.[38] Once the membership application form was signed, the salesperson took the membership fee over the phone, either using a credit card or by direct transfer.[39]

57. And that was it, at least as far as the salesperson was concerned. Once the membership application process was completed, the salesperson arranged a time in the following days for customer service staff employed by the CAR to contact the new member. The salesperson had no further contact with the member.[40] When the customer service staff called, they explained what was described as 'the paperwork'.[41]

58. ASIC pointed out – and Olive does not contest – the sales staff had a background in sales rather than financial planning.[42] They were trained by Mr Rigby. The training consisted of weekly sales meetings in which salespeople would discuss what they said (and what they were not allowed to say) in calls with prospective clients. Mr Rigby also 'barged' sales calls: he would listen in to a call while it was in progress and provide feedback via Skype to the salesperson as the call progressed, and he would provide one-one-one feedback afterwards.[43] From November 2017, Olive registered the individual salespersons on its Financial Adviser Register, but ASIC says – and Olive does not contest – at least some of the sales personnel did not know why they were added to the register, or the consequences of being on the register, or the nature of their authorisation.[44]

59. We note there was a dispute between the parties over whether Olive had failed to undertake background checks of its representatives. While ASIC acknowledged Mr Richmond had asked for background information about staff of Investor Centre in 2018 after that entity became a CAR, ASIC argues there is no evidence that enquiries were made of the other CARs.[45] Olive pointed out in its submissions that Mr Richmond had said in his evidence to the delegate that checks had been done, and we were referred to an email dated 3 May

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[38] Ibid 28 [86].
[39] Ibid 28 [87].
[40] Ibid 28 [89].
[41] Ibid 28 [88].
[42] Ibid 28 [92].
[43] Ibid 29 [95].
[44] Ibid 29 [97].
[45] Applicant's written outline of submissions, dated 6 April 2021, 38 [145] ('Applicant Submissions').

2016 in which Olive had sought background information about Mr Rigby when he commenced at Share Express.[46]

60. We are not satisfied this criticism of Olive is made out on the evidence, but there are other matters that are troubling. One of them was the corrosive incentive structure. We have already noted the remuneration of salespeople was linked to the number of memberships they sold each month. Olive accepts:[47]

> *While there were no formal sales targets in place that were required to be met by the salespeople, Share Express and Markets operated as sales businesses with a competitive atmosphere amongst the sales staff and there was a whiteboard in the office where each salesperson's sales were recorded.*

61. This conduct inevitably contributes to a culture of competition between the salespeople that has the potential to divert attention from the clients' interests.

The MDA Agreement and the statement of advice

62. Share Express and Markets used the same two individuals, Ms Paine and Ms Forte, as customer service staff. In their prearranged call with the new member/client, Ms Paine or Ms Forte would (a) complete a 'fact find' with the client, (b) explain how the client's trading account on the chosen trading platform would be funded, and (c) complete the documentation necessary for opening that account. The customer service person would then assemble what was known as the MDA Agreement which was comprised of several documents, including a 'fact find' questionnaire and a statement of advice.[48] That would occur while the client was on the phone.

63. The 'fact find' questionnaire is a remarkable document. It had preselected answers. The customer service officer would complete the form and potentially change the answers based on comments made by the new member during the conversation. Olive accepts the customer service officer did not necessarily explicitly address each question to the client.[49]

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[46] Ibid 38 [146].
[47] Respondent's SFIC (n 3) 30 [100].
[48] Ibid 31 [104].
[49] Ibid 33 [110].

64. One of the questions on the form referred to the member's 'risk appetite'. The uncontested explanation of that process in paras [113]-[115] of the respondent's further amended statement of facts, issues and contentions should be quoted directly to capture what occurred:

> *Clients self-assessed their risk profile by providing a number between 1 and 10 (1 being lowest risk and 10 being highest risk) to Customer Service, which was input at question 24 of the fact find.*
>
> *Customer Service generally suggested to clients that the risk of the MDA, being a derivative product, would be a 6, 7 or 8 whereas buying and holding blue chip shares would be around a 5.*
>
> *Customer Service provided guidance to the client as to the risk involved with the MDA, including that it traded in derivative products, that there were risks involved, that the trading team used parameters and stop-losses and that not all the client's margin was used to trade at any one time.*

65. The comparison drawn between the risk of derivatives relative to blue chip shares is startling and, on its face, misleading.

66. Olive does not contest that the customer service person did not go through the terms and conditions of the MDA agreement while on the phone with the new member. The member was left to read the documentation in due course and refer back to the customer service person if there were any questions.[50]

67. The MDA documentation assembled during the call also included a statement of advice. It turns out the customer service person used an advice template for this purpose. The advice was essentially the same for every client.[51] The advice noted that all derivative trading strategies involved risk including the risk of losing capital, and warned there would be volatility. The advice then continued:

> ***Our Advice***
>
> *It is recommended that:*
>
> - *You open a MDA account investing in Contracts and Products (as defined in the MDA Contract), which is operated by Olive and the MDA Manager, pursuant to the selected Investment Strategy; and*

[50] Ibid 34 [118].

[51] Ibid 34 [119].

- *The amount of risk capital specified above be applied to the MDA*

Why we consider out advice is appropriate

- *Olive has formed the view that the MDA is appropriate and suitable for you on the basis that it has held discussions with you whereby:*
- *You have demonstrated that you understand the structure of an MDA;*
- *Olive considers that your relevant Personal Circumstances are appropriate in light of the Investment Program; and*
- *You have confirmed that you understand the risks associate with opening a MDA and investing in Contracts and Products*

68. Importantly, it is uncontested that nobody associated with Olive or the CARs discussed the statement of advice with the new client. There was no explanation of the advice or testing of the client's understanding before the advice was included in the completed MDA Agreement and emailed to the client.[52] When the client signed the MDA Agreement, an email attaching the signed document was sent to Mr Morrison who signed the document (although the document could also be signed by Ms Green). Mr Morrison would sign the document under the words: "Executed by Olive Financial Markets Pty Ltd by its duly authorised officer".[53] Once the document had been signed on behalf of Olive, the completed document was disseminated to the client and customer service.[54]

69. To be clear, Olive does not contest ASIC's point that the member or client received the MDA Agreement which included the statement of advice *before* Mr Morrison had seen or signed that advice. By that point, the client had paid their membership fee, engaged in discussions about their situation with the customer service person, and received the MDA Agreement including the statement of advice and returned it after appending their signature. [55]

70. ASIC suggested Mr Morrison, who was authorised to sign statements of advice on behalf of Olive, would review and sign the MDA Agreement which incorporated the statement of

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[52] Ibid 35 [121].
[53] Ibid 37 [139].
[54] Ibid 36 [125].
[55] Ibid 37 [134].

advice in little more than a minute or two.[56] Olive did not concede that, but it accepted Mr Morrison seldom raised any concerns about the client's suitability for an MDA.[57] The evidence certainly does not suggest Mr Morrison engaged at length with the statements of advice.

71. We should add it was accepted by Olive that customer service officers would occasionally give personal advice to clients about the desirability of selling shares the client already held so the client could invest the proceeds of that sale in the MDA. (Share Express and Markets facilitated those transactions on occasion.)[58] That is problematic because, as we shall see, these staffers were restricted to providing general advice to clients rather than personal advice.

72. It is unsurprising that customer service staff did not understand the proper confines of their role. Olive accepts Share Express and Markets did not have an internal compliance function, and there was nobody within either CAR who was responsible for overseeing compliance issues in any conventional sense.[59] Olive also accepts:[60]

- Ms Forte did not hold RG146 qualifications while working for Share Express and Markets. (ASIC's Regulatory Guide 146 *Licensing: Training of Financial Advisers* sets out minimum training standards that apply to advisers.) She subsequently completed the 'Generic Knowledge' and specialist 'Securities' and 'Managed Investments' modules of the training in November and December 2017; and
- Ms Paine did hold RG146 qualifications in 'Generic Knowledge' while she worked for Share Express and Markets but she did not complete the specialist 'Securities', 'Derivatives' and 'Managed Investments' modules until 2018.

73. Olive also accepts customer service staff received "ad-hoc on-the-job training from Mr Rigby, Mr Lean and Mr Jones about general market conditions and how to deal with issues with clients."[61] Apart from that irregular internal training, it was accepted Mr Morrison and

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[56] Ibid 37-8 [140].
[57] Ibid 38 [141].
[58] Ibid 37 [137]-[138].
[59] Ibid 38 [144].
[60] Ibid 38-9 [146]-[147].
[61] Ibid 39 [151].

Mr Richmond would attend the offices of Share Express and Markets several times each year where they would meet with Mr Rigby, Mr Jones and Mr Lean. During those visits, ASIC says (and Olive does not contest):[62]

> *Customer Service staff would be called into those meetings for perhaps 30 minutes to have a general conversation about how things were going with clients, if there had been any complaints and if any changes to processes were being implemented. Mr Morrison also checked in with Customer Service staff approximately weekly about similar issues.*

74. Having said that, Olive does dispute some of ASIC's claims about the adequacy of training provided to business representatives.[63] In particular, Olive says the allegation (at [407(f)] of ASIC's further amended statement of facts, issues and contentions) that advisers were not properly trained to determine if the advice was suitable for particular clients is too vague. There is something to that. We note ASIC referred to evidence provided to the delegate in support of its allegation. While that evidence on its own does not inevitably point to a want of training, the absence of evidence about a proper training regime is also telling, and invites the inference that the training fell short..

75. It should also be noted customer service staff employed by Share Express and Markets had an incentive to sign up clients. While they received a base salary, they also received a commission for each trading account that was opened. The commission was equal to 0.1% of the amount invested.[64]

Trading on the MDA account

76. Once the MDA Agreement was approved and the client deposited funds in the account opened on the trading platform, trading would commence.[65] The trades were conducted by Mr Rigby, Mr Jones and Mr Lean.[66] The trades were not individualised but there was variation, as the respondent explained (and Olive did not contest) at [155] of the respondent's further amended statement of facts, issues and contentions:

> *Clients who entered the MDA at the same time had the same trades executed on their behalf. Each client had slightly different trades on their account based*

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[62] Ibid 39 [149].

[63] Applicant Submissions (n 43) 39-40 [151]-[156].

[64] Respondent's SFIC (n 3) 39 [152].

[65] Ibid 39 [153].

[66] Ibid 39 [154].

on the time that they entered the MDA, in that an existing client may have an open position that a new client would not.

77. ASIC asserts (and Olive does not contest) that Olive executives discussed trading with Mr Rigby and Mr Jones on an ongoing basis, and that Olive was able to monitor the trading. Olive also accepted its executives "occasionally provided high-level guidance to the traders about trades that were being undertaken".[67]

78. The trading performance of Share Express and Markets did not live up to expectations. While the Backtested Trading Model had shown more-or-less consistent positive returns over a long period, the average performance of the Share Express MDA in 2016 was a 28% loss (inclusive of fees) in 2016 and a 38% loss (inclusive of fees) in 2017.[68] The average trading performance of Markets in the following year when it replaced Share Express showed a 9.5% loss inclusive of fees.[69]

79. ASIC points out (and Olive does not contest) there was no ongoing advice to the clients provided after they became members. Clients were able to contact customer service at the CARs or Olive and ask questions.[70] Interestingly, the statement of advice said Olive would review the investment program annually. Presumably with that end in mind, Olive did email the client to ask about any change in personal circumstances each year. If the client did not describe any changes, Olive would send the client an Annual Investor Statement under cover of a letter from Mr Morrison which said:

> *Client suitability*
>
> *From a review of your personal information held on file, we have formed the opinion that the MDA Contract continues to be appropriate and suitable for you on the basis that:*
>
> - *Your personal circumstances have not changed since you originally opened the MDA*
> - *The MDA operated by you MDA Manager has not changed/has not changed substantially; and*
> - *The kinds of risks associated with the MDA have not changed.*

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[67] Ibid 40 [157]-[158].
[68] Ibid 40 [160].
[69] Ibid 40 [161].
[70] Ibid 40 [163]

> ***Note:*** *any advice provided in this Annual Investor Statement or any advice that may be provided, may be based on incomplete or inaccurate information relating to your relevant personal circumstances if you have not kept us updated of any changes, and because of that, you should, before acting on the advice consider the appropriateness of the advice, having regard to your relevant personal circumstances. If your circumstances have changed and you have not advised us of those changes please do so immediately by calling us or sending an email to: suzanne.forte@shareexpress.com.au. We will contact you and make a time convenient to you for us to ask you some questions and record a fact finder*

80. The Annual Investor Statement included a copy of the original statement of advice which was modified so that it recommended the client continue to invest in the MDA. Interestingly, the statement invariably recommended that the client invest the equivalent of the balance of their trading account, regardless of trading losses.[71] The only variation on that otherwise consistent theme was where a client had informed Olive that their personal circumstances had changed. In those cases, Mr Morrison or Ms Green would determine if the changes were such that the MDA was no longer suitable for that client.[72] Otherwise, those individuals received the same advice as everyone else.

Complaints and the dispute resolution process

81. We now turn to the dispute resolution processes of Olive and the CARs. Olive, Share Express and Markets all received complaints from members, although 16 complaints were also lodged with the Financial Services Ombudsman. (All 16 of the complaints to the Ombudsman were resolved by way of an agreed financial settlement.)[73] The members typically complained about poor trading performance. That is unsurprising given the representations made during the presentation from the salesperson using the Backdated Trading Model. That model presented a positive description of trading that did not actually occur. Members also complained after learning information when they read the MDA Agreement which had not been disclosed during the presentation.[74]

82. The MDA Agreement included only general information about complaints. The document said complaints would be acknowledged and reviewed in a timely way and pointed out a complaint that remained outstanding after 45 days could be referred to the Financial

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[71] Ibid 41 [166].
[72] Ibid 41 [167].
[73] Ibid 42 [171].
[74] Ibid 41 [169]-[170].

Ombudsman Service.[75] The dispute resolution procedure in Olive's Financial Services Guide provided little more information.[76] Disturbingly, the discussion of internal and external dispute resolution procedures contained in Olive's Financial Services Compliance Manual, an important document that sets out procedures, was also lacking in detail.[77]

83. Most complaints were lodged with the customer service staff working for Share Express and Markets. Those staff also dealt with complaints Olive received directly, including those lodged through the Financial Ombudsman Service,[78] even though the CARs did not have formal complaints handling processes of their own.[79] ASIC says (and Olive accepts) customer service officers spent about half of their time dealing with dissatisfied clients.[80] They maintained rudimentary complaints registers in the form of spreadsheets.[81] If they were unable to resolve a complaint, it was escalated to Mr Rigby or Mr Lean who had authority to offer a financial settlement to the client.[82]

84. Some complaints were resolved by offering the client a refund of all or part of the membership fee. Some clients received a payment compensating them for trading losses. In other cases, the CAR agreed to change the client's profile so they did not trade in particular products that were problematic. In other cases, the client was offered what was known as a 'backstop' in which the CAR offered to make good the difference on the client's account after 90 days if the account balance was lower.[83]

85. If a complaint could not be resolved in this way, or if the client insisted on dealing with Olive, the matter was referred to Mr Richmond.[84] ASIC says (and Olive accepts) the following complaints were referred to Mr Richmond by the CARs:[85]

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[75] Ibid 42 [172].
[76] Ibid 42 [173].
[77] Ibid 42 [174].
[78] Ibid 43 [176].
[79] Ibid 43 [178].
[80] Ibid 43 [175].
[81] Ibid 45 [191].
[82] Ibid 43 [177].
[83] Ibid 43 [179].
[84] Ibid 43 [180]
[85] Ibid 43-4 [181]

- From an individual on 4 February 2016 about the lack of suitability for the product, the pressure applied to sign up, and the refusal to refund the membership fee;
- From an individual on 19 December 2016 about the trading losses and a refund not being received after signing a non-disclosure agreement;
- From an individual on 6 January 2017 relating to trading losses;
- From an individual on 13 January 2017 relating to trading losses, the delay in paying a refund and general non-responsiveness;
- From an individual on 18 May 2017 about having been cold-called, and about high-pressure sales tactics and poor service;
- From an individual on 14 August 2017 about a failure to act in a timely manner in relation to a trading account; and
- From an individual on 7 December 2017 relating to trading losses.

86. Those complaints were in addition to the complaints made to the Financial Services Ombudsman about the salespersons making representations about past performance. Mr Richmond in particular was aware as early as September 2016 of the complaints received through the Ombudsman about past performance representations. Mr Richmond insisted during cross-examination that he did not appreciate the import of those complaints,[86] but that response is hard to credit. He was on notice of what was occurring. To the extent he genuinely did not appreciate the import of the complaints, it reflects on his suitability for any management function. As it happens, he did not present as unintelligent, naive or otherwise unsophisticated. There is no reason to assume he did not appreciate the import of what going on. We do not accept the contention in Olive's written closing submission that Mr Richmond was not aware of the misconduct in the CARs until the examination under s 19 of the ASIC Act in mid-2018.[87] Mr Richmond was on notice – and likely knew – that things were amiss in the CARs long before the s 19 examination.

87. Olive resolved a number of the complaints it dealt with by way of a monetary payment to the client. The amount of the payment was decided by Mr Richmond or Mr Morrison. Once

[86] Transcript of Proceedings, 308-310.
[87] Applicant submissions (n 43) 11 [37].

the decision was made to resolve the complaint, instructions were sent back to the customer service officers to implement the resolution.[88] In some cases, clients who received a financial payment were required to execute a non-disclosure agreement as part of the settlement.[89]

88. Where the decision was made to refund a membership fee, the salesperson who sold the membership was required to refund the commission they received. ASIC says (and Olive does not contest) each salesperson was required to refund between two and four commissions each month.[90] Interestingly, the salespersons were not otherwise informed of complaints.[91]

89. The failure to advise salespeople about the substance of complaints was of a piece with Olive's handling and analysis of complaints more generally. We have already pointed out Share Express and Market did not have formal complaints handling processes. The CARs were not required to inform Olive about the resolution of complaints unless the CARs negotiated a financial settlement. Olive did not otherwise review the rudimentary complaints registers maintained by the CARs.[92] That is a pity. It turns out they contained information about hundreds of clients over several years.[93]

90. Olive's analysis of complaints – to the extent there was any – focused on complaints it received directly, or which were referred to it by the CARs (most obviously, those which involved a financial settlement or which had been escalated) and the Financial Ombudsman Service. ASIC says (and Olive does not contest):[94]

- Olive did not review complaints with a view to identifying any systemic issues in the MDA business; and
- Olive did not in fact identify any systemic issues in that business apart from the fact clients were losing money.

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[88] Respondent's SFIC (n 3) 44 [182]-[183].
[89] Ibid 44 [184].
[90] Ibid 44 [186].
[91] Ibid 44 [185].
[92] Ibid 45 [187]-[188].
[93] Ibid 45 [192].
[94] Ibid 45 [189]-[190].

91. Mr Richmond was responsible for maintaining Olive's own complaints register,[95] but the register did not record all complaints received by the CARs. Complaints lodged through the Financial Ombudsman Service were recorded, although the register did not always record all the relevant details.[96] Even complaints sent direct to Olive were not always recorded on Olive's complaint register.[97]

92. Mr Richmond was cross-examined at length during the hearing about his management of the complaints function. He floundered when pressed to explain the details of the process. When shown the detail of how one of the complaints was handled, he agreed he had been careless. He also admitted the way the complaint was recorded in the register did not accurately reflect the nature and seriousness of the complaint.[98]

The MDA business after Investor Centre took over in 2018

93. For the sake of completeness, we note there were some relatively minor changes to the way the MDA business was conducted after Investor Centre became the sole CAR in June 2018. Investor Centre used the same trading strategies as its predecessors and employed many of the same staff in the same roles. In particular, Mr Rigby and Mr Jones continued to conduct the trades.[99] The only difference in process that is noteworthy for present purposes was in relation to the 'fact find' undertaken by the customer service people. Notwithstanding that change, the statement of advice was still completed and provided to the client before it was seen and signed by Mr Morrison.[100]

Summary of key factual findings in relation to Olive's MDA business

94. We are satisfied:

    (a) Olive's MDA business was principally conducted using corporate authorised representatives throughout most of the period under review. Most of the marketing

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[95] Ibid 46 [194].
[96] Ibid 45 [195], [197].
[97] Ibid 45 [196].
[98] Transcript of proceedings, 277 [17]-[22].
[99] Respondent's SFIC (n 3) 46 [201]-[202].
[100] Ibid 46-7 [203].

and trading activities were conducted by or under the supervision of a handful of individuals who remained within the MDA business even as Olive changed CARs;

(b) Contracts for difference are complex financial products that are not well-understood by ordinary investors. Investors in these products are exposed to significant risk of losses;

(c) Olive's marketing of the managed discretionary accounts which traded in these products relied on the 'Backtested Trading Model'. That model suggested positive returns over a period could have been achieved if trading had occurred according to the assumptions in the model. Those results were never actually achieved in practice. The model involved a retrospective analysis that was hypothetical;

(d) While Olive's marketing materials referred to the hypothetical nature of the Backtested Trading Model in fine print, the thrust of the marketing activities suggested the results referred to in the model were actually achieved, and the results were therefore presumably a guide to the likely future success of the trading strategies that Olive used which were incorporated in, and validated by, the model;

(e) While Olive's marketing material referred to the risk and complexity of contracts for difference in the fine print, the thrust of the marketing activities downplayed that risk in various respects;

(f) Senior management at Olive was on notice by at least September 2016 that marketing staff were incorrectly representing the results indicated by the Backtested Trading Model had actually been achieved. Managers became aware of that misrepresentation as a result of complaints that were being made, if not from personal observation of operations and documentation;

(g) Customer service staff engaged by CARs did not undertake a thorough review of each investor's personal circumstances before routinely generating a statement of advice that recommended the investor invest in the managed discretionary account operated by Olive. The perfunctory statement of advice was ordinarily formally signed by Olive after it had been provided to the investor and the statement of advice was not discussed with the investor in detail and their understanding of that advice or the MDA Agreement was not tested;

(h) The statement of advice was not carefully and routinely reviewed and updated over time following a systematic review of the investor's circumstances, including any changed circumstances;

(i) The dispute resolution and complaints handling processes used in Olive and its CARs were incomplete and unsystematic, and the complaints were not managed and analysed to identify systemic or other risks;

(j) The marketing and customer service staff were not given adequate training in financial planning (as opposed to sales) and were not supervised to the extent required in a business that sold complex, high risk products to ordinary investors. The remuneration of sales and customer service staff created an incentive to maximise sales; and

(k) Investors experienced significant losses from trading activities while Olive, its CARs and contracted staff enjoyed significant income.

Contentions in relation to the MDA business

95. Having set out a largely uncontested factual narrative and the principal findings in relation to the MDA business, it is convenient to consider the contentions about contraventions. In doing so, we address a remaining factual controversy over whether Olive engaged in hawking.

96. The discussion which follows occurs against the backdrop of concessions made by Olive in relation to contraventions in the MDA business *and* the superannuation business. We note ASIC records in its further amended statement of facts, issues and contentions that Olive has not complied with its obligations under s 912A(1) of the Corporations Act, which require it to:[101]

> *(a) to take reasonable steps to ensure that its representatives comply with the financial services laws (s912A(1)(ca));*
>
> *(b) to comply with the financial services laws (s912A(1)(c));*
>
> *(c) to have available adequate resources to provide the financial services covered by the licence and to carry out supervisory arrangements (s912A(1)(d));*

[101] Ibid 74 [377].

(d) to ensure that its representatives are adequately trained, and are competent, to provide the financial services covered by the licence (s912A(1)(f));

(e) to have an internal dispute resolution system with specified features (s912A(1)(g)); and

(f) to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (s912A(1)(a)).

97. Olive does not contest these contentions. In those circumstances, there is no doubt that the discretion to suspend or cancel contained in 915C(1) of the Corporations Act has been enlivened. We will nonetheless set out our conclusions in relation to contraventions in the MDA business, and deal with the outstanding allegations of fact in relation to hawking before turning to the superannuation business.

Olive failed in its obligation to comply with the financial services laws (s 912A(1)(c))

98. We have already described the legislative framework which applies in this case. In doing so, we described the various financial services laws that are in issue here, namely those contained in ss 961B, 961G, 1041E and 1041H of the Corporations Act and s 12CB of the ASIC Act.

99. We turn firstly to the contentions of historical contraventions of ss 1041E and 1041H. The findings of fact we have made make clear Olive's representatives made **false or misleading statements in breach of s 1041E** in the course of presentations made to individuals when the representatives repeatedly referred to historical trading results indicated by the Backtested Trading Model as *actual* results. Those results had not in fact been achieved; they were hypothetical. To be clear, statements and information given to people about the performance of the MDA business between 2004 and 2015 were misleading because information about the products was presented as though the performance was actual performance of the business rather than the hypothetical performance that was generated by the model using historical data. Treating the results as actual results was false and misleading, and statements to that effect lay at the heart of the marketing of the MDA business.

100. The failure to clearly distinguish between actual and hypothetical results underplayed the riskiness of the CFDs. That was compounded by the failure to correctly explain the nature of CFDs and the distinction between them and other, less risky financial products, like shares. The uncontested finding that sales personnel mentioned during the presentation

that trading was in ‘shares’, ‘blue chip shares’ or ‘blue chip stocks’ when the business dealt in CFDs was clearly a false or misleading statement in contravention of s 1041E.

101. We are satisfied the disclaimers in the fine print of material provided to potential clients (or qualifying statements made in the course of the presentations by representatives) that noted the returns were not actually achieved and that CFDs were risky do not outweigh or otherwise counteract the effect of the false or misleading statements we have referred to above. One does not draw the sting of a false or misleading statement by applying a thin salve of disclaimer. To be effective, a disclaimer or qualifying statement would need to be clearly brought to the attention of the consumer in a way that effectively counteracts the objectionable material that was featured prominently in the presentation. That did not occur here.

102. The same conduct also amounts to **misleading or deceptive conduct in breach of s 1041H**. Treating hypothetical results as if they were actual results is clearly misleading, and it tends to underplay the risk attaching to CFDs. Representations to the effect that trading occurred in ‘shares’ when in fact the business traded in CFDs would plainly lead members of the relevant class into error.

103. Olive did not contest that it engaged in **unconscionable conduct in contravention of the obligation in s 12CB of the ASIC Act.**[102] That is appropriate. Olive was in a relationship with potential investors that conferred special advantage arising out of Olive’s expertise concerning financial products. Olive knew those investors were generally reliant upon it for advice.

104. Much of the conduct we have already described might be regarded as unconscionable, including:

- offering a financial product to ordinary people without highlighting the significant risk associated with that particular product – for example, by referring to CFDs in the same context as ‘shares’ and other far less risky investments so as to create, at least, ambiguity about the risk involved;[103]

[102] Ibid 80 [405].
[103] Ibid 79-80 [404].

- representing past hypothetically generated positive results as actual results;[104]
- purporting to provide personal advice based on personal characteristics which in the end was the same advice provided to everyone.[105]

105. This conduct was compounded by charging clients an initial fee of between $4000 and $5750 and requiring an investment outlay of $20,000 - and then consistently losing clients' money while generating approximately $9 million dollars in brokerage fees.[106]

106. The conduct, taken as a whole demonstrates, '*such a departure from accepted community standards in the supply of the financial service as to warrant the characterisation that it is unconscionable'*: see *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 at [59]. This was because it involved practices directed to ordinary people who had no special knowledge, skill or qualifications about financial products, like CFDs, that departed significantly from the specific normative standards identified by the Corporations Act. The normative standards in question include those that we have referred to earlier concerning the making of representations that were false and misleading so far as the performance of the MDA was concerned. The conduct carried with it the kind of moral obloquy that is often regarded as the hallmark of unconscionability.

107. We are also satisfied Olive **failed to act in the best interests of clients in relation to personal advice provided to a retail client in breach of s 961B of the Corporations Act**. The advice in question was given to prospective clients by:

- salespeople during the presentation and by customer service staff during follow-up calls and in follow-up emails containing documents (including an unsigned statement of advice), and
- Mr Morrison when he signed the formal statement of advice.

108. Olive did not contest that the advice in question was 'financial product advice' within the meaning of s 766B(1) in that it was plainly intended to influence the prospective client in relation to CFDs. The advice was also 'personal advice' within the meaning of s 766B(3) in

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[104] Ibid.
[105] Ibid.
[106] Ibid.

that it was apparent to the prospective client that the advice was provided after the representative considered the prospective client's "objectives, financial situation and needs". (A prospective client would conclude their individual situation had been taken into account because the various representatives asked about those matters, starting with the telemarketers who first made contact.) In providing that advice, the representatives were all required to comply with the obligation to act in the best interests of the client. The advice included what clients were told about the performance of the MDA product in the presentations, the information in the unsigned statement of advice that was given to them when they agreed to become clients, and, ultimately, the finalised documents including the signed statement of advice that was provided by Mr Morrison.

109. The most obvious evidence that Olive and its representatives were not acting in the best interest of clients when giving advice lies in the fact there was only ever one product recommended to clients.[107] There was no reference to or consideration of alternative investment products that might be more suitable for a client having regard to their individual circumstances. The advice went in one direction, namely the same MDA product was best for everyone. Importantly, the advice from the salespeople was given without a detailed knowledge of the individual's personal circumstances, so no meaningful assessment could have been made *at that point* as to what was in their best interests.[108] We are not satisfied there was genuine consideration given to the particular circumstances of individuals during the sales process.

110. That leaves the question of **hawking** which remained in contest between the parties. The prohibition on hawking we must consider for the purposes of the MDA business was found in s 992AA of the Corporations Act.

111. There was no dispute that a person who entered into an MDA contract was acquiring an interest in a managed investment scheme. There is also no suggestion that an exemption applies. The dispute between the parties revolves around whether the initial calls from employees of Share Express or Marketing were 'unsolicited' in the relevant sense.

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[107] Ibid 77 [392].
[108] Ibid 77 [393].

112. Share Express and Marketing obtained clients by contacting people who had put their phone number and email address into a website which was used to promote the CAR's services.[109] The way the website worked was that when someone wanted information from the site, before being able to access that information they needed to enter their name and phone number on the site. In doing so the person checked a box that recorded their consent to being contacted at some point. Checking a box was said to mean the particular person accepted the terms and conditions associated with the web site. The terms and conditions were found in a document which explained (and the person checking the box "agreed"):[110]

> *Personal information may be communicated to related entities or direct affiliates who may use this personal information to provide you with products or services that you may be interested in. By acknowledging and agreeing to these Terms and Conditions you are providing Aristotle Group Pty Ltd with express consent to use your personal information for an indefinite period of time as stipulated within this document.*

113. The details obtained through the website found their way into a database which was used by telemarketers engaged by the CARs to call prospective clients to ascertain their interest in the MDA product in particular. If the individuals were interested, they were passed on to the salespeople in the way we have already described.[111]

114. An unsolicited contact certainly includes a telephone 'cold call'. But Olive took issue with whether there was a failure to satisfy this obligation because it argued the calls from the telemarketers were not unsolicited. Olive says the person who was called had agreed their information, including their name and phone number, would be placed in a data base and that they might be called about products in which they may be interested. In those circumstances, it was argued, the calls were not 'cold calls'.[112] Of course, the person who received the call at no time *requested* or *solicited* a call about anything. The person simply agreed they might be contacted when they gave up their data in return for access to the information on the website. We are satisfied that giving up one's data and formally allowing it to be used is not the same as *soliciting* the specific contact which eventuated. In our view the call by the telemarketers was unsolicited because it was not expressly (or even implicitly) requested by the person receiving the call. We note our interpretation of the word

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[109] Ibid 12 [54].

[110] Statement of Scott Morrison, dated 22 October 2019, 13 [51].

[111] Ibid 13 [52].

[112] Transcript of Proceedings, 130 [43]-[46].

'unsolicited' – emphasising the absence of a request - accords with the interpretation of the expression 'unsolicited services' used in s 64(2A) of the *Trade Practices Act 1974* in *Au Domain Administration Ltd v Domain Names Australian Pty Ltd* [2004] FCA 424; (2004) 207 ALR 521. In that case, Finkelstein J observed (at [50]):

> *In ordinary parlance the term "unsolicited services" is a reference to services which have been provided without there having been any prior request (including a request by contract) for their provision…*

115. We are therefore satisfied that Olive is in breach of the provision prohibiting the hawking of a managed investment scheme.

116. It follows we are satisfied there were serious and systemic (as opposed to isolated) breaches of financial services laws that occurred over an extended period. Even if we had taken a different view of the application of the hawking or unconscionability provisions, the misleading or deceptive conduct and false or misleading statements in relation to the presentation of the Backtested Trading Model and the riskiness of CFDs would count as significant, even egregious contraventions, as would the failings in relation to the provision of advice.

Olive failed in its obligation to take reasonable steps to ensure that its representatives complied with the financial services law (s 912A(1)(ca))

117. Having established that Olive's representatives failed to comply with financial services laws, ASIC also says – and Olive does not contest – that Olive failed to take reasonable steps to ensure Mr Morrison and Olive's representatives complied with those laws.

118. There is ample evidence to demonstrate Olive did not take reasonable or adequate steps to ensure that representatives were properly trained and qualified to provide financial product advice and personal advice where that was part of their role. This is an essential first step in the process to ensure compliance. The salespeople engaged by the CARs tended to have a background in marketing rather than financial planning, and the training that was provided tended to focus on sales techniques rather than technical or compliance issues. We have already found the customer service staff did not both hold appropriate qualifications under RG146. (To recap: Ms Forte did not hold any RG146 qualifications at all until 2017 while Ms Payne, the other customer service staffer, only held basic qualifications under RG146 that did not extend to advising on securities, derivatives and managed investments until 2018.) We have also concluded Olive only provided ad hoc

training to its staff, and it did not undertake appropriate steps to satisfy itself that the representatives were appropriately recruited, trained and supervised. Mr Morrison and Mr Richmond would engage with staff at a general level a few times each year, and Mr Richmond would check in with customer service staff to discuss 'how things were going' and any complaints or other issues. Beyond that, ASIC says (and Olive does not contest) that Olive:

- Did not provide adequate training to the customer service staff about how they should go about completing the MDA agreement including the personal advice component of the statement of advice that should have been discussed with the client;[113]
- Did not provide training to the representatives on how to discharge their duty to act in the best interests of clients.[114]

119. ASIC says (and Olive does not contest) that Olive failed to take reasonable steps to ensure representatives complied with the other provisions, in that Olive failed to ensure sales staff were supplied with and used an appropriate and accurate script when dealing with the prospective clients. Olive did not appear to take steps of its own to review the scripts they did use, or verify that the scripts were being followed.[115] Indeed, Olive was aware from complaints and otherwise that representatives were referring to the past results 'achieved' using the Backtested Trading Model as if they had actually been achieved – yet Olive did not appear to take any steps to address that behaviour by reviewing the presentation or conducting audits or undertaking training.[116]

120. In summary, we accept ASIC's contention that Olive failed in its obligation to take reasonable steps to achieve compliance with the financial services laws. Olive did not take the active steps it should have taken to ensure the establishment and supervision of processes and training, but – worse still – it failed to respond appropriately when information about problems came to light through the complaints process. These failings are serious and long-running.

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[113] Respondent's SFIC (n 3) 81 [407(g)].
[114] Ibid 81 [407(h)].
[115] Ibid 81 [408]
[116] Ibid.

Olive did not ensure its representatives were adequately trained and competent to provide the financial services covered in the licence (s 912A(1)(f))

121. The findings we have made and the discussion in relation to the steps Olive should reasonably have taken to ensure compliance also makes clear Olive failed to ensure its staff were, at a minimum, adequately trained to provide the products that were being supplied. The sales staff were mainly from a marketing background with limited knowledge of the products they were selling, and the customer service staff were not appropriately credentialed as we have explained. While there was some dispute over the extent to which Olive had satisfied itself whether the staff were competent by conducting background checks, Olive did not provide or commission appropriate ongoing training that would equip them to perform the roles at an appropriate standard. That is not altogether surprising given the confusion that was apparent in the division of responsibilities at the time between Mr Morrison and Mr Richmond. As Mr Richmond explained in his evidence at the hearing, they shared responsibility for training and compliance functions in a way that was not clearly explained.[117]

122. Olive's 'light hand on the tiller' approach to the training and supervision carried on by the CARs operating suggests Olive's contravention of this obligation is serious.

Olive did not have an appropriate internal dispute resolution mechanism with the required features (s 912A(1)(g))

123. We have already explained the requirements of a valid internal dispute resolution mechanism. Those requirements are described in s 912A(2). Section 912A(2)(a) requires that the dispute resolution system established by the licensee must conform to standards specified by ASIC under regulations. Those standards and requirements were set out in ASIC Class Order 09/339 *Internal Dispute Resolution Procedures* at the relevant time. ASIC also issued Regulatory Guide 165: *Licensing: internal and External Dispute Resolution* (RG 165). ASIC contends (and Olive does not contest) that Olive's dispute resolution system did not comply with the requirements because:

[117] Transcript of proceedings, 243 [13]-[14]; evidence of Mr Richmond at the hearing dated 15 March 2021 at p 243; Statement of Justin Richmond (n 8) 15 [57.2].

- Olive did not in fact record all the complaints that were received on complaints registers maintained by Olive. The separate complaint registers (such as they were) maintained by the CARs were also incomplete: cf RG 165 Appendix 1: IDR Procedures and Standards, Table 2, Guiding Principle 8.1;
- Olive did not require that complaints received by the CARs were notified to Olive: cf RG 165 Appendix 1: IDR Procedures and Standards, Table 2, Guiding Principle 8.1 (which deals with the collection of information);
- Olive did not systematically review, classify and analyse the complaints it did receive and record to identify issues or systematic concerns: cf RG 165 Appendix 1: IDR Procedures and Standards, Table 2, Guiding Principle 8.2 (which deals with analysis and evaluation of complaints);
- Olive did not do enough to bring the existence of its complaints handling process to the attention of customers. Information about the process was contained in the Financial Services Guide but we pointed out the clients were not provided with a copy of that document when they signed up – they were merely told where to find it: cf RG 165 Appendix 1: IDR Procedures and Standards, Table 2, Guiding Principle 4.2 (which deals with visibility of the process to those who might complain);
- Olive did not do enough to acquaint staff with the details and operation of the complaints handling process: cf RG 165 Appendix 1: IDR Procedures and Standards, Table 2, Guiding Principle 4.2 (dealing with visibility).

124. As a consequence of those failures, Olive missed the opportunity to identify and address concerns about representations being made by sales and customer service staff. This was a serious and enduring shortcoming in Olive's business, and a serious contravention in the circumstances.

Olive failed in its obligation to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (s 912A(1)(a))

125. The obligation referred to in s 912A(1)(a) is, in effect, a catch-all. ASIC says (and Olive does not contest) that Olive's conduct of the MDA business contravened that obligation insofar as it featured "a sales culture whose sole purpose was to raise revenue, with no ancillary

purpose of genuinely making investment returns for clients."[118] We agree. Our findings that misleading or deceptive conduct in relation to the Backtested Trading Model and the level of risk make clear that the services were not provided honestly. The failure to exploit the insights that would be available from a properly operating complaints handling system suggests the services were not provided efficiently or fairly. The fact the advice services were provided without proper regard for the needs of the clients points to a want of honesty, fairness or efficiency. The fact the CARs charged significant membership fees and derived significant income from trading products which yielded significant losses for clients also points to a extraordinary want of fairness, honesty and efficiency. Moreover, Olive stuck to the same model over a long period even though its officers were aware of the problems and the lack of success in trading (at least from the clients' point of view).

Conclusion in relation to the MDA business

126. The evidence establishes Olive has contravened obligations in s 912A(1) in the conduct of its MDA business. Those contraventions are serious. It follows we are satisfied the discretion to cancel under s 915C has been enlivened on the basis of s 915C(1)(a).

THE SUPERANNUATION BUSINESS

127. We now turn to Olive's other principal business, which provided superannuation services. The account of that business which follows also adheres closely to the uncontested portions of the narrative contained in the respondent's further amended statement of facts, issues and contentions.

128. Olive conducted the superannuation business using CARs. They were:

- Camori Pty Ltd, which became a CAR on 5 July 2013 and commenced providing services to clients in October 2014.[119] Mr Cator was a director and chief executive officer of the company; Mr Morrison was a director between May 2013 and November 2019 and Mr Richmond became a director from November 2019. The company was controlled by Messrs Morrison and Cator and Mrs Richmond.[120]

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[118] Respondent's SFIC (n 3) 86 [420].
[119] Ibid 47 [210].
[120] Ibid 47 [211].

- Ricarmo Pty Ltd, which became a CAR of Olive on 18 April 2016.[121] Mr Morrison was a director of the company from 6 April 2016 through 13 November 2019. Mr Cator was the chief executive officer and a director, and Mr Richmond became a director in November 2019. This company was also controlled by Messrs Morrison and Cator and Mrs Richmond.[122]
- Paradise Financial Group Pty Ltd became Olive's CAR on 8 March 2017. Mr Morrison and Mr Cator were the directors until November 2019 and Mr Cator was the chief executive officer. Mr Richmond was appointed a director in November 2019. The company was controlled by Messrs Morrison and Cator and Mrs Richmond.[123]

129. A fourth CAR, Cromwell Research Pty Ltd gathered leads and provided telemarketing services for Camori, Ricarmo and Paradise.[124] Cromwell became a CAR on 9 May 2018.[125] Mr Morrison and Mr Cator had been directors of that company since 30 June 2015, and Mr Cator was its chief executive officer. The company was also controlled by Messrs Morrison and Cator and Mrs Richmond.[126]

130. Olive Services Pty Ltd, a company controlled by Olive, commenced in the business in October 2018, at which point Camori and Ricarmo ceased taking new clients, with some exceptions.[127] Paradise had a shorter life. The company stopped taking new clients in around October 2017.[128]

131. ASIC points out (and Olive does not contest) Camori, Ricarmo and Paradise had common business models, management, advice processes, employees and premises – although each company invested using different platforms.[129] Each company also had a different manager reporting to Mr Cator, who was chief executive officer of all three companies.[130]

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[121] Ibid 48 [214].
[122] Ibid 48 [215].
[123] Ibid 48 [219].
[124] Ibid 47 [208].
[125] Ibid 48 [223].
[126] Ibid 49 [224].
[127] Ibid 47 [209].
[128] Ibid 48 [222].
[129] Ibid 57 [206].
[130] Ibid 47 [207].

Ricarmo and Paradise were apparently established to provide opportunities for senior Camori advisers to manage their own operation as part of Olive's overall business under the leadership of Mr Cator.[131]

132. The CARs provided financial advice to clients about superannuation and insurance products. The superannuation advice was directed to clients rolling over their existing superannuation into a model portfolio which was managed by the adviser on an online platform. As ASIC explained (and Olive did not contest):[132]

> *Camori, Ricarmo and Paradise represented to clients that they offered a "managed superannuation service, whereby clients' superannuation investments were "actively managed" and monitored to assess performance and change the investment allocation in response to market conditions.*

133. The composition of the model portfolios offered by CARs was selected by Mr Morrison and Mr Cator. Mr Richmond also played a role. He 'checked' the composition of the model portfolio in each case.[133]

134. The CARs charged clients a range of fees. While there was some dispute as to the extent of those fees, Olive did not contest that, at a minimum, the CARs charged clients:[134]

- A rollover fee of 4.84% (inclusive of GST) on amounts being rolled into the model portfolio; and
- An ongoing advice fee of 2.2% p.a. (inclusive of GST) that was paid in return for a range of services.

135. The rollover fee was charged in connection with the provision of a statement of advice, and in return for facilitating the rollover of funds into the new platform.[135] ASIC included the following table in its further amended statement of facts, issues and contentions setting out the number of clients and funds that each CAR had under management as at October 2017 to illustrate the scale of the business:[136]

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[131] Ibid 49 [229].
[132] Ibid 49 [228].
[133] Ibid 50 [233].
[134] Ibid 50 [235].
[135] Ibid 50 [237].
[136] Ibid 50-1 [239].

CAR	No of clients	No of rollovers	Total rolled over	Rollover fees charged
Camori	2,881	5,709	$241,454,060	$10,623,978
Ricarmo	422	1,609	$33,628,019	$1,479,632
Paradise (Hub24)	334	677	$25,832,431	$1,136,626
Paradise (Netwealth)	49	84	$5,152,461	$226,708
Total	3,686	8,079	$306,066,971	$13,466,946

136. ASIC says – and Olive does not contest - the three CARs generated total revenue in excess of $21.45 million between 2014 and 2017.[137] The outcomes achieved for the clients of the business are less clear. ASIC said the clients were disadvantaged by the fees that were charged[138] and referred to "potentially poorer superannuation performance" but it is not clear on the evidence whether most clients will be better off or worse off over time as a consequence of the advice they received. Olive pointed out in written closing submissions[139] that Olive has managed to retain many of the clients of its superannuation business even after they were aware of the bad publicity. Olive suggests that indicates the clients were generally happy with the advice. While we accept it remains to be seen whether clients are worse off, we do not derive much comfort from the fact many clients have not expressed dissatisfaction. The impact on their welfare may not yet be apparent.

Marketing of the superannuation business

137. We have already explained Cromwell provided telemarketing services for the CARs in connection with the superannuation business. The first step in the marketing process involved sourcing of potential leads. Camori, Ricarmo and Paradise would provide information to Cromwell about the demographic profile they wanted to target. That profile included males between the age of 25 and 65 who were interested in financial services.

[137] Ibid 51 [240].
[138] Ibid 105 [487].
[139] Applicant's Submissions (n 43) 40-1 [157]-[159].

Cromwell would then purchase names and contact information that met the criteria from a third-party provider known as Equifax.[140] (We will come back to the details of how Cromwell came to acquire the data.)

138. Telemarketers – known as 'research analysts' – working for Cromwell would then make contact with the individuals. The research analysts did not hold RG146 qualifications;[141] their job was marketing. Specifically, the objective of the research analysts was to generate firm 'leads' (potential clients) for follow-up by advisers working for one of the CARs.

139. ASIC explained (and Olive did not contest) that, during the initial call, the research analyst:[142]

> *(a) informed the client that they worked with financial advisers who specialised in assisting people to ensure they get the most out of their superannuation;*
>
> *(b) asked the client:*
>
> *(i) their email address;*
>
> *(ii) their age;*
>
> *(iii) their planned retirement age;*
>
> *(iv) the name of their current superannuation fund;*
>
> *(v) their approximate superannuation balance; and*
>
> *(vi) if they were interested in speaking with an adviser.*

140. The research analyst would do a quick assessment on the basis of that information to determine if the individual 'qualified' for the service that would be offered. The research analyst was able to exclude persons who were too old, were already retired, had insufficient funds in their existing superannuation fund, or who worked for certain employers.[143] If the research analyst was satisfied the individual was qualified and willing to speak with an adviser on behalf of one of the CARs, the analyst would enter the individual's details in a customer relationship management database that was used by all the CARs involved in the superannuation business. Before the other CARs came into the business, the leads were all allocated to Camori. Once the other CARs commenced operating, the customer

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[140] Respondent's SFIC (n 3) 51 [241].
[141] Ibid 52 [246].
[142] Ibid 52 [247]
[143] Ibid 52 [248].

relationship management database would divide the leads amongst the CARs, although managers of the CARs and Mr Cator might also allocate leads.[144]

141. Cromwell expected its research analysts to generate 15-20 leads per day.[145] When one of the leads resulted in a client rolling over an amount after speaking with an adviser, the research analyst received a commission payment calculated with reference to the roll-over amount. The commission was paid on a sliding scale so that research analysts generating more successful leads received a higher percentage commission.[146] Cromwell was paid a monthly fee for providing its service to the CARs that was calculated with respect to the volume of leads generated.[147]

142. The precise circumstances in which the research analysts came to contact the names on the database acquired from Equifax was the subject of some controversy. As we shall see, there is a dispute over whether the research analysts could be said to have 'cold-called' the individuals. The same question arose in the MDA business. We will return to that issue in due course when we discuss the contention in relation to hawking.

143. The advisers engaged by the CARs were known variously as 'Private Client Advisers', 'Financial Advisers' and 'Associate Advisers'.[148] The Associate Advisers appeared to be distinguished by the fact they did not hold RG146 qualifications, whereas the other advisers did appear to have those credentials. While the Associate Advisers did not have the same credentials, it appears they still made calls in the same way as the others.[149]

144. ASIC says (and Olive does not contest) some of the advisers engaged by Camori and Ricarmo were not listed on the Financial Adviser Register at the time they were dealing with the clients.[150] It was also not contested that "Advisers did not necessarily have experience

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[144] Ibid 53 [252].
[145] Ibid 51 [244].
[146] Ibid 52 [245].
[147] Ibid 53 [253].
[148] Ibid 53 [255].
[149] Ibid 53 [256].
[150] Ibid 54 [257].

in superannuation prior to commencing employment with Camori, Ricarmo or Paradise".[151] ASIC also said (and Olive did not contest):[152]

> *Camori, Ricarmo and Paradise had a strong sales culture. The adviser's objective when speaking to clients was to get them to rollover their superannuation to be managed by Camori, Ricarmo or Paradise on the Hub24 or Netwealth platform.*

145. The advisers worked from 'lead sheets' generated from the Cromwell data. The adviser's first step was to contact individuals listed on the lead sheet to arrange an appointment time for an online presentation about the services provided by the relevant CAR.[153] Advisers were expected to follow a script that had been prepared by the CAR managers and approved by Mr Cator.[154]

146. During that initial call, the adviser would confirm the details that had been collected regarding the individual's existing superannuation arrangements. The adviser also discussed general information about superannuation and said the adviser could assist the individual to rollover their existing super funds into a single fund.[155]

147. The adviser's initial call generally lasted 5-10 minutes. The adviser typically made a number of claims during the call which ASIC says (and Olive does not contest) the claims included:[156]

> *(a) "our advisory firm specialize in assisting people improve their super with the wholesale managed funds, which typically return 13 to 15% with far lower risk than regular super";*
>
> *(b) "our portfolio returned between 13 to 15% on average over 5 years, compared to the Australian average super fund returns which is 7.7%. So we can get you an additional 4 to 6% on your money which in the long run can mean a huge difference to your superannuation and retirement";*
>
> *(c) "Now in doing so we reduce the risk of your super by around 25%. In general regular balanced super options have a 75% growth asset base, which is things like shares and property, and 25% cash based products such as fixed interest and term deposits etc. Our portfolio is made up of 50% growth and 50% cash which means we have reduced the risk by 25% while getting you far better returns as I mentioned before";*

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[151] Ibid 54 [258].
[152] Ibid 54 [259].
[153] Ibid 54 [260].
[154] Ibid 54 [261].
[155] Ibid 54 262].
[156] Ibid 54-55 [263]

(d) "with your current fund you are tracking for roughly $xx at retirement, now, with wholesale super, and that's what I specialise in, that figure jumps up to around $xxx [name], that's roughly $xx extra that I believe should be in your pocket"; and

(e) "… oh and by the way, on my figures wholesale is about 25% safer than your current fund"

148. ASIC provided (and Olive does not contest)[157] a specific example of a claim that was made by an adviser to the following effect:

> *As an example, a Camori adviser told a 35-year-old client who had $100,000 in Australian Super that he was likely to have $1.5 million by age 65 if he stayed with Australian Super but the adviser believed he was potentially able to receive up to $5.8 million with Camori.*

149. The adviser would generally end the call after arranging another appointment to discuss the individual's superannuation in more detail. The individual was asked to have a copy of the statement for their existing arrangements on hand for that discussion.[158]

150. Following the initial call, but before the scheduled appointment, the adviser sent a follow-up email. ASIC says (and Olive does not contest) the follow-up emails typically included a number of representations of which the following are an example:[159]

> *(a) "Looking at your current circumstance unless you make some dramatic changes there is the possibility you will run out of money in your retirement."*
>
> *(b) "In summary our strengths are:*
>
> *(i) Proactive approach to managing your superannuation, meaning during bad times such as the financial crisis we can shift your funds to cash or other low to no risk investments to protect your super balance.*
>
> *(ii) In general on average, significantly better returns, currently 12.85% after fees per year over the last 5 years, compared to the average of 7.7% for regular balanced super funds, as of the 31st October 2014.*
>
> *(iii) Generally much lower risk in the portfolio with an asset allocation of 50% cash and 50% growth, which means a reduction from standard balanced super of 25% risk which generally has a 75% growth and 25% cash base.*

151. Some of the follow-up emails included a copy of projections generated by a 'retirement calculator' that compared returns of 7% and the rate of return that could be achieved using

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[157] Ibid 55 [264].

[158] Ibid 55 [265].

[159] Ibid 55 [266]

the CARs' products.[160] (That appears to have been a practice amongst Camori advisers but not those engaged by Ricarmo.[161]) The advisers separately accessed the product disclosure statement for the individual's existing funds and ascertained the rate of return.[162] This detail becomes important for reasons that will shortly become apparent.

152. When the appointed time arrived, the adviser would call the individual who was seated in front of a computer. The individual would be guided to a website where they could log-in to access the online presentation being delivered from the adviser's computer. The presentation then proceeded according to a script which had been approved by CAR managers and Mr Cator. ASIC says (and Olive does not contest) the scripts for each adviser were substantially the same, although there might be some variations in content between individuals, and between advisers. It was accepted that, as a general rule, the adviser would discuss the individual's existing superannuation and insurance arrangements, and then compare those arrangements to the offerings of the relevant CAR. The adviser would also discuss the 'retirement calculator' used to project the client's superannuation balance at retirement.[163] The adviser gathered details from the individual regarding their risk profile, age, desired retirement age, superannuation goals, income and whether they had any dependents.[164] The adviser also asked about retirement objectives, including the amount of yearly income they would require in retirement.[165]

153. The 'retirement calculator' was an excel spreadsheet provided to all the advisers by Mr Cator. The way in which the retirement calculator was used is of central importance. As ASIC explained (and Olive did not contest):[166]

> *The adviser used the retirement calculator to project the client's superannuation balance at retirement based on an average superannuation fund's return. The adviser did not use the return generated by the client's actual superannuation fund but instead used a return of approximately 7.7% (depending on the adviser and the script) on the basis that this was the average performance of a superannuation fund. The adviser then compared that with a return of approximately 11% or 13%, which the adviser said was Camori, Ricarmo or Paradise's average return.*

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[160] Ibid 56 [267].
[161] Ibid 58 [278].
[162] Ibid 56 [268].
[163] Ibid 56t [271].
[164] Ibid 57 [272].
[165] Ibid 57 [273].
[166] Ibid 57 [275]-[277].

The retirement calculator projection of the returns that a client could achieve with Camori, Ricarmo and Paradise did not include fees, purportedly because the rollover fee deducted in the first year would make the projection less accurate.

By way of example about how the retirement calculator was used, an adviser calculated that a person aged 49 years with a current superannuation balance of $1.3 million would have retirement savings of $8.1 million by age 65 and $35 million by age 80, based on an investment return of 10.8%.

154. It follows the use of the retirement calculator communicated a number of misrepresentations, but the problems did not end there. ASIC's investigation revealed (and Olive did not contest) that advisers made statements such as:[167]

(a) The average return being achieved by Camori was around 13% after fees;

(b) "We have established that at your current income, returns, etc you're looking at a retirement figure of around ….., which means you will be out of money from your super by the age of ….., which obviously isn't that great, agreed? If you could make just one change and get a slightly higher return, your retirement balance could now be …… And most probably not run out of money for your whole retirement";

(c) Camori reduced the risk by over 25% compared to regular balanced funds, because the balanced investment option used by Camori was 50% growth and 50% cash, whereas a 'regular' balanced fund was 75% growth and 25% cash, thereby "heavily reducing risk while increasing the returns substantially";

(d) "How we get far better returns is to put your money directly with the fund managers themselves in the wholesale market. Normally these type of investments are reserved for the rich and famous";

(e) "Our approach is proactive, meaning that if we see bad periods ahead we can quickly adjust to put you in the best area";

155. The basis of these predictions about superior performance was not explained, most obviously because there was no legitimate basis. To underline the point, ASIC provided a specific example of an explanation provided by one of the Camori advisers, Mr Sitke, to an individual during a presentation call on 31 May 2016. In summary, Mr Sitke told the individual:[168]

(a) Camori had been paying its clients 13.09% for the past five years, which was a good 5% over and above what his current fund, Cbus, had earned (at page 24);

(b) The difference of 5% between the returns Camori was paying and what [REDACTED] *was earning in his Cbus fund would absorb the 4.4% rollover fee and part of the annual fee in the first year (at page 31);*

(c) [REDACTED] *current superannuation balance of $167,000 could be worth:*

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[167] Ibid 58 [279].

[168] Ibid 58-9 [280].

(i) With his current fund:

1. $1.1 million by age 65 (at page 34);

2. $2.2 million by age 90 (at page 35);

(ii) With Camori's wholesale managed superannuation fund:

1. $2.1 million by age 65 (at page 36);

2. $33 million by age 90, due to compound interest (at page 37); and

(d) Camori wouldn't necessarily outperform the market but it would outperform a falling market (at page 47).

156. The advisers would also discuss fees with the individual, including the 'rollover fee' of 4.84% payable to the CAR to facilitate the rollover and an annual fee of 2.2% to manage the portfolio together with fees and charges payable to the investment platform.[169] Advisers represented to clients that the CAR would actively manage the client's superannuation, and would make adjustments to the asset allocation within the portfolio as appropriate in response to market conditions.[170] Interestingly, not all of the advisers were aware that the CARs charged an ongoing advice fee.[171]

157. ASIC points out Olive was aware of the representations being made by advisers during the presentation calls about rates of return achieved by each of the managed funds in the CARs' portfolios, and the rates of return achieved by the balanced portfolio of each CAR.[172] Mr Morrison and Mr Cator each had access to real-time information provided by a subscription service about the performance of the model portfolios.[173] The advisers were also aware of the rates of return for each CAR's model portfolio: that information was found on the intranet that the advisers were able to access.[174] Yet only the rate of return for the balanced portfolio of each CAR was shown to the client during the presentation call.[175] ASIC pointed out (and Olive did not contest):[176]

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[169] Ibid 59 [281].
[170] Ibid 69 [339].
[171] Ibid 69 [336].
[172] Ibid 59 [282].
[173] Ibid 59 [283].
[174] Ibid 60 [284].
[175] Ibid 59 [283].
[176] Ibid 60 [285].

As at September 2018, the returns of the Balanced model portfolios used by Camori, Ricarmo and Paradise were as follows (before the deduction of adviser fees by Olive, i.e. the 4.84% rollover fee and 2.2% pa ongoing fee):

CAR	***1-year***	***5-year***
Camori	*10.81%*	*10.63%*
Ricarmo	*11.97%*	*11.85%*
Paradise	*11.97%*	*11.85%*

158. Those returns are difficult to square with the representations made about by the advisers during the course of the presentation calls.

Providing advice

159. If an individual was willing to proceed with the superannuation rollover at the end of the presentation, the adviser would at that point complete a 'fact find' and risk profile while the client remained on the phone. The advisers from different CARs took different approaches to this task. As ASIC explained (and Olive did not contest):[177]

> *Camori advisers determined a client's risk profile based on their current superannuation investment option or the client's self-assessment of their risk profile. Clients who were assessed as having a higher or lower risk tolerance than Balanced were still advised to roll their superannuation into the Camori Balanced model portfolio.*
>
> *The risk profile completed by Ricarmo and Paradise was determined based on a 19-question risk profile questionnaire which was completed by the adviser over the phone using Adobe Sign.*
>
> *From around mid-2016, part of the fact find/ risk profile process involved the adviser calling the client's primary existing fund, with the client on the line, to obtain information about the client's existing fund. The adviser did not call every superannuation fund where the client had an existing account, only the main one and sometimes a second.*
>
> *Before mid-2016, Camori and Ricarmo did not call the client's existing fund but rather relied on annual statements provided by the client to ascertain information about the existing fund.*

160. Olive did not contest that the adviser would send the fact-find and risk profile documents (whether signed by the client or not) to an administration team at the conclusion of the call

[177] Ibid 60-61 [288]-[291]

with the individual. The administration team would check for any typographical errors or other issues on the face of the document.[178] Ms Fry, a compliance officer, would then review the statement of advice but ASIC says – and Olive does not contest – Ms Fry did not consider whether advisers were complying with their statutory obligations. She said she considered it was each adviser's responsibility to ensure their own compliance.[179] That is not an approach one would expect from a compliance officer.

161. After Ms Fry's review, the adviser would call the client to discuss the statement of advice and obtain an electronic signature. The document would then be emailed to Mr Morrison who would review and sign the statement of advice. ASIC says Mr Morrison's review appeared to be perfunctory: we were referred to examples where a review would be completed in less than ten minutes.[180] ASIC says (and Olive accepts) some advisers never discussed the draft statement of advice with Mr Morrison; it is unclear whether any of the advisers had regular contact with Mr Morrison in this regard.[181] In any event, the signed document would then be sent to the client.[182]

162. While this process was common to the CARs, the details of how the individual CARs dealt with clients in relation to the statement of advice varied slightly. **Camori** statements of advice were completed by the adviser or associate adviser who spoke with the client. Those individuals were described in the documents as an 'associate planner'. In each case, the statement of advice noted it was completed by Mr Cator, subject to the supervision of Mr Morrison. Mr Morrison signed the letter to the client enclosing the advice but Mr Cator signed the risk profile declaration on behalf of the CAR, and Mr Morrison signed the advice itself.[183]

163. As to the advice itself: ASIC says (and Olive does not contest):[184]

> *The advice provided to each client in the SOA was templated and was identical for every client, because all clients were classed as a Balanced investor and there was only one investment option, being the Camori Balanced Portfolio with Hub24.*

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[178] Ibid 61 [293].
[179] Ibid 65 [307].
[180] Ibid 65 [310].
[181] Ibid 68 [328].
[182] Ibid 65 [309].
[183] Ibid 61 [295].
[184] Ibid 62 [296].

164. Importantly, and worryingly, ASIC says – and Olive does not contest - the personal advice component of the statement of advice was *the same for every client*.[185] In each case, the obviously templated advice suggested the client should inform the CAR if the balanced risk profile was inappropriate,[186] underlining the fact that the balanced risk profile was used as a default.

165. The statements of advice prepared by **Ricarmo** were also completed by the adviser who spoke to the client, although the adviser was described as a 'financial planner' or an 'associate adviser'. Where the adviser was described as an associate adviser, Mr Campbell, a manager at Ricarmo, would be recorded as the 'financial planner'. ASIC says – and Olive does not contest – it is unclear whether the adviser discussed the client or the advice with Mr Campbell, and Mr Campbell may not have been actively involved in reviewing any of the advice. Mr Morrison signed the advice and the covering letter. The covering letter said Mr Morrison had "reviewed [the advice] for quality assurance'.[187]

166. While the Ricarmo advice was prepared in a slightly different way, the personal advice was ultimately identical to the advice prepared for each client by Camori, save that Ricarmo advice referred to using the Netwealth platform instead of Hub24 and different managed funds. The Ricarmo advice also expressly said there was no Risk Insurance Advice included.[188]

167. The Paradise advice was completed by the adviser who spoke with the client, who was described in the documents as an 'associate planner'. The advice was said to be prepared and reviewed by a Mr Allison, who was supervised by Mr Morrison. Mr Morrison signed the covering letter and the statement of advice. The personal advice was substantially the same as that provided by Camori and Ricarmo.[189]

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[185] Ibid 62 [297].
[186] Ibid 62 [298].
[187] Ibid 63 [300].
[188] Ibid 64 [301].
[189] Ibid 64 [302].

168. ASIC says the standard advice was deficient in several respects. As it explained in these uncontested paragraphs of the further amended statement of facts, issues and contentions:[190]

> *Initially, Camori did not compare the characteristics of the client's existing fund with Hub24, but instead used an "average" superannuation fund as the basis for the comparison, and contrasted this with Hub24. Later, Camori used the client's main fund as the basis for the comparison. If the client had multiple superannuation funds, Camori did not include all funds in the comparison.*
>
> *The fee comparison in the SOA did not take into account whether the client's existing fund deducted the equivalent to a rollover fee or contribution fee (akin to the 4.84% fee charged by Camori, Ricarmo and Paradise) because the adviser had no visibility as to whether the client's existing fund deducted such a fee (as the fees were charged by a dealer group rather than the fund).*
>
> *The fee comparison in the SOA also did not consider any insurance premiums currently being paid from the client's existing superannuation fund.*

Advice in respect of insurance and fees

169. It was accepted that advisers would tell clients not to rollover the entirety of their superannuation balance at first instance. The advisers typically suggested the client leave enough money in their existing funds to cover any insurance premiums until their insurance needs were assessed.[191] The formal superannuation rollover advice did not ordinarily address the client's insurance needs (apart from the Ricarmo statement of advice which mentioned that no Risk Insurance Advice was included.) Other staff from the CAR would ordinarily contact the client to discuss insurance needs once the rollover was complete.[192] ASIC concluded (and Olive did not contest) that:[193]

> *If the client had "good insurance" in one of their existing superannuation funds, the insurance adviser might recommend that the client keep that fund and not roll it over to Camori, Ricarmo or Paradise. The client may therefore end up with multiple funds, despite one of the purported benefits of Camori, Ricarmo and Paradise being to consolidate the client's superannuation for convenience and lower fees.*

170. ASIC also pointed out (and Olive did not contest) that the fee comparison the adviser undertook when recommending the client move to the Hub24 platform did not take account

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[190] Ibid 64 [303]-[305]

[191] Ibid 65-6 [313].

[192] Ibid 65 [312].

[193] Ibid 66 [314].

of the fact the client would end up paying two sets of fees while the old fund remained active.[194]

The application to access the Hub24 platform

171. In addition to the interaction in relation to the statement of advice, clients of Camori and Paradise were asked (typically at the end of the presentation call with the adviser) to assist the adviser to complete an application on the client's behalf to use the Hub24 platform. The process was described in some detail in the respondent's further amended statement of facts, issues and contentions. The process was devised by Mr Cator.[195] In summary, the client would write out a form of words authorising the CAR to sign the application on the client's behalf before taking a photograph of the writing and the client's drivers' licence or other identification and providing that photograph to the adviser.[196] Administration staff engaged by the CAR would then photoshop the client's signature onto the Hub24 application form.[197] Olive said this was done to ensure the signature on the form matched the identification documents.[198]

172. The effect of this unusual process was described by ASIC (a description that was not contested by Olive) as follows:[199]

> *Because of the above practice:*
>
> *(a) the client did not see the Hub24 application form;*
>
> *(b) the client was not aware of the information disclosed in the Hub24 application form;*
>
> *(c) the client's signature was affixed beneath certain acknowledgements and warranties on the form despite the client not having read them;*
>
> *(d) the client may have wrongly certified certain things to Hub24 as being correct; and*
>
> *(e) the client's rights may have been prejudiced by their signature being taken to have acknowledged certain matters when in fact they were not aware of such matters.*

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[194] Ibid 66 [315].
[195] Ibid 66 [318].
[196] Ibid 66 [316].
[197] Ibid 66 [317].
[198] Ibid 66 [319].
[199] Ibid 67 [320].

Training and supervision of advisers

173. The CARs provided internal training to their advisers. The training was overseen by Mr Cator. He also provided scripts to the advisers for use with prospective clients. It appears individual advisers might have made their own adjustments to the scripts which they shared with colleagues,[200] and managers provided their own input on matters like handling objections and how to close.[201] Mr Cator and managers within the CARs also trained advisers on:

- how to compare the features and returns obtained from the client's existing funds with the options offered by the CAR;
- sales psychology;
- sales training;
- motivation tactics; and
- objection handling.

That training was delivered one-on-one and in groups, and team leaders would listen into advisers' calls with clients.[202]

174. Olive had a limited role with respect to the training – training which appeared to focus on sales. (ASIC quoted one of the advisers who characterised the training provided by the CARs in those terms.[203] That description seems apt given the uncontested explanation of the content of the training we recounted above.) ASIC says (and Olive does not contest) Messrs Morrison and Richmond would visit the offices of the CARs approximately quarterly to speak with Mr Cator but they did not have substantive discussions with advisers about their work or clients[204] (or, we infer, any discussion regarding compliance issues or legal obligations). It was expressly accepted that Olive did not provide any training to advisers on

[200] Ibid 67 [322].
[201] Ibid 67 [324].
[202] Ibid 67 [323]-[324].
[203] Ibid 67 [325].
[204] Ibid 68 [327].

the use of the retirement calculator, a key tool used by the advisers in the marketing and advice-giving process. It seems all that was left to Mr Cator.[205]

Compliance issues

175. Messrs Richmond and Morrison made decisions and issued directions in relation to compliance issues. The directions were executed by a small compliance team that operated across all three CARs.[206]

176. We have already mentioned Ms Fry was the compliance manager (at least until she was replaced by Ms Munt in early 2018).[207] Ms Fry and Ms Wallbanks were employed in operations prior to being appointed to compliance team.[208] As ASIC observed in its further amended statement of facts, issues and contentions (and Olive did not contest):[209]

> *Ms Fry was 24 years of age when she was the Compliance Manager and her employment background was administration, hospitality and real estate. She did not have prior experience in the financial services industry before commencing employment at Cromwell in February 2016 then moving to Camori as Mr Cator's personal assistant two weeks later. Ms Fry completed her Diploma of Financial Planning and a Responsible Manager training course in early 2017.*

177. One of Ms Fry's duties as Mr Cator's assistant was reviewing statements of advice after they were signed by clients to ensure all the fields in the form had been completed, and to check for typographical and formatting problems.[210] It was not substantive compliance work.

178. Notwithstanding that limited experience, Ms Fry was appointed to be Camori's compliance manager at the age of 24 in January 2017. She performed a limited range of tasks in that role, including:[211]

- ensuring advisers were up-to-date with their 'Kaplan' training;

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[205] Ibid 66 [326].
[206] Ibid 69 [341]-[342].
[207] Ibid 69 [341].
[208] Ibid 69 [343].
[209] Ibid 69 [344].
[210] Ibid 70 [345].
[211] Ibid 70 [346].

- updating templates and other standard documents in accordance with the directions of Mr Richmond;
- checking that renewal notices and fee disclosures were sent;
- updating the CAR's quarterly newsletter; and
- performing random checks of the statements of advice in relation to insurance that were issued by the CARs. ASIC noted at least one of the Ricarmo advisers who had also worked for Camori confirmed he had never received any feedback from the compliance teams about any shortcomings in his advice.[212] (That is unsurprising give it was accepted Ms Fry did not review the statements of advice to check whether advisers were complying with legal requirements. She did not identify or report any systemic concerns with the contents of the statements of advice she reviewed.[213])

179. Interestingly, Ms Fry did not think her role extended to identifying compliance issues more generally in the CARs.[214] The activities she did perform appear to have been principally administrative in character. Given the limited conception of the role of the compliance manager, it is unsurprising Olive had not identified any compliance issues in the superannuation business as at June 2018.[215]

The dispute resolution process

180. There is no dispute that Olive received complaints about the superannuation business, although the Financial Ombudsman Service and the Australian Financial Complaints Authority did not receive complaints until more recently.[216]

181. We have already noted Olive's Financial Services Guide included a complaints handling process that lacked detail, and we referred to the Financial Services Compliance Manual which described the internal and external dispute resolution procedures. The manual was

[212] Ibid 71 [353].
[213] Ibid 70 [350].
[214] Ibid 70 [349].
[215] Ibid 70 [348].
[216] Ibid 71 [354]-[355].

plainly deficient. In an uncontested paragraph of its further amended statement of facts, issues and contentions, ASIC said of the manual:[217]

> *It contained little detail regarding receiving complaints, investigating complaints, responding to complaints, referring unresolved complaints to the external dispute resolution scheme, recording information about complaints and identifying and recording systemic issues.*

182. Mr Cator and Mr Dorman, a manager, were responsible for dealing with complaints received by the CARs at first instance.[218] If the complaint could not be resolved by the CAR, it would be escalated to Olive where Mr Richmond had primary responsibility for complaints.[219] Where Mr Richmond became involved, he might engage with the complainant directly.[220] The advisers did not have a role in the CARs complaint handling process.[221] Curiously, Ms Fry, the compliance manager, did not have any role in dealing with complaints either (other than to record information as directed by Mr Cator or Mr Richmond about outcomes in the complaint registers maintained by the CARs). She was unfamiliar with the detail of how complaints were handled.[222] Her role in the process was essentially administrative.

183. ASIC noted complaints (the complaints that were documented, at any rate) about the superannuation business were generally resolved, and that the resolution might be achieved through offering a financial settlement (such as offering reimbursement of some or all the fees charged) or by disengaging with the client and 'rolling out' their superannuation to another fund.[223] The analysis of outcomes was undoubtedly complicated by the quality of the records maintained by Olive. ASIC says (and Olive does not contest) that Olive's complaint register contained 39 entries as at 14 November 2017.[224] ASIC says at least five of the complaints related to the superannuation business however the absence of detail means it was difficult to know for sure.[225] Not all of the complaints received were necessarily recorded on Olive's complaints register, as some were only recorded on the

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[217] Ibid 71 [357].
[218] Ibid 72 [358].
[219] Ibid 72 [362].
[220] Ibid 72 [365].
[221] Ibid 72 [361].
[222] Ibid 72 [359]-[360].
[223] Ibid 72 [363].
[224] Ibid 72 [364].
[225] Ibid 72 [366].

registers maintained by the CARs.[226] Olive's register recorded complaints made via the Financial Ombudsman Service and complaints made to Olive itself.[227] Where complaints were made to Hub24 or Netwealth and referred on, they might not be recorded in Olive's register.[228] ASIC provided three examples of complaints that were lodged with the platforms that were resolved following engagement with one of the CARs, and one example where a complaint was made to a platform which was recorded in Olive's register.[229] That uncontested material suggests the recording of complaints was incomplete and inconsistent, if not haphazard.

184. That conclusion is consistent with ASIC's undisputed claim[230] that:

- Olive did not review complaints in order to ascertain whether those complaints raised systemic issues in relation to its superannuation business; and
- Olive did not identify any systemic issues in relation to its superannuation business.

185. ASIC pointed out Olive's breach register – another important database – only contained one entry, and that entry did not relate to the superannuation business.[231] Given the issues in the business we have discussed which manifested in complaints, the absence of relevant entries in the breach register is indicative of a serious compliance problem.

Summary of key factual findings in relation to the superannuation business

186. We are satisfied on the basis of the uncontested material set out above:

(a) Olive's superannuation business was conducted through corporate authorised representatives throughout the period under review. Most of the functions were carried out by a common team under the leadership of Mr Cator, while Mr Morrison and Mr Richmond also played a directing role. The senior managers at Olive had a

[226] Ibid 72 [367].
[227] Ibid 72 [368].
[228] Ibid 73 [370].
[229] Ibid 73 [371]-[372].
[230] Ibid 73 [373]-[374].
[231] Ibid 73 [375].

commercial interest (either direct, or through associates) in the CARs that operated the superannuation business;

(b) The superannuation business focused on convincing individuals to 'roll-over' their existing superannuation into portfolios managed by the CARs using online platforms. The CARs also provided advice in relation to insurance products;

(c) Camori, Ricarmo and Paradise derived fee revenue from individuals paying a roll-over fee calculated as a percentage of the amount, and an ongoing annual fee. In the period 2014-2017, the three CARs generated in excess of $21.45 million in revenue;

(d) The CARs were characterised by a strong 'sales' culture and not all of the advisers held RG146 qualifications. The contacts between advisers and prospective clients were scripted. The training that occurred tended to focus on sales techniques rather than emphasising legal obligations or compliance issues, and advisers were remunerated in a way that created an incentive to convince clients to roll-over their funds;

(e) During initial contacts and follow-up emails, the advisers made representations about lower risk and higher rates of return from portfolios managed by the CAR without properly understanding the details of the client's existing superannuation;

(f) The advisers subsequently used a 'retirement calculator' in presentations with each prospective client that made projections based on the average rate of return achieved by superannuation funds (as opposed to the rate of return achieved by that individual's fund) and an average rate of return achieved by the CAR's fund. The projected rate of return from the CAR fund did not take into account fees, the possibility of adverse market events, or (at least in some cases) insurance premiums;

(g) While the advisers may have referred to the rates of return achieved by different funds managed by the CAR during the course of the online presentation, the website on which the presentation was delivered only referred to the returns from the balanced portfolio managed by the CAR in question;

(h) Advisers would conduct a 'fact find' and complete a risk profile after the prospective client agreed to proceed with the roll-over. The advisers would then prepare a statement of advice for the client. The advice was prepared on a template and was essentially the same for every client, who was in every case classified as having a 'balanced risk profile'. After a superficial review by administrative and compliance staff, the client would be asked to sign the statement of advice before it was sent to Mr Morrison for review and signature on behalf of Olive; and

(i) The role of compliance staff did not extend to identifying compliance issues or systemic or legal problems with the statements of advice. The compliance manager did not check statements of advice to determine if advisers were complying with statutory duties or other legal requirements: the compliance manager believed it was the adviser's role to ensure their own compliance.

187. We have already summarised our findings about the adequacy of the complaint and dispute resolution processes in the MDA business. We reach the same conclusion in relation to complaints in the superannuation business. Complaints made in relation to the superannuation business were not exhaustively recorded in the registers maintained by Olive and the CARs, and the complaints were not analysed with a view to identifying systemic risks.

Contentions in relation to the superannuation business

188. Having summarised the main findings of fact in relation to the superannuation business, we turn to consider the contentions. Just as the principal factual allegations were not contested, most of the contentions are uncontested – but we must set out our conclusions in any event. As we do so, we shall also address one of the outstanding factual controversies in relation to hawking.

Olive did not have an internal dispute resolution system with the required features (s 912A(1)(g))

189. It is convenient to deal first with the criticisms of the adequacy of Olive's internal dispute resolution processes. The criticisms made of that process in relation to the MDA business are largely replicated in the superannuation business because it was ultimately the same process. Olive did not record all of the complaints it received, and it certainly did not record

complaints in a systematic way. Only the complaints made directly to Olive or through the Financial Ombudsman's Service were routinely recorded; complaints lodged with the CARs were not all recorded in Olive's registers. It follows Olive had not established a proper recording system for managing complaints or disputes: cf RG 165 Appendix 1: IDR Procedures and Standards, Table 2, Guiding Principle 8.1 (collection of information). That inevitably compromised Olive's ability to analyse and evaluate complaints. Not that Olive showed any interest in analysing complaints, of course: as in the MDA business, Olive tended to deal with complaints by making a payout instead of using the data to identify problems. The processes themselves were also inadequately documented or described. We have already referred to the paucity of detail contained in the provisions of the Financial Services Compliance Manual which was the obvious place to establish processes and procedures for dealing with complaints and resolving disputes. The fact the so-called 'compliance manager' did not appear to accept responsibility for dealing with complaints or using the information obtained through complaints to identify compliance issues points to Olive's failings: cf RG 165 Appendix 1: IDR Procedures and Standards, Table 2, Guiding Principle 4.2 (dealing with visibility).

Olive contravened the obligation in s 912A(1)(c) to comply with the financial services laws

190. ASIC points to a series of contraventions of the financial services laws that individually and collectively amount to a contravention of the obligation in s 912A(1)(c).

191. The evidence establishes advisers employed by the CARs to speak with prospective clients over the phone made **false or misleading statements in contravention of 1041E** and **engaged in misleading or deceptive conduct in contravention of s 1041H**. Specifically, the advisers projected the superannuation balance that would be available to the individual if they placed funds in superannuation funds managed by the relevant CAR compared to the amount that would otherwise be available in circumstances where:

- The adviser assumed the CAR's funds would achieve 11-13% each year into the future without factoring in the possibility of adverse market conditions or other factors that might impact on fund performance;
- The adviser's projection of the likely balance in the CAR's funds did not take into account the impact of charging the rollover fee; and

- The rate of return used as a comparator was not the potential client's existing superannuation fund but the rate of return of an average fund. That rate might have been higher or lower than the rate achieved by the client's existing fund.

192. That comparison was false or misleading, and it certainly amount to misleading or deceptive conduct.

193. The advisers were also making predictions about future performance without a reasonable basis for making those predictions. One cannot offer a projection about future performance unless one has a reasonable factual basis for doing so: the very act of making the prediction carries with it the inference that one has good or sufficient reasons for believing the prediction will come to pass. We have set out the uncontested evidence of what advisers were saying about future performance but there is little if any evidence that they had an informed basis for what they were saying. That amounts to misleading or deceptive conduct and each of the predictive statements is likely to be false or misleading. The problem was illustrated by examples like those we cited earlier in which clients in their forties were told they would enjoy dramatically improved superannuation balances when they turned 65 and 80 or 90 if they made the change to funds managed by the CARs. The comparisons did not take account of fees and charges or the possibility of adverse market events. The calculation of the superannuation balance at 80 and 90 also failed to take account of the impact of the client drawing down on their super after they reached preservation age.

194. The evidence also establishes the advisers represented that the funds managed by the CARs would be 'actively managed' over time to achieve superior returns. There was no clear evidence that the CARs undertook active or systematic management of the funds on an ongoing basis; they CARs certainly did not engage effectively with clients on an ongoing basis (apart from a perfunctory annual email) to ascertain any changes in circumstances that might be relevant. It follows the claim about active management of the funds was false or misleading and amounted to misleading or deceptive conduct. Olive and the CARs were apparently motivated by a sales culture in which advisers were focused on achieving rollovers because that impacted on their remuneration.

195. We next turn to the contention that Olive, through its advisers, **failed to act in the client's best interests and provide appropriate advice in contravention of ss 961B and 961G**. There seems to be no doubt that the advisers provided clients with 'financial product advice'

within the meaning of s 766B(1) because the advice was obviously intended to influence the prospective client in their decision-making about the superannuation product offered by the relevant CAR. The advice was also 'personal advice' within the meaning of s 766B(3) because a reasonable person would have assumed the adviser had prepared the advice having regard to the prospective client's objectives, financial situation and needs.

196. It is necessary to provide some further explanation for why the advice amounted to 'personal advice'. We found the representatives of the CARs asked questions of prospective clients about their circumstances and objectives, including details like their age, employment circumstances, existing superannuation arrangements and dependents. Some of that information made its way into 'fact find' documents and the retirement calculator in such a way that a reasonable person would assume the information was being used for the purpose of preparing that advice. That is enough to qualify the advice as personal advice even if – as ASIC suggests – the advisers who prepared the advice and those who signed off did not use the information appropriately.

197. We also found that (oral) advice was routinely given during the presentation in advance of the 'fact find' and before the formal risk profile document or statement of advice was created. Almost by definition, advice that precedes the information gathering process which reveals relevant circumstances, needs and objectives cannot satisfy the requirement to act in the best interests of the client: s 961B. For similar reasons, 'premature advice' of this nature cannot be said to be 'appropriate' to the client: s 961G. Having said that, the information-gathering process that occurred after that oral advice was given was mostly perfunctory. The evidence does not establish the advisers or administration staff – much less Mr Morrison, who signed the statements of advice – engaged in a probing inquiry in an effort to fully understand the potential client's situation at any point of the process.

198. The inadequacy of the advice-giving process was underlined by the outcome of reviews into the handling of seven different clients of the superannuation business. ASIC commissioned the review in November 2018. The reviewers examined the records in relation to three clients of Camori, two clients of Ricarmo, and two clients of Paradise.[232] The conclusions of

[232] Ibid 87-8 [429].

the reviews were not contested by Olive. They concluded the process fell short of what was required in circumstances where:

- The fact the 'retirement calculator' used by the advisers used the average return of all superannuation products as a comparator rather than the returns achieved by that individual's existing superannuation funds;
- Administration staff who assembled the statement of advice provided the unsigned document simultaneously to the adviser and the client before it had been reviewed and signed by Mr Morrison;
- all clients of Camori were classed as 'balanced investors' and all received essentially the same templated advice that recommended the client roll over their funds into a balanced portfolio, which was the only product Camori offered.

199. ASIC pointed out – and Olive did not contest – that the advice given to clients that recommended a roll-over did not ordinarily explain why that course was appropriate having regard to the client's circumstances and objectives. That is unsurprising given the evidence we have already discussed suggesting the advice was essentially prepared according to a template.

200. The slap-dash nature of the information-gathering and analysis was perhaps most clearly illustrated by the way in which advisers dealt with insurance needs. In many cases, those needs were dealt with as an after-thought. Clients were on occasions advised to leave a small balance in their existing superannuation fund to pay insurance premiums without properly considering the implications in terms of fees.

201. We are satisfied the advice-giving process was seriously deficient. We are satisfied Olive, through its representatives, contravened ss 961B and 961G. The contraventions are very serious because they went on over a lengthy period. They were also likely the product of a dash to sign up clients in the expectation of short-term gain.

202. That leaves the question of whether Olive and its CARs **contravened s 992A(3) which prohibits making an offer to issue or sell a financial product in the course of, or because of, an unsolicited telephone call to another person**. We have already considered the operation of s 992AA which was at the time a companion provision that prohibited hawking of interests in a managed investment scheme. While both provisions

draw attention to the meaning of the expression 'unsolicited telephone call', the circumstances are slightly different.

203. We have already found Cromwell was commissioned by the CARs to source potential client leads. Cromwell obtained the relevant information from Equifax, a commercial service which assembled databases of names of people who were potentially interested in financial products like those the CARs had on offer. The 'research analysts' employed by Cromwell – essentially telemarketers – would access the database and call the individuals to ask if they might like to speak to somebody from one of the CARs.

204. Olive does not agree the telemarketers' calls were 'cold calls', or that they were unsolicited in the relevant sense. Olive also denies that the subsequent calls from the advisers were unsolicited given the individual had agreed to the contact.

205. We accept the call from the *adviser* could not be said to be unsolicited. The individual had clearly invited that call in the course of the earlier call from the telemarketer. But there is a question over whether the call from the telemarketer which initiated the sales and advice process was in the same category. We should say at once there is no evidence that the offer to sell the product was made in the course of the initial call; the question is whether any offer that might subsequently be made was *because* of that call if it was unsolicited.

206. There is good reason to conclude the offers were *because of* the initial calls in the sense that an offer would not have been made to that client if the lead to the client had not been provided by Cromwell. We do not agree with Olive's submission that the agreement to become a client was too far removed from the initial call.[233] The provision of leads was an essential part of the business model of the CARs and Cromwell. As we explained in our factual narrative, Cromwell expected its telemarketers to generate a certain number of leads each day, and it was paid a fee by the CARs that was calculated with reference to the volume of leads that were generated. Cromwell also entered the leads it generated directly into the CARs' customer relationship management database, which pointed to the seamless relationship between Cromwell and the CARs that underlay the process which led to engagement with clients.

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[233] Applicant's submissions (n 43) 35 [133].

207. That brings us back to the question of whether the initial call from the telemarketer was 'unsolicited'. We have no difficulty describing the calls as 'cold calls' in that the individual did not anticipate contact from Cromwell in particular about the products that were being offered by the CARs. But the legislation does not use the expression 'cold call'.

208. As we understand the evidence, the contact information assembled by Equifax was obtained from the operators of websites that attracted traffic from individuals interested in financial services. Those individuals were presumably required to provide their contact and other details in return for access to information on the site. Olive assumed the individuals checked a box indicating they assented to their information being shared with other entities who might contact them about other products and services.

209. That may not have been a safe assumption. The evidence about the circumstances in which Equifax acquired the data and supplied it to Cromwell was not as precise as the evidence in relation to the MDA business. Mr Henry SC, who appeared for Olive, referred in his closing submissions to a transcript of evidence provided by Mr Cator to ASIC. Mr Cator was a director of Cromwell. He said he understood Equifax was the largest operator of its type and he apparently expected it would have supplied data that had been obtained from individuals after obtaining consent.[234] We understand Mr Cator did not seek confirmation of that consent. One would have assumed a prudent manager purchasing that sort of data for this purpose would seek confirmation given the prohibition against hawking.

210. Olive pointed out in its submissions that ASIC bears the onus of establishing a contravention under ss 992AA and 992A, and the fact that hawking might prompt criminal charges means the Tribunal should proceed cautiously.[235] Even if we assume the individuals providing their information checked a box formally indicating their assent to sharing information for marketing purposes, we are not satisfied for reasons we have already explained that giving one's consent to be contacted could be said to be a *solicitation* of that conduct. The word 'solicitation' carries with it the connotation that the person engaged in the act of solicitation is pressing to achieve the outcome in question; in this context, that the individual actively sought or desired the particular contact. We are not satisfied that giving consent to be contacted (particularly where that consent was given as the price of obtaining access to the

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[234] Ibid 36 [137]; S 19 examination of Mitchell Cator (11 October 2017) 72 [18]-[28].

[235] Applicant's submissions (n 43)37 [142].

features of a website) amounts to *soliciting* a call from a telemarketer who is initiating a sales pitch for a particular product or service. We are satisfied Olive, through its CARs, engaged in hawking in contravention of s 992A(3).

Olive contravened the obligation to take reasonable steps to ensure that its representatives complied with the financial services laws (s 912A(1)(ca))

211. We have found Olive's CARs failed to comply with the financial services laws in various respects. The contraventions we have identified are unsurprising given Olive's approach to the management of the marketing and advice-giving functions. ASIC contends (and Olive does not contest) that Olive:[236]

- Did not ensure its advisers all had RG146 qualifications and did not ensure those individuals were all included on the Financial Adviser Register. The Register is a public record of financial advisers who provide personal advice in relation to complex financial products. The Register provides information to consumers about the adviser which permits the consumer to make an informed decision about taking advice from that individual. It also helps ASIC monitor who is giving advice;

- Did not have a properly functioning compliance regime. While there was a staffer bearing the title 'compliance manager', that individual had a limited role which did not extend to substantively reviewing statements of advice or the process which led to them. She was not appropriately qualified or trained and she did not take an interest in whether the advisers or anyone else were complying with their statutory or other obligations. She did not take steps or have a process for identifying systemic compliance issues, much less dealing with them;

- Did not properly supervise the marketing staff of the CARs by ensuring they had proper scripts and training which they could and did follow in their interactions with prospective clients;

- Did not properly supervise advisers and other staff involved in the advice-giving process to ensure they undertook a reasonable investigation before completing the advice, and did not ensure the advice that was given took those matters into

[236] Respondent's SFIC (n 3) 95-97 [445]-[446].

account. Olive was obviously aware of the perfunctory enquiries and the disorderly process for preparing what was ultimately templated, formulaic advice because Mr Morrison signed the advice and participated in the process.

Olive contravened the obligation to have available adequate resources to provide the financial services covered by the licence and to carry out supervisory arrangements (s 912A(1)(d)) and the obligation to ensure its representatives are adequately trained and competent to provide those services (s 912A(1)(f))

212. The factual findings we made in support of our conclusion that Olive contravened the obligation in s 912A(1)(ca) to take reasonable steps to ensure compliance also support findings that (i) Olive failed to make available adequate resources in contravention of the obligation referred to in s 912A(1)(d) and (ii) Olive failed to ensure its representatives were adequately trained and competent. Olive failed to establish and resource proper arrangements for training, supervising and auditing the staff of the CARs, and it failed to establish or resource properly-functioning compliance processes. Many of the staff in key positions were not appropriately credentialed. To the extent Olive executives played a role in the business of the CARs, they contributed to the problems: in particular, Mr Morrison was at the apex of a seriously deficient advice-giving process and Mr Richmond was in charge of a deficient complaints' handling process.

Olive contravened the obligation to do all things necessary to ensure the financial service provided under the licence were provided efficiently, honestly and fairly (s 912A(1)(a))

213. As we have already explained, Olive did not train or supervise its marketing staff appropriately, and the advice-giving process was seriously deficient, which points to a want of honesty, efficiency and fairness. Clients were misled about (a) the performance of the CARs' funds relative to their existing funds, and (b) the quality and appropriateness of the personal advice which was mostly templated, which points to a want of honesty. The failure to make proper use of the information generated through complaints and to deal with complaints in a principled way was also a serious shortcoming that suggested a want of efficiency and fairness. Those shortcomings individually and collectively confirm Olive did not do that which was required to provide the services efficiently, honestly and fairly.

CONCLUSION WITH RESPECT TO THE HISTORICAL CONTRAVENTIONS

214. We are satisfied in light of the evidence we have recorded – most of which was uncontested – that Olive contravened its obligations under s 912A of the Corporations Act in the superannuation business as well as the MDA business. We would reach that view even if we were to find that Olive had not engaged in hawking. The false or misleading statements and the misleading or deceptive conduct we identified is particularly egregious. Our findings in relation to the conduct of the superannuation business confirms the discretion to suspend or ban under s 915C(1)(a) has been enlivened.

DOES ASIC – OR THE TRIBUNAL, STANDING IN ASIC'S SHOES – HAVE REASON TO BELIEVE OLIVE IS LIKELY TO CONTRAVENE ITS OBLIGATIONS UNDER s 912A(1)?

215. While we have found Olive's historical conduct meant it did not meet obligations in s 912A, there remains a dispute over whether the alternate (additional) ground in s 915C(1)(aa) is made out – namely whether ASIC (or the Tribunal standing in its shoes) "has reason to believe that the licensee is likely to contravene their obligations under s 912A" in the future. While Olive's troubling history is relevant to our assessment of the likelihood of future contraventions, we must also consider what has happened more recently.

216. Olive has provided evidence of changes to its ownership, organisation, processes and people, and it has foreshadowed further changes. We have already mentioned that Olive has not used CARs (other than a company known as Olive Services which we understand it controls) since about October 2018. Olive says in its submissions that the decision to stop using external CARs is of critical importance.[237] The general thrust of its case was that the problematic behaviour emanated from the external CARs, and those CARs are gone – although that submission does not take proper account of Mr Morrison's role at the apex of the advice-giving process. Nor does it take proper account of the serious deficiencies in the way Mr Morrison and Mr Richmond dealt with complaints. But we digress.

217. Olive has not actively marketed or accepted new clients into its superannuation business since November 2018[238] although it has not left the superannuation business altogether. Mr

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[237] Applicant's submissions (n 43) 9 [30].

[238] Transcript of Proceedings, 149 [6]-[14].

Richmond said the superannuation business still had around 2600 clients who were receiving advice in relation to superannuation products at the time of the hearing.[239] Around 1000 of them were receiving both superannuation and insurance advice.[240] Olive has not operated the MDA business since about September 2020.[241] Before it was suspended, the business had morphed into a fintech trading platform that Olive operated without using a CAR. The business no longer provided 'trade alerts'. (Olive pointed out in written closing submissions that the provision of trade alerts was something the CARs provide on their own account, rather than a service that was provided on behalf of Olive.[242]) Clients of the revamped business were able to trade on the platform or engage in 'social trading' in which they followed other traders.[243] The business was described by Mr Richmond in his statement, which also referred to a product disclosure statement that had been lodged with ASIC.[244]

218. A range of other measures were introduced including:

- only clients who passed an RG 227 test with an understanding of CFD's were accepted;[245]
- qualified financial advisors reviewed statements of advice;[246] and
- weekly assurance reviews were conducted to review client suitability and the like.

219. Those changes to aspects of the MDA business in particular are encouraging, but Olive says they need to be seen in a wider context of substantial change. Olive has not just dismantled the historical arrangements in which external CARs were able to engage in problematic behaviour under the terms of the Olive licence. It has also introduced what it described in closing submissions[247] as:

> *an orthodox, committed-based governance structure and 3LoD [ie '3 lines of defence'] model designed to put risk management and compliance at the heart of*

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[239] Statement of Justin Richmond, dated 19 August 2020, 14 [54]; Applicant's Submissions (n 43) 6 [17(a)].
[240] Applicant's Submissions (n 43) 5-6 [17].
[241] Ibid 8 [26]; Transcript of Proceedings, 132 [24]-[25].
[242] Applicant's Submissions (n 43) 8 [26].
[243] Transcript of Proceedings, 133 [18]-[45].
[244] Statement of Justin Richmond (n 8) 40 [136]; Applicant's Submissions (n 43) 6 [17].
[245] Transcript of Proceedings, 136-137 [40]-[12].
[246] Ibid 139 [12]-[13].
[247] Applicant's submissions (n 43) 10 [35].

Olive's business…to ensure transparency and management oversight in all aspects of Olive's operations…

220. As part of those changes, Olive says it has appointed independent persons to key committees and retained relevant professional experts and advisers.[248] A revamped complaints handling process with new staff has been established with revised procedures for dealing with complaints, including a single register. There is also a revised Breach and Incident Reporting Policy and Procedure.[249] Olive has also made changes to remuneration arrangements for advisers so they no longer have an incentive to 'cut corners'. Importantly, Olive made clear in its submissions and reports provided during and following the hearing that the transformation is ongoing.[250]

221. We were provided with a good deal of evidence about the '3LoD' or '3 lines of defence' model that is being implemented at Olive. The 3LoD compliance structure is underpinned by a risk register that has been developed and refined by external and internal experts.[251] The first 'line of defence' focuses on the operational level with improved and properly documented procedures, internal and external training for advisers, and provision for a diligent structured review of each statement of advice by a designated manager. The changes include detailed and extensive changes to the way in which advice is prepared and given. The evolution of these new arrangements was described in the two statements of Mr Ashley Brown dated 19 August 2020 and 19 February 2021. By way of illustration, Olive has introduced a Personal Advice Policy that is overseen by an experienced manager (Mr Brown) who has been appointed Head of Personal Advice. Under the changed arrangements, advisers are now required to complete an advice checklist before submitting draft advice for review through a quality assurance process.[252] A range of other process improvements have also been implemented at this level. Olive pointed out in its submissions that ASIC has not criticised the revamped advice-giving process described in the statement of Mr Brown.

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[248] Ibid.

[249] Transcript of Proceedings, 203 [21]-[22].

[250] Transcript of Proceedings 13 [24]-[35].

[251] Ibid 154 [29]-[35].

[252] Statement of Ashley Brown, dated 19 February 2021,5 [16].

222. The second 'line of defence' – which is said to be 'operationally distinct' from the first line - includes controls like 'call barging' undertaken by a designated compliance manager, regular audits of personal advice, and the management of the various registers. The third 'line of defence' evaluates and tests the operation of the other two lines of defence. The third line is effectively an internal audit function and operates in relation to, but independent of, the other two lines.[253]

223. We do not need to exhaustively recount all the details of the 3LoD model here. Suffice to say we were told that approach represents best practice. Olive has also established a committee system that includes the Risk and Compliance Committee, the Conflicts of Interest Committee, the Internal Audit Committee, the External Audit Committee, and Finance and Investment sub-committees.[254] The name of each committee reflects its designated function. The first two committees include independent members and the third has an independent chair.[255] The operation and remit of the Risk and Compliance Committee and the Conflicts of Interest Committee was described in the statement of Mr Andrew Vine dated 4 August 2020. It is not necessary to descend into further detail about these committees other than to observe the arrangements are detailed and prescriptive and have as their object compliance with regulatory requirements.

224. Olive commissioned a series of reports from EY, a firm of independent consultants, that were provided at the hearing and subsequently. The reports were tendered to reassure us that Olive has changed and has adopted a more regular course.

225. The reports were prepared by Mr Graeme McKenzie, a senior partner of EY. We were not told of any reason to doubt his expertise or the diligence and appropriateness of his reviews. The first of the reports tendered at the hearing was a 'desktop review' which analysed the structures, processes and personnel in place as at August 2020. The conclusions of the report were generally positive although it identified changes that were required to achieve best practice.[256] The second report reviewed the progress made in implementing the 33 recommendations contained in the first report as at October 2020. That report concluded

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[253] Transcript of Proceedings, 154 [5]-[8].
[254] Ibid 160, 162, [29]-47], [6].
[255] Ibid 161 [10]-[11], [45].
[256] Expert Report of Graeme McKenzie, dated 1 September 2020, 3-6 [1.2]-[1.3].

that Olive had taken steps in relation to all 33 recommendations, with only nine recommendations still outstanding.[257] The third report followed up by evaluating whether Olive operations were actually conducted in accordance with the framework that had been developed and which was refined in the wake of the earlier reports. That report was received in March 2021. It identified what the report characterises as a handful of additional changes – tweaks, in effect – that would help Olive achieve best practice.

226. A fourth report was dated 26 July 2021. ASIC did not oppose admitting that report into evidence but it would be appropriate to do so in any event because it potentially assists us in assessing whether Olive has remediated the history of non-compliance. If that history were not addressed, it would provide a reason to believe Olive is likely to contravene its obligations in the future.

227. The report commented on how Olive had dealt with the outstanding recommendations made in the earlier reports and conducted a review of four advice files to test the new policies, procedures and approaches. The report expressed general satisfaction with the quality of the advice files. The report made some additional recommendations for refinement but Olive said in written supplementary submissions that the report provided a basis for the Tribunal to conclude Olive had reached a satisfactory point in its journey towards compliance.

228. ASIC was more critical of the shortcomings that were revealed by the various EY reports. The third report incorporated a review of a sample of client files. In two of the cases reviewed, Olive's adviser failed to meet the 'best interests' duty. In two cases, internal assurance had not been effective. In five cases, internal assurance was only partly effective. There were other deficiencies identified, some of which were not material. ASIC argued the third report in particular demonstrated Olive still had a long way to go before it could be said to be compliant. ASIC argued in supplementary written submissions exchanged after receipt of the fourth report that the Tribunal should draw limited comfort from that document. ASIC says the small number of files reviewed in the report were all taken from the superannuation business (although it should be noted the MDA business had ceased when the report was prepared). ASIC was also critical of the slow pace at which the reforms had occurred – and

[257] Second expert report of Graeme McKenzie, dated 15 October 2020, 4 [1.3.1]-[1.3.2].

the fact that problems were still coming to light, even if those problems are of a more routine nature.

229. Olive argued the reports, taken together, should provide comfort that it had changed its ways. While its recent performance was not perfect, it was operating more professionally and in accordance with its obligations. It argues the Tribunal can be confident Olive will continue to improve, but that it is already at a point where the Tribunal no longer has reason to *believe* (as opposed to merely 'suspecting') Olive was *likely* (as opposed to 'might possibly') contravene its obligations.[258]

230. We accept the reports must be seen in context. The fact mistakes continue to be made is not necessarily the issue: compliance and risk management programs are premised on the assumption mistakes will occasionally be made, and constant improvement is required in complaint businesses. The challenge is to minimise risk of adverse events from occurring, but to also identify and address risk and respond quickly and appropriately when problems do emerge.

231. In this regard, we note Olive submitted a breach report to ASIC on 14 September 2021. A copy of the report was provided to us as we were deliberating along with supplementary written submissions from both parties. The report described a potential breach of ss 946A or 946AA and 947D. The potential breaches arose out of advice given to clients in June 2020 about the management of their portfolios which might be affected by Covid. In August 2021, Olive's internal assurance process turned up an instance where the email communications with a client did not include a statement of advice in the proper form. Olive concedes in the breach notice that this failing was the product of a policy or process deficiency. ASIC point out the breach notice suggests on its face that the same breach may have impacted up to 600 clients. An updated breach report dated 16 November 2021 confirmed 420 clients were affected. The update provided a more refined description of the problem. Apparently Olive had failed to disclose in records of advice the transaction fees charged to clients by a third party service provider. Olive's remedy was to refund the amount of the fees ($66 plus interest) to each of the affected clients.

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[258] Transcript of Proceedings, 202 [1]-[19].

232. Olive says the notice should be seen for what it is: evidence that its assurance systems work (although ASIC notes the problem remained undetected for over a year) and evidence that it is committed to complying with its obligations. We agree it is important to see the breach report for what it is – evidence of an instance of a contravention in 2020 – without lending it disproportionate weight on account of the history. We also accept it is important to consider the problems identified in the breach report (including the update) in light of the EY reports which indicate Olive has made (and is making) substantial improvements, even if that evolution is a work in progress.

233. There are other matters to which we must have regard when we consider if we have reason to believe Olive is likely to contravene its obligations. One of those is the extent of personnel changes. A majority of CAR employees are no longer involved in the Olive business, but some remain. We note Ms Paine and Ms Forte continued in employment with Olive at the time of the hearing.[259] Those two individuals are now employed in different positions and we understand they have since received further training. Neither of them was involved in the contraventions that arose from making misleading statements, but we should observe they were part and parcel of the overall business involved in the contraventions. We also note eight employees of one or other of the CARs were employed by Olive at the time of the hearing, and several of those individuals appeared to occupy reasonably senior positions. The positions of Head of Financial Advice relating to the superannuation business, Head of Operations and Human Resources, Head of Compliance (Advice) and the Services Manager were all held by people who were employed before 2018 by one or other of the superannuation representatives. Several financial advisers employed by the superannuation representatives also continued in employment with Olive. A less-than-complete transition in the workforce inevitably raises questions over whether the culture at Olive has changed.

234. It is one thing for individual employees and even middle-managers to retain a role in the 'new' Olive. There is inevitably more concern about those who were in control while the problems took hold. That brings us to Mr Morrison and the other senior executives.

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[259] Respondent's SFIC (n 3) 101 [467].

235. We were assured Mr Morrison has had no direct role in the business since about November 2019.[260] His departure from the scene was attributed to ill health although we understand his departure may also have been prompted by intimations from ASIC that it would seek a banning order against him.[261] It is unclear whether his influence has been eliminated. We note Mr Richmond conceded in cross-examination that he had spoken with Mr Morrison before giving evidence. That is perhaps unsurprising given Mr Morrison's historical role in the business which was being discussed, but the fact Mr Morrison should remain in proximity to the business at the time of the hearing is a concern given our findings about his conduct, and given all the controversy that has ensued. We also note Mr Richmond conceded in cross-examination that he was still speaking to Mr Morrison "once or twice a week" about the business in the ordinary course given he was still a substantial shareholder at that point.[262] Mr Henry, in submissions, denied there was anything remarkable about Mr Richmond keeping Mr Morrison briefed on important matters concerning the future of the company given he was a major shareholder, but that submission rather points to the risk that a person who played a central role in the problems might continue to exert influence.

236. Mr Cator has not been involved in the business since November 2018.[263] Mr Richmond suggested in cross-examination that Mr Cator left after it became apparent ASIC disapproved of him.[264] Mr White has also long since parted company with Olive. That leaves Mr Richmond at the helm of Olive, and the company is now effectively controlled by his wife. At the conclusion of the hearing, Mr Richmond offered to resign as a director and chief executive officer and cease employment with the company. Olive proffered an undertaking that it would not offer Mr Richmond employment or appoint him as an offer for a three-year period, and he undertook not to acquire any shares in Olive. Those undertakings must be seen in light of the fact Mr Richmond's spouse now controls Olive.

237. The long period of serious non-compliance while the organisation was under the control of individuals who still have a role (or who may at least exert ongoing influence) raises the possibility that Olive may contravene its obligations under s 912A in the future. We have been encouraged by evidence of change and by the EY expert reports that have indicated

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[260] Transcript of Proceedings, 120 [17]-[18].
[261] Ibid 241-2 [39]-[46], [1]-[21]; Applicant's Submissions (n 43) 13 [47].
[262] Transcript of Proceedings, 342 [22]-[23].
[263] Ibid148 [16]-[18].
[264] Ibid 340 [22]-[28].

improvements in processes, governance and personnel. Those reports certainly do not suggest perfection – the breach report filed in September 2021 confirms there may yet be policy and process improvements required - but there has undoubtedly been real progress.

238. ASIC points out the improvements – such as they are - have been achieved in the shadow of ASIC's regulatory action and the present proceedings, and in circumstances where parts of the business are in hiatus pending the outcome of this review. ASIC also points out the expert reports do not give Olive a completely clean bill of health, and there has been at least one breach reported to ASIC since the bulk of the supposedly game-changing changes were introduced. ASIC argues there is a danger Olive would revert to what had become the norm if that regulatory shadow were lifted and Olive remained in business, even if conditions were imposed on its licence or undertakings were provided. Olive disagrees with this assessment. It says it began a deliberate program of change in 2018 when it (belatedly) became aware of the various problems that had taken hold following ASIC's initial intervention. Those changes have taken time to bed down but Olive has proceeded at an appropriate pace along what amounts to an arc of improvement. Olive has progressed along that arc to the point where the Tribunal should be confident there is no going back: just continuous improvement.

239. We acknowledge s 912A sets a high bar. Financial services laws impose obligations that can easily be breached – as evidenced by (a) the EY reports which showed compliance problems (albeit less serious and not as widespread) were still occasionally occurring and (b) the breach report filed in 2021. Yet we do take comfort in the reports provided by the consultants which point to significant changes which should substantially reduce the risk of contraventions at this point and into the future. The changes they described have now been in operation, at least in the superannuation business, for some time, even if there is concern about the slow start to the reforms. Olive's revised structures and processes and personnel changes should have the effect of reducing the likelihood of serious or enduring contraventions, and we expect the unpleasant and expensive experience culminating in these proceedings might serve as a strong incentive to comply in the future.

240. There is no doubt Olive might contravene its obligations in the future. Given its troubled history, significant changes in personnel, organisation, policies, procedures *and culture* were required. That sort of change was always going to take time. At the conclusion of the hearing, it was difficult to be confident that the required change had been achieved. The EY

material filed after the hearing tended to confirm Olive was on a compliance trajectory that, given time, would result in sustainable compliance. The breach report in 2021 is a matter of concern but it certainly does not suggest backsliding – the breach that was identified and reported was apparently a narrow one, even if it impacted hundreds of clients – and the fact remains the breach was identified and reported. Olive makes clear it is committed to learning from that experience, something which it singularly failed to do when confronted with complaints in the past.

241. The changes that have been implemented do not guarantee an absence of contraventions. They may yet occur. But given the passage of time we are not satisfied there is *at this point* reason to believe the applicant is *likely* to contravene its obligations. We reach that view with some trepidation given the history – but we rely on the expert reports in particular which suggest a trajectory of improvement. That means we are not satisfied the ground in s 915C(1)(aa) is made out.

CANCELLATION IS THE APPROPRIATE COURSE

242. There is no dispute that the power to cancel or suspend the licence under s 915C has been engaged because Olive has not complied with its obligations under s 912A.[265]

243. We explained at the outset of these reasons that the power to cancel or suspend a licence is informed by the objects of the Corporations Act generally, and so far as licensing is concerned, by s 760A which speaks of the object of promoting (amongst other things)

> *(aa) the provision of suitable financial products to consumers of financial products; and*
>
> *(b) fairness, honesty and professionalism by those who provide financial services; …*

244. We also referred to the objects of the ASIC Act. Relevantly, s 1(2) requires that ASIC must strive to:

> *(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and*
>
> *(b) promote the confident and informed participation of investors and consumers in the financial system; …*

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[265] Respondent's SFIC (n 3) 74 [378].

when performing its functions and exercising its powers.

Given the Tribunal steps into ASIC's shoes when it exercises the same powers on review, the Tribunal must also be conscious of those instructions in s 1(2).

245. We have also discussed the various financial services laws that regulate the conduct of financial services businesses, but the licensing process which lies at the heart of the regulatory arrangements is a key feature of our system. The licensing process would be meaningless unless the available powers of cancellation and suspension were used in a discriminating way to deal with those who fail (or who are likely to fail) to meet the requirements of the regulatory regime. The legislature has provided that both cancellation and suspension are available and must be used (or not used) as appropriate.

246. Olive relied on the Tribunal's decision in *Sovereign Capital and Australian Securities and Investments Commission* [2008] AATA 901 ('*Sovereign Capital*') in support of an argument that a regulatory response short of cancellation was appropriate in circumstances where the organisation is making acceptable progress towards becoming compliant. In that case, the Tribunal observed (at [84]):

> *A licence should only be suspended or cancelled if it is necessary to do so in order to accomplish the objects of the legislative scheme. A suspension will ordinarily be preferable if there is a reasonable prospect that the licence-holder can remedy the defects which prompted the concern. If there is no reasonable prospect of the issues being resolved, cancellation may be the appropriate course. The power to suspend or cancel should not be used merely to punish the licence-holder for transgressions: see Story v National Companies and Securities Commission (1988) 13 NSWLR 661.*

247. In *Sovereign Capital*, the Tribunal decided suspension was the preferable course in all the circumstances because the problems were capable of being addressed during the course of the suspension. In that case, it was thought more stringent action would serve no further purpose and risked becoming a form of punishment. But that decision (and that passage in the reasons in particular) should not be taken to stand for the proposition a licensee can readily avoid the most serious consequences if it belatedly commits to doing better. The key to understanding the decision in *Sovereign Capital* lies in its references to the centrality of the objects of the regulatory regime and the circumstances of the individual case.

248. Subsequent cases in the courts and the Tribunal have made clear that achieving the objectives of the legislative regime might require the decision-maker to give significant weight to the deterrent value of regulatory action. As the Tribunal explained in *Masu*

Financial Management Pty Ltd and Australian Securities and Investments Commission [2017] AATA 97 at [48]:

> *The power in s 915C … is (amongst other things) a tool for exhortation and correction that the regulator can use as each licensee engages with the never-ending task of adapting and improving its individual arrangements to meet the challenges it faces. The sting of the lash contained in s 915C can help focus the mind of compliance laggards; the report of the lash will also serve an example pour encourager les autres.*

249. We acknowledge cancellation of a licence is a serious step. It should not be taken where it would be a disproportionate response to the conduct if a lesser response – such as suspension or enforceable undertakings – would adequately address the shortcomings and otherwise achieve the objects of the legislation. That is the message of *Sovereign Capital*. But the deterrent value of a particular form of regulatory action is an important and relevant consideration. The value of deterrence is, if anything, more obvious in the wake of the report of the Hayne Royal Commission.

250. ASIC says that cancellation is appropriate in the all the circumstances of this case rather than suspension or some other regulatory response, such as enforceable undertakings.[266] We agree. In doing so, we acknowledge that (a) we are encouraged by Olive's progress towards becoming reliably compliant, and (b) cancelling the licence will not deter Olive from future transgressive behaviour precisely because the entity will not be permitted to conduct a financial services business in the absence of a licence. Yet there is no doubt cancellation would send a powerful message of general deterrence which is more likely to be heard and understood by other participants in the industry. Cancellation in this case will serve as lesson to others that will assist in "maintain[ing], facilitate[ing] and improv[ing] the performance of the financial system and the entities within that system.."[267] and "promote the confident and informed participation of investors and consumers in the financial system".

251. The need to 'send a message' to other participants in the industry is appropriate and proportionate given the egregious nature of the contraventions that occurred in the MDA business. The risky nature of the CFDs should have prompted Olive to be especially careful, but that did not happen; the hope is that others in the industry will benefit from seeing what

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[266] Respondent' SFIC (n 3) 106 [492]-[493].

[267] ASIC Act s 1(2).

happened to Olive and do better. The practice of using financial models in a misleading way without emphasising the risk of these products must also be denounced in the strongest terms. Our findings that Olive failed to comply with its statutory obligations to act in the best interest of clients and provide appropriate advice also merit a robust response. Those problems went undetected – or were ignored – over a long period partly because of serious shortcomings in the compliance arrangements and complaints handling process. The same shortcomings enabled representatives to make misleading representations about superannuation products and fail to act in the best interests of clients or give proper advice in the superannuation business. All that bad behaviour went on under the noses of senior managers who manifestly failed to supervise those for whom they were responsible.

252. Olive acknowledged most of the shortcomings in its operations, which makes our task somewhat easier. But the concessions came very late in the day – effectively, on the eve of the hearing – and even then, Olive hedged. Olive argued it would not contest most of the factual allegations put against it 'for the purpose of the hearing of these proceedings only and for no other purpose'.[268] That approach rather suggests a tactical withdrawal in the face of overwhelming evidence. It does not bespeak genuine contrition and a firm commitment to doing better, even as it started to introduce changes on its own terms. While even a late acknowledgement of wrongdoing counts in Olive's favour, it carries rather less weight than if it had occurred at an earlier point when the facts were obvious and the need for reform was already pressing.

253. We acknowledge a substantial amount of time has elapsed between the events that prompted the reviewable cancellation decision and our final decision on review. That delay has not disadvantaged the applicant: the delay has worked to its advantage in that it has had more opportunity to introduce and 'bed down' changes which make it less likely to contravene its obligations. But the passage of time does not excuse the historical conduct or diminish the force of the lessons that must be learned from what occurred.

254. We would not be acting consistently with the objects of the regulatory system if we were to conclude Olive should now be permitted to move on. Even though we concluded in Olive's favour that we do not have reason to believe Olive it is likely to breach its obligations in the

[268] Applicant's Further Amended Statement of Facts, Issues, and Contentions, (10 March 2021) 3 [6].

future having made changes to its operations (and having foreshadowed further changes in enforceable undertakings that were offered), a stringent regulatory response would still be required to achieve a general deterrent effect. We should add that we would reach the same view even if we decided Olive had not contravened the anti-hawking rules.

255. We are satisfied that, on the basis of conduct that was not contested by Olive at the hearing, cancellation is the only appropriate option given the seriousness of that conduct and the need to deter similar conduct elsewhere. While we acknowledge Olive has made good progress towards remedying the shortcomings that were detected and that it was prepared to undertake further steps, that welcome progress does not outweigh the other considerations.

CONCLUSION

256. The cancellation decision is affirmed.

I certify that the preceding 256 (two hundred and fifty six) paragraphs are a true copy of

the reasons for the decision herein of Deputy President Bernard J McCabe and Member R Reitano

.....

Associate

Dated: 21 December 2022

Date(s) of hearing:	**11 March 2021 - 12 March 2021; 15 March 2021 - 17 March 2021; 21 April 2022 - 22 April 2021.**
Counsel for the Applicant:	**Ms Elizabeth Steer and Mr Michael Henry**
Solicitors for the Applicant:	**Arnold Bloch Leibler**
Counsel for the Respondent:	**Mr Simon Cleary and Mr Matthew Brady**
Solicitors for the Respondent:	**Self Represented**