

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Ultiqa Lifestyle Promotions Limited (in liq) [2022] FCA 561

File number(s): QUD 354 of 2021

Judgment of: **DOWNES J**

Date of judgment: 17 May 2022

Catchwords: **CORPORATIONS** – whether contraventions of ss 961L and 912A *Corporations Act 2001* (Cth) – whether holder of Australian financial services licence took reasonable steps to ensure that its representatives complied with ss 961B, 961G and 961J *Corporations Act 2001* (Cth) – where representatives engaged in process of selling interests in managed investment scheme in time-share category – where representatives gave personal advice to consumers – where consumers were not told and were not aware that they were receiving financial advice – where only limited information was obtained from consumers prior to advice being given – where representatives were provided with template statement of advice document, training manual and sales script – where focus of documents provided to representatives was to make a sale of an interest in scheme – contraventions established – declaratory relief granted

Legislation: *Corporations Act 2001* (Cth) ss 761A, 764A(1)(b), 766B, 910A, 912A(1)(a), 912A(1)(c), 912A(1)(ca), 912A(5A), 912C, 960, 961(1), 961B, 961G, 961H, 961J, 961L, 1101B(1)(a)(i), 1317E(1), Ch 7 Pt 7.7A
Federal Court of Australia Act 1976 (Cth) s 21

Cases cited: *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135
Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3) (2020) 275 FCR 57; [2020] FCA 208
Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2) (2020) 142 ACSR 277; [2020] FCA 69
Australian Securities and Investments Commission v Financial Circle Pty Ltd (2018) 131 ACSR 484; [2018] FCA 1644

Australian Securities and Investments Commission v NSG Services Pty Ltd (2017) 122 ACSR 47; [2017] FCA 345
Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 2) (2021) 156 ACSR 371; [2021] FCA 877
Australian Securities and Investments Commission v Westpac Securities Administration Ltd (2019) 272 FCR 170; [2019] FCAFC 187

Division: General Division
Registry: Queensland
National Practice Area: Commercial and Corporations
Sub-area: Corporations and Corporate Insolvency
Number of paragraphs: 130
Date of hearing: 4 March 2022
Counsel for the Plaintiff: Mr SJ Cleary and Mr SE Seefeld
Counsel for the Defendant: The Defendant did not appear

ORDERS

QUD 354 of 2021

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **ULTIQA LIFESTYLE PROMOTIONS LIMITED (IN
LIQUIDATION) (ACN 096 169 256)**
Defendant

ORDER MADE BY: DOWNES J

DATE OF ORDER: 17 MAY 2022

THE COURT NOTES THAT:

In these Declarations and Orders, the following terms have the following meanings:

- (a) **Act** means the *Corporations Act 2001* (Cth).
- (b) **Authorised Representative Steps**, means the following steps:
 - (i) implement an advice process to be followed by authorised representatives which was designed to comply with sections 961B, 961G and 961J of the Act;
 - (ii) provide policy and procedure documents to authorised representatives designed to ensure compliance during the advice process with sections 961B, 961G and 961J of the Act;
 - (iii) provide tools and template documents to authorised representatives that provided for sufficient information to be obtained about the client's financial position, including income, expenses and cashflow, so as to determine whether the recommendations were affordable, appropriate and in the client's best interests;
 - (iv) provide a statement of advice template document to authorised representatives that could be tailored to the client's circumstances and include sufficient financial information to support the advice;
 - (v) provide sufficient training to authorised representatives about compliance with sections 961B, 961G and 961J of the Act;

- (vi) provide sufficient monitoring and supervision of authorised representatives during the advice process to ensure compliance with sections 961B, 961G and 961J of the Act;
- (vii) carry out audits to determine whether advice provided by authorised representatives was in the best interests of clients and was appropriate to the client's goals and objectives, and re-training authorised representatives based on the results of those audits;
- (viii) identify and manage conflicts of interest within the advice process, and ensure that authorised representatives are trained on the management of conflicts of interest.

(c) *Federal Court Act* means the *Federal Court of Australia Act 1976* (Cth).

THE COURT DECLARES THAT:

1. Pursuant to section 1317E of the Act, during the period 5 October 2017 to 21 March 2019, the defendant contravened section 961L of the Act by failing to take the Authorised Representative Steps to ensure that its authorised representatives complied with section 961B of the Act when providing advice to the persons listed in Schedule A to these orders.
2. Pursuant to section 1317E of the Act, during the period 5 October 2017 to 21 March 2019, the defendant contravened section 961L of the Act by failing to take the Authorised Representative Steps to ensure that its authorised representatives complied with section 961G of the Act when providing advice to the persons listed in Schedule A to these orders.
3. Pursuant to section 1317E of the Act, during the period 5 October 2017 to 21 March 2019, the defendant contravened section 961L of the Act by failing to take the Authorised Representative Steps to ensure that its authorised representatives complied with section 961J of the Act when providing advice to the persons listed in Schedule A to these orders.
4. Pursuant to section 1101B of the Act and section 21 of the *Federal Court Act*, during the period 5 October 2017 to 21 March 2019, the defendant failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly and thereby contravened section 912A(1)(a) of the Act.

5. Pursuant to section 1101B of the Act and section 21 of the *Federal Court Act*, during the period 5 October 2017 to 21 March 2019 and by reason of the matters set out at Orders 1 to 3 above, the defendant failed to take reasonable steps to ensure that its representatives complied with financial services laws, namely sections 961B, 961G, and 961J of the Act and thereby contravened section 912A(1)(ca) of the Act.
6. Pursuant to section 1101B of the Act and section 21 of the *Federal Court Act*, during the period 5 October 2017 to 21 March 2019 and by reason of the matters set out at Orders 1 to 5 above, the defendant failed to comply with the financial services laws, namely sections 961L, 912A(1)(a) and 912A(1)(ca) of the Act and thereby contravened section 912A(1)(c) of the Act.

THE COURT ORDERS THAT:

1. The plaintiff forthwith serve a copy of this judgement on the defendant.
2. The matter be listed for a case management hearing at 9.30 am on 27 May 2022 for further directions.

Schedule A

No	Consumer Name	Date advice given
1	Bianca Lindrea and Daniel Perkins	10 July 2018
2	Sharon and Gregory Collins	12 July 2018
3	Caterina and Brett Waterford	5 October 2017
4	Kevin Wood and Ah-Hong Jr Ah-Hong	6 April 2018
5	Christopher and Rachael Gill	11 January 2018
6	Kelly and Terrence McLean	21 March 2019

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

REASONS FOR JUDGMENT

DOWNES J:

INTRODUCTION

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

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

3 In general terms, an interest in the Scheme enabled consumers to go on holidays at various locations within Australia and overseas. The Scheme was represented to be a form of club which involved points. Holders of an interest in the Scheme were allocated or able to acquire points to book and stay at holiday accommodation.

4 The consumers were enticed to obtain a membership in the Scheme after viewing photographs and videos of examples of accommodation which were available under the Scheme. Generally, they were told that they would be able to book holiday accommodation at various locations, and that there would be costs savings in doing so.

5 Ultiqa conducted its business through a network of corporate sales agents who were registered as corporate authorised representatives under Ultiqa's AFSL. These corporate authorised representatives employed individual sales consultants who were also registered as authorised representatives under Ultiqa's AFSL. Ultiqa provided its representatives with scripts, a training manual and other documentation, including a template "statement of advice" document which was "one size fits all". It is plain from the content of these documents that the purpose of this material was to maximise the prospect of a sale of an interest in the Scheme.

6 After obtaining limited information from the consumers about their personal circumstances, these representatives gave financial advice to the consumers which recommended that they acquire an interest in the Scheme. Generally, the consumers were not told and did not appreciate that they were receiving financial advice or that they were acquiring an interest in a managed investment scheme. That is likely because Ultiqa did not regard that its services formed part of the financial services industry process, being a view which was misconceived.

7 In this proceeding, the plaintiff (ASIC) alleges that Ultiqa contravened ss 961L, 912A(1)(a),
912A(1)(c) and 912A(1)(ca) of the Act by reason of the manner in which it conducted its
business during the relevant period.

8 The primary allegation by ASIC in this proceeding is that Ultiqa contravened s 961L of the Act
by failing to ensure that its authorised representatives complied with ss 961B, 961G and 961J
when providing financial product advice to six pleaded consumers.

9 Having regard to the evidence adduced by ASIC, its case against Ultiqa is a compelling one.

10 Ultiqa ceased promoting the sale of interests in the Scheme on 28 January 2020 and was placed
into liquidation on 30 April 2021. The liquidator of Ultiqa was served with the Originating
Application and Concise Statement on 1 November 2021. Leave was granted to ASIC to bring
this proceeding against Ultiqa *nunc pro tunc* on 11 November 2021, which leave was not
opposed. Ultiqa did not appear at the hearing on 4 March 2022 and has played no part in the
proceeding.

11 ASIC relies on voluminous evidence to support its allegations in this proceeding, none of which
was contested. These reasons will therefore only identify key aspects of the affidavit and expert
evidence.

12 ASIC seeks declarations, pecuniary penalties, injunctions and costs, and has provided a draft
order as being the first set of orders sought by it. For the following reasons, ASIC has
established the contraventions and is entitled to the declaratory relief sought by it in its draft
order, with some modifications. I will relist the matter for directions in relation to the question
of the remainder of the relief sought by it in this proceeding.

EVIDENCE

13 ASIC relies upon affidavit evidence from each of the six consumers listed in schedule A to the
Orders which will be made. The six consumers are actually six couples. The affidavit evidence
of the consumers is as follows:

- (a) affidavit of Bianca Lindrea filed 15 December 2021 (affirmed 20 August 2020);
- (b) affidavit of Sharon Collins filed 15 December 2021 (affirmed 3 September 2020);
- (c) affidavit of Caterina Waterford filed 15 December 2021 (affirmed 28 January 2021);
- (d) affidavit of Kevin Wood filed 15 December 2021 (affirmed 28 January 2021);
- (e) affidavit of Christopher Gill filed 15 December 2021 (affirmed 14 September 2020);

- (f) affidavit of Kelly McLean filed 15 December 2021 (affirmed 18 August 2020); and
- (g) affidavit of Kelly McLean filed 15 December 2021 (affirmed 18 November 2020).

14 ASIC also relies upon the following evidence:

- (a) expert report of Paul Green, an independent expert accountant and director of forensic services at Vincents Chartered Accountants, dated 15 October 2021 as updated by an affidavit filed on 1 March 2022 (**Green Report**);
- (b) expert report of Cheyenne Walker, an independent expert in financial services compliance and managing director of Australian Independent Compliance Solutions Pty Ltd, dated 11 December 2021 (**Walker Report**);
- (c) affidavit of Jennifer Leisfield, a lawyer employed by ASIC in its Financial Services Enforcement Team, which was filed on 15 December 2021, and a supplementary affidavit of Ms Leisfield filed on 1 March 2022.

RELEVANT FACTS

Ultiqa Scheme

15 The Scheme was registered with ASIC on 27 August 2001 as a managed investment scheme in the time-share category.

16 The Scheme operates by offering various classes of interests to its members. Each class of interest has different rights and are all subject to the restrictions provided for in the Scheme's constitution.

Ultiqa Sales Process

17 During the relevant period, the following sales process was used by the authorised representatives of Ultiqa:

- (a) a marketing consultant would typically approach consumers at a shopping centre, theme park or similar location and give the consumers a scratch card. If the consumer scratched three matching symbols on the card, they may be entitled to win a prize. To be eligible for the prize, the consumer was required to be married or living together for a minimum of two years, aged between 28 and 65 years, and have a minimum combined annual income of \$50,000. To receive the prize, the consumer was required to attend a 90-minute sales presentation;

- (b) upon attendance at the presentation at a sales office, the consumer completed a document called a “Lifestyle Survey”. The Lifestyle Survey recorded the consumer’s name, age, employment, marital status, address, combined yearly income range and whether the consumer was a homeowner. Usually, no information was sought in relation to the consumer’s expenses, assets or liabilities;
- (c) the consumer would then be seated with an authorised representative, who would obtain information from the consumer about their holiday preferences, including the frequency and approximate cost of those holidays. This was recorded in a document called a “Holiday Survey” which was part of a sales aid template referred to as a “T-sheet”. All authorised representatives based at a sales office used the T-sheet for that office, which could not be changed;
- (d) the only documents provided by Ultiqa to the authorised representatives for the collection of consumer information were the Lifestyle Survey and the Holiday Survey. As set out below, Ultiqa’s stated position to ASIC is that, “Our investigations into the client’s affairs are limited to understanding the client’s holiday profile”;
- (e) the authorised representative would then give a presentation to the consumers about purchasing interests in the Scheme following an approved sales script and using the T-sheet. Ultiqa required the authorised representative to use the T-sheet without modification;
- (f) at the conclusion of the presentation, the authorised representative would provide the consumer with a Statement of Advice (**SOA**) which recommended the purchase of interests in the Scheme. The SOA was a template two page document which attached, or was provided with, a recommendation page and each of the consumer’s completed survey pages. The representative did not go through the SOA with the consumer;
- (g) the consumer was then invited to purchase an interest in the Scheme. The price to acquire an interest in the Scheme during the relevant period was between \$9,990 and \$19,992. In most cases, any purchase was funded by a loan from a related company, called Future Holiday Finance Pty Ltd;
- (h) generally, indirect pressure was placed on the consumer to make a decision before leaving the presentation. Such pressure included offering incentives to the consumer to sign up at the presentation and giving inadequate time and privacy to the consumer to enable a considered decision to be made about whether to proceed;

- (i) when the consumer agreed to acquire an interest in the Scheme, the consumer would be provided with and would initial a document described as an “At a glance” document, the content of which varied depending upon which product had been recommended to that client. The authorised representative was required by Ultiqa to use this document and could not change it. Other documents were also shown to the consumers and signed by them, but without adequate time being allowed for the consumer to be able to read and understand what they were signing.

18 The T-sheet and “At a glance” documents were initially developed and approved by Mark Henry (director and CEO of Ultiqa) and Peter Singh (Group Sales Manager who reports to the CEO and the Ultiqa board). Any variations or amendments to those documents (such as the tailoring of a T-sheet for a sales office) were made by Mr Singh and approved by Mr Henry. When a new sales office opened, Mr Singh was responsible for tailoring the T-sheet for that sales office as well as training and supervising the authorised representatives appointed for that office. Mr Singh would then arrange for hard copies of the applicable T-sheet and “At a glance” documents to be provided to the authorised representatives.

19 Ultiqa provided its authorised representatives with a sales script (which varied depending on the location of the sales office) to both train its authorised representatives and to guide them in their dealings with consumers. Mr Singh developed these sales scripts and they were approved by Mr Henry. They were used during the relevant period and the focus of their content was to sell interests in the Scheme.

20 For example, the Broadbeach and Port Douglas sales script states the following about the Holiday Survey (also called “discovery”):

The main aim of your discovery is to find - Why they holiday? Where they holiday? Who they holiday with? If money wasn't an issue where would you have your next holiday? If money wasn't an issue how much more often would you holiday? Do you save for holidays? . . .

21 The Shearwater sales script referred to the client's “sales experience” and stated that:

The discovery or survey is our way of finding out why the clients need this program. Sometimes, timeshare sales consultants forget that the sole purpose of the discovery is to find the clients Dominant Buying Motive (DBM).

22 Ultiqa also issued a document entitled “Ultiqa Lifestyle Sales Training Manual” which was in use at least during the period of 1 July 2018 to 31 December 2019. Again, the focus of the content of this manual was to sell interests in the Scheme.

23 For example, the Sales Training Manual provided the following direction as to the Holiday Survey:

6) *SURVEY SHEET*

OBJECTIVE: TO FIND THEIR HOT BUTTONS AND BOX THEM IN ON A “HOLIDAY COMMITMENT”

The survey sheet is not an interrogation and must not sound like one. It should be done in a conversational and relaxed manner and should be an extension of your warm up.

The survey is sometimes referred to as the DISCOVERY; it’s where you will continue to discover the needs and interests of your Guests. It will also give you the opportunity to plant seeds to use later in your presentation. You should NOT talk about the product at this stage as you need to save all your ammunition for later.

If you have done an effective warm-up you should know the answers to some of the questions in the survey sheet. However, you must bridge into it correctly. Otherwise, your clients will be suspicious.

...

GETTING A HOLIDAY COMMITMENT

You must always remember that unless you get a holiday commitment your chances of getting the sale are highly remote.

24 The Sales Training Manual also stated the following about the clients:

CLIENTS - THE RAW MATERIAL

How to get them: 99% of the people who walk through our doors come via our OPC marketing programme. These are people who are paid simply to bring a client to the door. The remainder is generated by referrals and some other programmes. Your clients have been told that they have won a prize and to collect it they must come into our office and listen to a 90 minutes presentation on Timeshare/Holiday Ownership. The OPC’s job ends in reception, and your job starts. Your job is firstly to keep your client, secondly to relax them, take away their fear and suspicion and lastly and most importantly to sell them.

Sometimes the hardest part of the job is simply keeping your client, not selling them. Once your client is on the Sales Deck they come to the grim realization that this is a sales environment and what is going through their mind is “How can we get out of here?”, and, if you give them the chance, they will. DO NOT GIVE THEM THE CHANCE! Do everything you can do to amuse, interest, excite, relax, humour, flatter and if necessary cajole your clients into staying.

EVERY GUEST MUST BE GIVEN THE OPPORTUNITY TO BUY

(emphasis original)

The manner in which Ultiqa oversaw its authorised representatives

25 The three directors of Ultiqa during the relevant period were Mr Henry, Christopher Wilson and Neville Beekman. The secretary was Charmaine Richardson.

26 Mr Wilson was also the Compliance Officer for the Ultiqa Group, being a group of companies of which Ultiqa was one. Mr Wilson sat on a Compliance Committee which had two external members. Ultiqa also had a Compliance Plan which it lodged with ASIC on 3 July 2015.

Documents provided to authorised representatives

27 The sales scripts, marketing documents and sales documents (including information-gathering documents and sales aids) that were in use during the period between 16 August 2017 and 7 November 2019 were approved by Mr Singh (in the case of nine of them), Mr Singh and Mr Wilson (in the case of two of them) and by Mr Singh, Mr Wilson and Mr Henry (in the case of three of them).

28 Ultiqa's stated position to ASIC is as follows:

- (a) “[Ultiqa] is not a financial planner and does not provide investment or financial planning advice. It only provides personal advice in relation to ULTIQA Lifestyle, a time share product. Our investigations into the client's affairs are limited to understanding the client's holiday profile”;
- (b) it provided the corporate authorised representatives with documents for the authorised representatives to use to gather information from clients at sales presentations;
- (c) those documents were limited to the T-sheet and “At a glance” documents;
- (d) the authorised representatives were required to use those documents and could not change them;
- (e) the documents were developed and approved by Mr Henry and Mr Singh many years ago and any variations or amendments to the documents were made by Mr Singh and approved by Mr Henry;
- (f) “The Board of [Ultiqa] has ultimate oversight of the authorised representatives and their compliance with their regulatory obligations (including the obligation to act in the client's interests though there is not separate or distinct item which specifically covers the best interests obligations). Standing items at each Board meeting include authorised representatives, Training Register and Sales Monitoring along with Breach Reports, Complaints Reports, and Proposed Amendments to the Act, Industry and Internal Standards; and the Board receives reports on these items”;
- (g) “[The Board] did not approve the original documents provided to the [corporate authorised representatives] for [authorised representatives] to use to gather information

from clients (the T-sheet and “At a glance” documents) or any variations to those documents”;

- (h) “[The Board] did not provide any documents to the [corporate authorised representatives] for [authorised representatives] to use to gather information from clients”.

Training and monitoring of authorised representatives

29 Ultiqa outsourced the initial and (from January 2019) ongoing monthly training of its authorised representatives, who also received internal training from the corporate authorised representatives.

30 Various steps were also taken to monitor the performance of the authorised representatives, which included a review of each client file and the conduct of quality control surveys. The review of the client file was done by completing a checklist known as a “Contract Route Memo”.

Policies and procedures

31 By a s 912C Notice dated 16 March 2021, ASIC asked Ultiqa to list all policies and procedures it relied upon between 5 October 2017 and 25 July 2019 to ensure:

- (a) its authorised representatives complied with the best interests obligations expressed in ss 961B, 961G, 961H and 961J of the Act; and
- (b) it complied with its compliance obligations as expressed in ss 912A(1)(ca) and 961L of the Act.

32 In response, Ultiqa produced three sales scripts and two versions of the “Contract Route Memo”, dated 2015 and 2018 respectively. No other documents were produced.

33 The two forms of “Contract Route Memo” are no more than cursory checklists which appear designed to ensure that certain documents have been signed or other steps completed.

34 The sales scripts were just that – scripts containing content which is designed to maximise the prospect of a sale of an interest in the Scheme.

The pleaded consumers

35 ASIC’s case concerns the financial product advice given to six consumers by the authorised representatives of Ultiqa during the relevant period.

Bianca Lindrea and Daniel Perkins

36 Ms Bianca Lindrea and Mr Daniel Perkins are from Landsborough in Queensland. As at July 2018, Ms Lindrea was a registered nurse and Mr Perkins was a rig worker. They were 37 and 35 years old respectively in July 2018, with a combined gross income of approximately \$160,000 per annum. They were both employed on a casual basis, and did not get paid holiday leave. They had various financial commitments including mortgage payments on a home loan. Together, they had five children who were financially dependent.

37 Ms Lindrea and Mr Perkins were approached by an Ultiqa sales consultant at a Maroochydore shopping centre. They subsequently attended a presentation and received advice from an authorised representative of Ultiqa (Mr Manan Raj) at Caloundra on 10 July 2018 to purchase interests in the Scheme at a cost of \$19,992. Prior to their dealings with Ultiqa, they had not seen a financial planner and did not realise that they were receiving financial advice from Mr Raj. Nor did Mr Raj explain what his role was at the time of the presentation.

38 Mr Raj did not ask questions about their personal circumstances or financial situation beyond what was contained in the standard documents provided by Ultiqa. For example, Mr Raj did not ask whether their employment status was permanent, part-time or casual, and he did not ask whether they expected any change to their income or expenses.

39 The purchase price for the interests in the Scheme was financed by a loan from Future Holiday Finance Pty Ltd.

40 Ms Lindrea and Mr Perkins have not used the membership and have attempted to cancel their membership of the Scheme without success.

Sharon and Gregory Collins

41 Mrs Sharon and Mr Gregory Collins are from Highbury in South Australia and, as at July 2018, were self-employed in an earth-moving business operated through their company. They were 57 and 56 years old respectively as at July 2018, with a gross annual income of approximately \$120,000 per annum. Their home was mortgaged.

42 Mr and Mrs Collins were approached by an Ultiqa sales consultant while on holiday in Port Douglas. After being told by a consultant that they had won a prize, they were asked to attend a presentation. They asked the consultant if the presentation was to do with time-share because if so, they were not interested. Mr and Mrs Collins were told it was not a time-share presentation, but about securing cheaper accommodation for holidays.

43 They subsequently attended the presentation given by an authorised representative of Ultiqa (Ms Megan Clark) on 12 July 2018. They specifically asked again if the membership was “some type of time-share scheme” and were told that it was not.

44 Other than asking if they were working, the age of their children and their holiday preferences, Ms Clark did not ask any questions about the personal circumstances of Mr and Mrs Collins, including their health and whether and when they planned to retire.

45 Ms Clark gave advice to Mr and Mrs Collins and recommended that they purchase interests in the Scheme at a cost of \$9,990. Mrs Collins did not understand that Ms Clark was providing financial advice and there was no mention of any “financial advice” during the presentation. Mr and Mrs Clark were not provided with a copy of the SOA which was signed at the presentation.

Caterina and Brett Waterford

46 Mrs Caterina and Mr Brett Waterford are from Altona North in Victoria. As at October 2017, Mrs Waterford was a supervisor in an Officeworks store and Mr Waterford was a document writer at Air Services Australia. As at October 2017, they were 51 and 44 years old respectively, they had one dependent child and a combined gross income of approximately \$190,000. They had financial liabilities including mortgage payments on their home, mortgage payments on an investment property and car lease payments.

47 Mr and Mrs Waterford received advice from an authorised representative of Ultiqa (Mr Mathew Elliott) while on holiday at the Gold Coast on 5 October 2017. Mrs Waterford did not understand that Mr Elliott was providing financial advice and there was no mention of any “financial advice” during the presentation. Prior to giving the advice, Mr Elliott did not carry out any type of assessment as to whether they could afford to purchase interests in the Scheme.

48 Mr and Mrs Waterford purchased interests in the Scheme at a cost of \$17,880 which was financed through Future Holiday Finance Pty Ltd.

49 They had difficulty booking accommodation and only used the Scheme to access accommodation on two occasions in 2018. The quality of the accommodation was “quite average” and not to the same standard as had been shown to them during the presentation.

50 Mr Waterford died of cancer in May 2020.

Kevin Wood and Ah-Hong Jr Ah-Hong

51 Mr Kevin Wood and Mr Ah-Hong Jr Ah-Hong are from Point Cook in Victoria. Mr Wood is a primary school teacher and Mr Ah-Hong is a reservations clerk at a hotel. In April 2018, they were 58 and 41 years old respectively with a combined gross income of approximately \$250,000 per annum. They had financial liabilities including mortgage payments on their home and loan payments on a car. Mr Wood was only able to take holidays during school holidays.

52 Mr Wood and Mr Ah-Hong were approached by an Ultiqa sales consultant at a Melbourne shopping centre and subsequently received advice from an authorised representative of Ultiqa (Ms Roxanne Karras) on 6 April 2018. The advice was to purchase interests in the Scheme at a cost of \$9,992. Mr Wood and Mr Ah-Hong were not told they were receiving financial advice, and were not asked for information relevant to their ability to afford to acquire interests in the Scheme (such as details of their assets and liabilities). Nor were they provided with a product disclosure statement until two weeks later.

53 The purchase of interests in the Scheme was financed by a loan from Future Holiday Finance Pty Ltd.

54 Mr Wood and Mr Ah-Hong have had difficulty using the Scheme to obtain holiday accommodation in the places and at times that they require.

Christopher and Rachael Gill

55 Mr Christopher and Mrs Rachael Gill are from Griffith in New South Wales. Mr Gill is a television cameraman and producer and Mrs Gill is a school teacher. They were 49 and 44 years old respectively in January 2018, with a combined gross income of approximately \$130,000 per annum. They had various financial commitments including mortgage payments on a home loan. Together, they had three children who were financially dependent.

56 They were approached by an Ultiqa sales consultant at SeaWorld while on holiday at the Gold Coast. They subsequently received advice from an authorised representative of Ultiqa (Mr Tim Grant) on 11 January 2018 and purchased interests in the Scheme at a cost of \$9,990. Mr Grant told Mr and Mrs Gill that what Ultiqa was offering was not a time-share. He also said that Ultiqa must be a legitimate operation because it operated out of SeaWorld. Mr Grant would not allow Mr and Mrs Gill to telephone someone to discuss whether to acquire interests in the Scheme. Although Mr Grant asked about assets and liabilities, he did not ask whether Mr and Mrs Gill anticipated that their financial circumstances might change in the future.

57 The purchase by Mr and Mrs Gill of interests in the Scheme was financed by a loan from Future Holiday Finance Pty Ltd.

58 Mr and Mrs Gill have tried to arrange accommodation through the Scheme on numerous occasions without success.

Kelly and Terrence McLean

59 Mrs Kelly and Mr Terrence McLean are from Bellara in Queensland. In March 2019, Mrs McLean was an optical salesperson and Mr McLean was a chef. After she was retrenched in 2020, Mrs McLean now works on a casual basis. They were both 52 years old in March 2019 and rented their home. They had debts in the form of personal loans. Neither had any real investment experience.

60 They were approached by an Ultiqa sales consultant at a Maroochydore shopping centre and subsequently received advice from an authorised representative of Ultiqa (Mr Jaymit Thakore) at Caloundra on 21 March 2019. The advice was to purchase interests in the Scheme at a cost of \$19,992. This purchase was financed by a loan from Future Holiday Finance Pty Ltd.

61 Mrs McLean did not understand at the time that she was receiving financial advice, and the fact that financial advice was being provided was not mentioned. Neither Mrs McLean nor Mr McLean were asked about their personal or financial circumstances except to the extent required to obtain the loan. They were also asked general information about taking annual holidays.

ISSUES

62 The following issues arise from the Concise Statement and the form of the Orders sought by ASIC:

- (1) whether the Ultiqa authorised representatives provided advice within the meaning of Chapter 7 Pt 7.7A Div 2 of the Act to the consumers such that they were required to comply with ss 961B, 961G and 961J of the Act;
- (2) whether the Ultiqa authorised representatives complied with s 961B of the Act when providing advice to the pleaded consumers;
- (3) whether the Ultiqa authorised representatives complied with s 961G of the Act when providing advice to the pleaded consumers;

- (4) whether the Ultiqa authorised representatives complied with s 961J of the Act when providing advice to the pleaded consumers;
- (5) whether Ultiqa contravened s 961L of the Act by failing to take reasonable steps to ensure that its authorised representatives complied with ss 961B, 961G and 961J of the Act when providing advice to the pleaded consumers;
- (6) whether Ultiqa failed to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly and thereby contravened s 912A(1)(a) of the Act;
- (7) whether Ultiqa failed to take reasonable steps to ensure that its authorised representatives complied with the financial services laws, namely ss 961B, 961G and 961J of the Act and thereby contravened s 912A(1)(ca) of the Act;
- (8) whether Ultiqa failed to comply with the financial services laws, namely ss 961L, 912A(1)(a) and 912A(1)(ca) of the Act and thereby contravened s 912A(1)(c) of the Act;
- (9) whether ASIC is entitled to declaratory relief in the form sought by it.

CONSIDERATION

Whether advice was provided within the meaning of Chapter 7 Pt 7.7A Div 2 of the Act

63 By s 764A(1)(b) of the Act, an interest in a registered scheme is a financial product for the purposes of Chapter 7 of the Act. Accordingly, an interest in the Scheme is a financial product for the purposes of Chapter 7 of the Act.

64 By s 766B(1) of the Act, financial product advice includes a recommendation or a statement of opinion, or a report of either of those things, that is intended to influence a person in making a decision in relation to a particular financial product.

65 Applying these sections of the Act and on the facts of this case, the recommendation by the authorised representatives of Ultiqa that each consumer acquire an interest in the Scheme was financial product advice within the meaning of s 766B(1).

66 For the purposes of Chapter 7 of the Act, personal advice includes financial product advice that is given or directed 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 (other than for purposes which are not relevant to the facts of this case) or a reasonable person might expect the provider to have considered one or more of these matters: see s 766B(3) of the Act.

67 Applying s 766B(3) of the Act and on the facts of this case, the recommendations by the authorised representative of Ultiqa that each consumer acquire an interest in the Scheme was personal advice within the meaning of s 766B(3). That is because either the representatives in fact considered the respective consumer's objectives, financial situation and needs (to an extent) or a reasonable person might expect the provider to have considered one or more of these matters (having regard to the Green Report).

68 Each of ss 961B, 961G and 961J of the Act falls within Chapter 7 Pt 7.7A Div 2. Pursuant to s 961(1) of the Act, Div 2 applies in relation to the provision of personal advice to a person, who is the **client**. The individual who provides the advice is the **provider**.

69 It follows that the authorised representatives of Ultiqa were required to comply with ss 961B, 961G and 961J of the Act when providing advice to the pleaded consumers.

Whether authorised representatives complied with s 961B of the Act

70 Section 961B of the Act provides:

961B Provider must act in the best interests of the client

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

- considered as relevant to advice on that subject matter; and
- (ii) assessed the information gathered in the investigation;
- (f) based all judgements in advising the client on the client's relevant circumstances;
- (g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

71 In *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170; [2019] FCAFC 187, the Full Court of the Federal Court considered s 961B of the Act.

72 At [10] of that decision, Allsop CJ stated that:

[Section 961B] is contained in Pt 7.7A Div 2 entitled “Best Interests Obligations”, which contains a detailed attempt to define what is, in effect, an obligation of good faith and unqualified faithfulness to the interests of the client. The primary obligation is simply expressed in s 961B(1) as a requirement to “act in the best interests of the client in relation to the advice”. Section 961B(2) contains seven more detailed requirements, proof of all of which will satisfy the general obligation in s 961B(1) ...

73 At [301], Jagot J stated as follows:

To discharge the duty in s 961B(1) the provider must have as its purpose or object acting in the best interests of the client. The provider can effectively prove that their purpose or object was to act in the best interests of the client by doing each of the matters in s 961B(2), each of which is essentially procedural. As the Explanatory Memorandum explains the fact of harm is not the criterion against which performance of this duty is measured ...

74 In the Green Report, Mr Green considered the advice provided by the authorised representatives to each of the six clients and whether it complied with the “best interests” duty in s 961B of the Act. As part of this analysis, Mr Green considered whether the authorised representatives had done the things identified in s 961B(2) of the Act.

75 Mr Green noted that the authorised representatives only identified a limited number of personal circumstances, objectives, financial situation and needs of the six clients. This included age, employment status and occupation, living status, a basic understanding of combined yearly income, whether they were homeowners, whether they belonged to any other holiday club or time-share (in some instances), and information about their holiday preferences.

76 Mr Green expressed the opinion that, in relation to each client, there was insufficient information gathered prior to the provision of the advice to reasonably consider recommending a financial product to any of the six clients.

77 Mr Green identified other objectives, financial situation and needs of the six clients that should have been obtained by each authorised representative prior to the provision of any advice, but were not. These were as follows:

- (a) full details regarding the client's income;
- (b) full details regarding the client's employment status, including an understanding of the nature of their employment (i.e. casual, permanent, self-employed);
- (c) full details regarding the client's assets and liabilities;
- (d) full details regarding the client's existing expenses including loan repayments, bills, child support payable and living expenses;
- (e) the client's goals, objectives and needs (both personal and financial), and not just a "wish list" of holiday preferences;
- (f) whether the client anticipated any changes to their personal circumstances which, given the nature and time frame of the financial product being recommended (being a membership with a minimum time frame of 15 years) would be a key consideration in the provision of any recommendation and advice; and
- (g) the client's risk profile.

78 Mr Green expressed the opinion that, in providing the advice to the pleaded consumers, the respective authorised representative in each instance:

- (a) did not identify the subject matter or purpose of the advice, being the objectives that the advice was designed to achieve;
- (b) did not make reasonable inquiries to obtain complete and accurate information upon which to provide advice;
- (c) was not in a position to reasonably consider providing the advice to the client and did not attempt to conduct a reasonable investigation to properly understand the product being recommended, nor, based upon the information provided to them, properly assess the appropriateness of the financial product to the goals, objectives and needs of the client, having regard to their relevant personal circumstances (including financial situation) and risk profile;
- (d) did not base the recommendations on the client's relevant circumstances including financial situation, goals, objectives and needs as well as risk profile;

- (e) failed to advise the client of sufficient information to allow them to make an informed decision about the advice.

79 Having regard to Mr Green's evidence, which I accept, the Ultiqa authorised representatives did not take the steps identified in s 961B(2) of the Act in relation to the pleaded consumers.

80 Mr Green concluded that, had it been, in each instance, reasonable to recommend an interest in the Scheme, then:

- (a) prior to the recommendation of investment in the Scheme, a variety of financial products (including time-share as well as other financial products) should have been considered to ensure appropriateness of the product specific to each client's relevant personal circumstances, goals, objectives, needs and risk profile;
- (b) an adviser acting with due care and consideration and in the best interests of their client would have, as a minimum:
 - (i) ensured that each client was aware of the type of product being recommended and that it was considered financial product and personal advice;
 - (ii) ensured that each client was aware of the limited scope of the advice and the specific implications of the limited scope of the advice;
 - (iii) in the event that each client wanted to proceed with the advice (with a complete understanding of the product being offered and the type of advice being provided), ensured a complete data collection, goal setting and risk profile process was undertaken;
 - (iv) ensured that a variety of investments was researched and investigated to ensure that the product being recommended would meet each client's goals, objectives and needs;
 - (v) provided an advice document (i.e. SOA) which was clearly tailored to each client and set out the recommendations specific to each client (i.e. not a template document) and in terms that each client could easily understand;
 - (vi) where relevant, included the borrowing recommendations, and the basis and justification for the borrowing recommendations within the advice document (i.e. SOA); and
 - (vii) provided each client with sufficient time to read and understand the advice prior to providing an authority to proceed.

81 Having regard to Mr Green’s evidence, which I accept, the Ultiqa authorised representatives did not comply with their obligations to act in the best interests of the pleaded consumers and thereby contravened s 961B(1) of the Act.

Whether authorised representatives complied with s 961G of the Act

82 Section 961G of the Act is concerned with the quality of the resultant advice and whether it is appropriate to the client. That section provides:

961G Resulting advice must be appropriate to the client

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.

83 In the Green Report, Mr Green opined that, even if the Ultiqa authorised representatives had met the “best interests” duty, it would not have been reasonable to conclude that the advice was appropriate for the six clients.

84 Mr Green expressed this opinion because:

- (a) the investment recommended (i.e. interest in the Scheme) was inappropriate for each client’s personal circumstances and risk profiles;
- (b) the advice, for five of the six clients, increased the level of borrowings which was not appropriately addressed or recorded in an advice document (i.e. SOA);
- (c) the client were not provided with an adequate explanation for or warning of the risks associated with an investment in the Scheme including:
 - (i) the difficulties that may be faced with booking and obtaining holiday accommodation, specific to each client’s personal circumstances (both at the time of the advice and into the future); and
 - (ii) the increase in risk associated with the borrowings associated with the advice (where relevant);

such that each client was in a position to make an informed decision about the recommendations relative to alternative strategies.

85 Having regard to Mr Green’s evidence, which I accept, it would not have been reasonable to conclude that the advice given by the Ultiqa authorised representatives was appropriate for the respective pleaded consumers with the consequence that s 961G of the Act was contravened.

Whether authorised representatives complied with s 961J of the Act

86 Section 961J of the Act requires the provider of advice to give priority to the client's interests if the individual knows, or reasonably ought to know, that there is a conflict with the interests of the provider, licensee, authorised representative or associates. The section provides:

961J Conflict between client's interests and those of provider, licensee, authorised representative or associates

- (1) If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:
 - (a) the provider; or
 - (b) an associate of the provider; or
 - (c) a financial services licensee of whom the provider is a representative; or
 - (d) an associate of a financial services licensee of whom the provider is a representative; or
 - (e) an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee; or
 - (f) an associate of an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee;

the provider must give priority to the client's interests when giving the advice.

87 In this case, there was a conflict between the interests of the authorised representatives and the respective consumers within the meaning of s 961J(1)(a) of the Act. That is because there was a commission payable to the Ultiqa authorised representative if the consumer acted on the advice and acquired interests in the Scheme.

88 Such conflict was known to, or ought to have been known by, the authorised representative because the payment of commissions to that representative was noted in documents which were usually provided by them to the consumers at the presentations such as the "Authorised Representative Statement" and SOA. Further, the "Recommendation" page of the SOA identified the amount of commission payable to the authorised representative in respect of the advice. The amount of the commission varied between \$512.38 and \$1,859.26.

89 There was also a conflict of interest between the consumers and Ultiqa, which was the financial services licensee of which the authorised representative was a representative. That is because, as observed in the Walker Report, the authorised representatives were recommending an in-house product which had been developed internally within the Ultiqa group of companies. This

conflict of interest falls within s 961J(1)(c) of the Act and each authorised representative knew or ought to have known there was such a conflict.

90 In relation to each of the six consumers and by their conduct, including their contraventions of ss 961B and 961G of the Act, the respective authorised representative gave priority to making a sale of an interest in the Scheme for the benefit of Ultiqa and themselves personally, or, at the least, did not give priority to the consumer's interests when giving the advice.

91 That they gave such priority also manifested by the authorised representatives engaging in tactics to pressure the consumers to sign up at the presentation, including (in one instance) preventing the consumer from obtaining external advice, (in two instances) misleading the consumers by representing that the interest in the Scheme was not a time-share scheme, in generally not giving the consumers sufficient privacy and time to discuss and debate the proposed acquisition of interests in the Scheme, and by offering inducements to the consumers to sign up at the presentation.

92 That they were required by Ultiqa to give such priority is apparent from the content of the documentation provided by Ultiqa, extracts of which appear above. The focus in giving the advice was on making a sale, and not on acting in the consumer's interests.

93 For these reasons, the Ultiqa authorised representatives failed to give priority to the consumer's interests in contravention of s 961J of the Act. Such a conclusion accords with the expert opinion of Mr Green as contained in the Green Report. Further, Ms Walker opined that the records did not support that Ultiqa placed their clients' interests first and failed to sufficiently identify conflicts of interests within their advice process.

Whether Ultiqa contravened section 961L of the Act

94 Section 961L of the Act provides as follows:

961L Licensees must ensure compliance

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

95 By the definitions in s 960 (which in turn refers to section 910A), an authorised representative of a licensee is a "representative" for the purposes of s 961L. Section 961L is a civil penalty provision.

96 Section 961L is in Pt 7.7A of the Act. In *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 142 ACSR 277; [2020] FCA 69 at [105] to [107], Lee J made the following observations:

First, the word “ensure” is forward-looking. It is directed to the taking of steps to achieve compliance with certain statutory norms (including the relevant best interests obligations) before any particular instance of non-compliance has arisen. Although the seriousness of the obligation is amplified by the use of the word “ensure” ... the onerousness of the standard is moderated by the requirement to take “reasonable steps” ...

Secondly, the text of s 961L makes its focus the conduct of the licensee, not the representative, and whether the licensee has taken “reasonable steps” (albeit these steps are directed at the conduct of their representatives). Critically, there is nothing in the text of s 961L that makes a contravention of the relevant best interests obligations a pre-requisite to a contravention of s 961L ...

Thirdly, the relevant best interests obligations to which s 961L refers fall under separate subdivision headings and each prescribe distinct statutory norms of conduct for the providers of financial advice ... Although the obligations relate to one another and breach of one may, depending upon the circumstances, amount to a breach of another, their particular content and focus differs.

97 More recently, in *Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 2)* (2021) 156 ACSR 371; [2021] FCA 877 at [393], Moshinsky J accepted those observations as to the construction of s 961L. Moshinsky J went on to note at [396]:

Although the duty in s 961L is broad, the case law has begun to fill in the contours of what is expected of a licensee by way of compliance with the provision. The authorities indicate that s 961L may require a licensee to take steps to ensure representatives are competent, to monitor and supervise them (including in relation to advice processes, advice quality and conflicts of interest), to ensure compliance concerns are escalated, and to take action that is commensurate with the risks presented by such concerns ...

(citations omitted)

98 In *Australian Securities and Investments Commission v Financial Circle Pty Ltd* (2018) 131 ACSR 484; [2018] FCA 1644 at [123], O’Callaghan J stated that contraventions of ss 961B, 961G or 961J of the Act may “provide persuasive evidence of a licensee failing to take reasonable steps”.

99 In *Australian Securities and Investments Commission v NSG Services Pty Ltd* (2017) 122 ACSR 47; [2017] FCA 345 at [39], Moshinsky J noted a causal relationship between the failure of the licensee’s practices and policies to take reasonable steps (and therefore its contravention of s 961L) and the contraventions of ss 961B and 961G by its representatives.

100 Turning to the facts of this case, a decision as to whether Ultiqa contravened s 961L of the Act requires consideration of two questions:

- (a) what were the reasonable steps that the holder of an AFSL in the position of Ultiqa should have taken to ensure compliance by its authorised representatives with ss 961B, 961G and 961J of the Act?
- (b) did Ultiqa take such steps?

What were the reasonable steps which should have been taken to ensure compliance with ss 961B, 961G and 961J of the Act?

101 Ms Walker expressed the opinion in the Walker Report that AFSL holders should:

- (a) issue their authorised representatives with a “fact find” document which contains appropriate fields to capture the relevant client information for the type of financial advice being provided. Authorised representatives should be trained to ask relevant questions and record this information within the “fact find” document;
- (b) issue directions to their authorised representatives on how to appropriately scope the subject matter of the advice to be provided and to identify the relevant goals, objectives and personal details appropriate to that type of advice. Authorised representatives should be trained to capture and record this relevant information. The AFSL holder should also train its authorised representatives to obtain complete and accurate information where it is reasonably apparent that this has not been obtained;
- (c) provide ongoing training to ensure their authorised representatives are competent to provide advice and are also trained not to provide advice which is outside their competency. The training of the authorised representatives should be monitored and supervised by the AFSL holder;
- (d) provide product training to their authorised representatives on the different product options available with its in-house products, and an awareness of the other advice strategies, time-share schemes and other holiday options which may be available;
- (e) provide training, tools and templates to educate their authorised representatives on when and how to comply with the best interests obligations. For example, the licensee must provide training to its authorised representatives to identify when further investigation or additional client information is required or if there is a gap within their advice process.
- (f) monitor and supervise their authorised representatives when they are providing advice;
- (g) audit the advice given by their authorised representatives to ensure it is appropriate to the client’s goals and objectives; and

- (h) educate their authorised representatives to take any other steps at the time that the advice is provided to ensure they are acting in the client's best interest. This may include explaining clearly the type of advice being provided, considering whether ongoing advice services will be required in the future, and offering to provide advice on any other key issues within the subject matter of the advice.

102 As to the steps which must reasonably be taken to ensure compliance with s 961G of the Act, Ms Walker opined that AFSL holders should have adequate resources in place to monitor and supervise its authorised representatives and ensure that every advice outcome is appropriate to each client.

103 As to the steps which must reasonably be taken to ensure compliance with s 961J of the Act, Ms Walker expressed the opinion in the Walker Report that:

- (a) authorised representatives must be trained on conflicts of interest and be educated on Ultiqa's specific conflicts. It is the obligation of the AFSL holder to ensure its authorised representatives are trained to identify, manage or avoid conflicts of interests;
- (b) licensees are also responsible for monitoring and supervising their authorised representatives to ensure that they disclose and explain to the clients where there is a conflict of interest and how they deal with it.

104 In the Green Report, Mr Green expressed the opinion that Ultiqa should have done the following:

- (a) ensured that all authorised representatives were adequately trained, aware and understood the nature of their obligations surrounding the provision of financial product advice, the provision of personal advice and their responsibility to ensure that any personal advice was prepared and provided in accordance with the best interests and appropriate advice obligations;
- (b) provided the necessary information and documentation for the authorised representatives, including, but not limited to:
 - (i) appropriate training documents and courses where necessary;
 - (ii) SOA documents that were able to be customised for each specific client to ensure that any recommendation being made are tailored specific to each client and can be used to prompt the authorised representative to make additional

enquiry/further evaluation steps to ensure the process of the provision of financial advice is complete;

- (iii) file note templates in order for the authorised representatives to prepare the necessary and required documentation in order to satisfy s 961B(2) of the Act; and
 - (iv) checklists for the preparation, presentation and processing of personal advice, including s 961B(2) of the Act;
- (c) ensured that all clients being provided with personal advice were provided with sufficient information (including risks and alternatives) and time to review the recommendations without any time constraints (i.e. without advising the client that they could only access specific deals if they signed up there and then without being able to fully review the advice being provided to them); and
- (d) had appropriate review processes in place such that all authorised representatives were subject to reviews of their recommendations and personal advice documents (i.e. SOAs and file notes etc.) on a regular basis to ensure compliance with their obligations under the Act.

Did Ultiqa take reasonable steps to ensure compliance by its authorised representatives with ss 961B, 961G and 961J of the Act?

105 Ms Walker observed that Ultiqa believed that their services and advice did not form part of the financial services industry advice process. She also observed that Ultiqa clients were unaware and did not understand they were receiving financial product advice on time-share membership purchases.

106 Ms Walker also expressed the following opinions in the Walker Report (in summary):

- (a) there was no evidence that Ultiqa provided sufficient training, monitoring or supervision to its authorised representatives on ss 961B, 961G and 961J of the Act. There was little evidence that Ultiqa had documented policies and procedures in place to demonstrate compliance to support the advice process. Ultiqa did not take reasonable steps or have adequate arrangements in place to ensure its authorised representatives complied with the “best interests” duty and other obligations;
- (b) the advice process implemented by Ultiqa started with the financial product and the authorised representative made the clients’ goals and objectives fit into the product features which did not lead to appropriate financial advice in most cases. The Sales

Training Manual supported this position. All outcomes when the sales process was followed was to sell Ultiqa's time-share memberships to clients;

- (c) Ultiqa's T-sheet document captured insufficient client information to be able to make a recommendation in the client's best interests. It did not have relevant sections to capture the client's financial position including cashflow regarding their income and expenses. Authorised representatives would be unable to confirm if the time-share memberships were affordable to the clients and therefore, would not be able to confirm if appropriate advice has been provided;
- (d) the authorised representatives did determine if the clients were homeowners and if they earned a minimum combined income amount. However, this was insufficient information to gauge if the clients could afford the ongoing fees of the time-share memberships because there were no actual income amounts or expenses collected to determine any surplus cashflow. Ultiqa did not provide tools and templates to its authorised representatives to comply with the best interests obligations;
- (e) Ultiqa's SOA document was pre-templated for all clients and demonstrated a "one size fits all" approach. Important financial information to support the product recommendation was missing from the SOA;
- (f) AFSL holders must ensure that they audit the clients' files to comply with the financial services laws. Ultiqa's monitoring and supervision activities were not sufficient to capture or audit compliance with the best interests requirements by its authorised representatives. The auditing activities on the advice process used a check-a-box approach. This did not demonstrate any competence to comply with the "best interests" duty and other obligations or whether the advice was appropriate to the clients' individual goals and objectives;
- (g) if Ultiqa was auditing the financial advice under its monitoring and supervision obligations, then it would have identified inappropriate advice and Ultiqa would have been obligated to re-train its authorised representatives to provide appropriate advice in the client's best interests;
- (h) there was little evidence that Ultiqa identified or managed conflicts of interests within the advice process, or that the authorised representatives were trained on Ultiqa's conflicts process; and
- (i) Ultiqa therefore did not take reasonable steps to establish processes to ensure its authorised representatives complied with ss 961B, 961G and 961J of the Act.

107 In addition to taking into account the expert evidence of Ms Walker and Mr Green, who were
briefed with all documents and information provided by Ultiqa in response to the requests by
ASIC and whose evidence I accept, other considerations are also relevant.

108 First, the evidence relied upon to show that there were contraventions by the authorised
representatives of ss 961B, 961G and 961J of the Act was compelling. The findings that these
sections of the Act were contravened in the circumstances of this case provides strong support
for a further finding that Ultiqa failed to take reasonable steps to ensure that its representatives
complied with ss 961B, 961G and 961J of the Act in relation to the six consumers.

109 Second, Ultiqa prepared and provided the authorised representatives with the documents to be
used by them for the purposes of gathering the information from the consumers. It also
supplied the template SOA document, the Sales Training Manual and sales scripts, and it
imposed various restrictions on changes being made to those documents as referred to above.
Ultiqa was also responsible for the training and supervision of the authorised representatives
(and in fact itself engaged in both training and supervision). Ultiqa also conducted a review of
the work which was done by the authorised representatives. There was therefore a causal
relationship between Ultiqa's conduct and the contraventions by its authorised representatives
of ss 961B, 961G and 961J of the Act, which provides further support for a finding that Ultiqa
contravened s 961L of the Act: cf *NSG Services* at [39].

110 For these reasons, I am satisfied that Ultiqa contravened s 961L of the Act during the relevant
period by failing to take reasonable steps to ensure that its authorised representatives complied
with ss 961B, 961G and 961J when providing advice to the six pleaded consumers.

Whether Ultiqa breached section 912A(1) of the Act

111 The remaining aspect of ASIC's case concerns alleged contraventions of the general
obligations of AFSL holders which are set out in ss 912A(1)(a), (c) and (ca) of the Act as
follows:

912A General obligations

- (1) A financial services licensee must:
 - (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 laws; and

- (ca) take reasonable steps to ensure that its representatives comply with the financial services laws;

...

Section 912A(1)(a)

112 Section 912A(1)(a) of the Act provides that a licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.

113 In *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57; [2020] FCA 208, Beach J provided a helpful summary of the key propositions as to the meaning of “efficiently, honestly and fairly”, as follows:

[506] First, the words “efficiently, honestly and fairly” are to be read as a compendious indication requiring a licensee to go about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.

[507] Second, the words “efficiently, honestly and fairly” *connote* a requirement of competence in providing advice and in complying with relevant statutory obligations. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client’s affairs ...

[508] Third, the word “efficient” refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate. Inefficiency may be established by demonstrating that the performance of a licensee’s functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect.

...

[512] Further, it is also not in doubt that a contravention of the “efficiently, honestly and fairly” standard does not require a contravention or breach of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise. The statutory standard itself is the source of the obligation.

114 Having regard to my acceptance of the expert evidence relied upon in support of the contraventions of s 961L of the Act, which provided ample evidence of Ultiqa’s incompetence, Ultiqa also contravened s 912A(1)(a) of the Act by failing to do all things necessary to ensure that the financial services covered by its licence were provided efficiently, honestly and fairly. That is, Ultiqa was not efficient in the sense that it was not “capable, competent and adequate”: cf *ASIC v AGM* at [508].

Section 912A(1)(ca)

115 Section 912A(1)(ca) of the Act provides that a financial services licensee must take reasonable steps to ensure that its representatives comply with financial services laws. Each of ss 961B, 961G and 961J are contained in Chapter 7 of the Act and are financial services laws for the purposes of s 912A(1)(ca) of the Act.

116 The obligation in s 912A(1)(ca) mirrors that in s 961L of the Act: see *NSG Services* at [31]. Accordingly, if Ultiqa contravened s 961L, it will follow that it also failed to take reasonable steps to ensure compliance with the financial services laws in contravention of s 912A(1)(ca).

117 As I am satisfied that Ultiqa contravened s 961L of the Act, it follows that Ultiqa also contravened s 912A(1)(ca) of the Act.

Section 912A(1)(c)

118 Section 912A(1)(c) of the Act provides that a licensee must comply with the financial services laws.

119 The financial services laws are defined in s 761A of the Act and include each provision of Chapter 7 of the Act. Sections 961L, 912A(1)(a) and 912A(1)(ca) are in Chapter 7 of the Act and are therefore financial services laws for the purposes of s 912A(1)(c). This means that a contravention of any of ss 961L, 912A(1)(a) or 912A(1)(ca) will also amount to a contravention of s 912A(1)(c) of the Act.

120 Accordingly, as I have found that Ultiqa contravened ss 961L, 912A(1)(a) and 912A(1)(ca), it follows that Ultiqa also contravened s 912A(1)(c) of the Act.

Whether ASIC is entitled to the declaratory relief sought

121 By s 1317E(1) of the Act, if the Court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention.

122 At all times, s 961L of the Act was a civil penalty provision. For the above reasons, I am satisfied that Ultiqa has contravened s 961L of the Act with respect to its failure to ensure that its authorised representatives complied with ss 961B, 961G and 961J of the Act in providing financial advice to the six pleaded consumers. I am therefore required to make the declaration sought.

123 ASIC submits that, since 13 March 2019, ss 912A(1)(a) and 912A(1)(ca) have been civil penalty provisions. It submits that the consequence is that the declarations of contravention of these sections from 13 March 2019 are required to be made under s 1317E(1) of the Act. However, sections 912A(1)(a) and 912A(1)(ca) of the Act are not (themselves) civil penalty provisions. The relevant civil penalty provision is s 912A(5A) which provides:

A person contravenes this subsection [that is, s 912A(5A)] if the person contravenes paragraph 1(a), (aa), (ca) ...

Note: This subsection is a civil penalty provision (see section 1317E).

124 Section 1317E of the Act also identifies that s 912A(5A) is a civil penalty provision. In this case, ASIC has not alleged that there was a contravention of s 912A(5A) of the Act, Ultiqa has not had notice of any such allegation and there is no finding that s 912A(5A) of the Act has been contravened.

125 However, by s 1101B(1)(a)(i) of the Act, the Court may, on the application of ASIC, make such orders as it thinks fit if it appears to the Court that a person has contravened a provision of Chapter 7 of the Act. Section 912A is contained in Chapter 7 of the Act. Further, by s 21 of the *Federal Court of Australia Act 1976* (Cth), the Court may make declarations in civil proceedings in relation to a matter in which it has original jurisdiction. Accordingly, whether under s 1101B(1)(a)(i) of the Act, or s 21 of the *Federal Court of Australia Act*, the Court may make declarations as to the contraventions by Ultiqa of ss 912A(1)(a), 912A(1)(c) and 912A(1)(ca) of the Act.

126 I am satisfied that, in the circumstances of this case and subject to minor modifications, the declarations sought by ASIC should be made because they will vindicate the regulator's claim that Ultiqa contravened the provisions of the Act, assist the regulator to carry out its duties and deter other persons from contravening the provisions.

127 The declarations will also assist authorised representatives to comply with their "best interests" obligations in Pt 7.7A of the Act when selling interests in managed investment schemes in the time-share category to consumers.

128 The declarations sought therefore relate to real and not hypothetical questions, they involve matters of public interest and there is utility in making the declarations sought.

129 Further, the circumstances of this case call for the marking of the Court's disapproval of the contravening conduct.

130 Finally, the declarations sought by ASIC contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act, as required: see *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 at [66].

I certify that the preceding one hundred and thirty (130) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes.

Associate: 

Dated: 17 May 2022