

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v DOD Bookkeeping Pty Ltd (in liq), in the matter of DOD Bookkeeping Pty Ltd (in liq) (No 2) **[2025] FCA 395**

File number(s): NSD 444 of 2021

Judgment of: **GOODMAN J**

Date of judgment: 24 April 2025

Catchwords: **CORPORATIONS** – where the defendant as the holder of an Australian financial services licence, contravened: (1) s 961K(2) of the *Corporations Act 2001* (Cth) by reason of its representatives contravening ss 961B and 961G of the Act; (2) s 963E(2) of the Act by reason of the provision to, and acceptance by, representatives of the defendant of conflicted remuneration in the form of bonus payments – consideration of declarations to be made and penalties to be imposed

Legislation: *Corporations Act 2001* (Cth), ss 553, 961B, 961G, 961H, 961K, 963E, 963J, 1317E, 1317G
Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth)
Federal Court Rules 2011 (Cth), r 39.05

Cases cited: *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450
Australian Competition and Consumer Commission v Employsure Pty Ltd [2023] FCAFC 5; (2023) 407 ALR 302
Australian Competition and Consumer Commission v Reckitt Benckiser Pty Ltd [2016] FCAFC 181; (2016) 340 ALR 25
Australian Competition and Consumer Commission v Yazaki Corporation [2018] FCAFC 73; (2018) 262 FCR 243
Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 4) [2020] FCA 1499; (2020) 148 ACSR 511
Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Pty Ltd [2022] FCA 1105

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

Australian Securities and Investments Commission v Forex Capital Trading Pty Limited [2021] FCA 570

Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 3) [2023] FCA 723; (2023) 171 ACSR 331

Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liq) (No 2) [2015] FCA 93

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147

Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited [2021] FCA 1008; (2021) 156 ACSR 614

Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2) [2017] FCA 557

Markarian v The Queen [2005] HCA 25; (2005) 228 CLR 357

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; (1996) 71 FCR 285

Nyoni v Murphy [2018] FCAFC 75; (2018) 261 FCR 164

Trade Practices Commission v CSR Ltd [1990] FCA 762; [1991] ATPR¶ 41-076

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	70
Date of last submission/s:	27 June 2024
Date of hearing:	5 June 2024
Counsel for the Plaintiff:	Mr A Leopold SC with Ms T Fishburn
Solicitor for the Plaintiff:	Australian Securities and Investments Commission, Litigation Team

ORDERS

NSD 444 of 2021

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

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

AND: **DOD BOOKKEEPING PTY LTD (IN LIQUIDATION)**
Defendant

ORDER MADE BY: **GOODMAN J**

DATE OF ORDER: **24 APRIL 2025**

**THE COURT DECLARES PURSUANT TO SECTION 1317E OF THE
CORPORATIONS ACT 2001 (CTH) THAT:**

Division 2 contraventions

Mr and Mrs AA

1. On or about 14 August 2015, the defendant contravened s 961K(2) of the *Corporations Act 2001* (Cth) by being the responsible licensee for the contravening conduct of its representative, Adviser YY, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs AA, when providing them with personal advice in a Statement of Advice provided on or about that date.
2. On or about 14 August 2015, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser YY, who contravened s 961G of the Act by providing advice to Mr and Mrs AA which included a recommendation that Mr and Mrs AA create a self-managed superannuation fund (SMSF) and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr and Mrs AA.

Mr and Mrs BB

3. On or about 8 July 2015, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser ZZ, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs BB, when providing them with personal advice in a Statement of Advice provided on or about that date.
4. On or about 8 July 2015, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser ZZ, who contravened s 961G of the Act by providing advice to Mr and Mrs BB which included a recommendation that Mr and Mrs BB create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr and Mrs BB.

Mr and Mrs CC

5. On or about 14 December 2017, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser YY, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs CC, when providing them with personal advice in a Statement of Advice provided on or about that date.
6. On or about 14 December 2017, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser YY, who contravened s 961G of the Act by providing advice to Mr and Mrs CC which included a recommendation that Mr and Mrs CC create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr and Mrs CC.

Mr and Mrs DD

7. On or about 16 August 2016, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser XX, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs DD, when providing them with personal advice in a Statement of Advice provided on or about that date.

8. On or about 16 August 2016, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser XX, who contravened s 961G of the Act by providing advice to Mr and Mrs DD which included a recommendation that Mr and Mrs DD create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr and Mrs DD.

Mr and Mrs EE

9. On or about 22 November 2017, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser YY, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs EE, when providing them with personal advice in a Statement of Advice provided on or about that date.
10. On or about 22 November 2017, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser YY, who contravened s 961G of the Act by providing advice to Mr and Mrs EE which included a recommendation that Mr and Mrs EE create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr and Mrs EE.

Mr and Mrs FF

11. On or about 24 July 2017, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser ZZ, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs FF, when providing them with personal advice in a Statement of Advice provided on or about that date.
12. On or about 24 July 2017, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser ZZ, who contravened s 961G of the Act by providing advice to Mr and Mrs FF which included a recommendation that Mr and Mrs FF create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr and Mrs FF.

Ms GG

13. On or about 18 May 2015, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser ZZ, who contravened s 961B of the Act by failing to act in the best interests of his client, Ms GG, when providing her with personal advice in a Statement of Advice provided on or about that date.
14. On or about 18 May 2015, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser ZZ, who contravened s 961G of the Act by providing advice to Ms GG which included a recommendation that Ms GG create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Ms GG.

Mr HH and Ms JJ

15. On or about 13 July 2017, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser YY, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr HH and Ms JJ, when providing them with personal advice in a Statement of Advice provided on or about that date.
16. On or about 13 July 2017, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser YY, who contravened s 961G of the Act by providing advice to Mr HH and Ms JJ which included a recommendation that Mr HH and Ms JJ create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr HH and Ms JJ.

Mr KK and Ms LL

17. On or about 22 July 2016, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser XX, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr KK and Ms LL, when providing them with personal advice in a Statement of Advice provided on or about that date.

18. On or about 22 July 2016, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser XX, who contravened s 961G of the Act by providing advice to Mr KK and Ms LL which included a recommendation that Mr KK and Ms LL create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr KK and Ms LL.

Mr and Mrs MM

19. On or about 29 August 2016, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser XX, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr and Mrs MM, when providing them with personal advice in a Statement of Advice provided on or about that date.
20. On or about 29 August 2016, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser XX, who contravened s 961G of the Act by providing advice to Mr and Mrs MM which included a recommendation that Mr and Mrs MM create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr and Mrs MM.

Mr NN and Ms OO

21. On or about 13 February 2018, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser XX, who contravened s 961B of the Act by failing to act in the best interests of his clients, Mr NN and Ms OO, when providing them with personal advice in a Statement of Advice provided on or about that date.
22. On or about 13 February 2018, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser XX, who contravened s 961G of the Act by providing advice to Mr NN and Ms OO which included a recommendation that Mr NN and Ms OO create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Mr NN and Ms OO.

Ms PP

23. On or about 23 August 2016, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser ZZ, who contravened s 961B of the Act by failing to act in the best interests of his client, Ms PP, when providing her with personal advice in a Statement of Advice provided on or about that date.
24. On or about 23 August 2016, the defendant contravened s 961K(2) of the Act by being the responsible licensee for the contravening conduct of its representative, Adviser ZZ, who contravened s 961G of the Act by providing advice to Ms PP which included a recommendation that Ms PP create an SMSF and cause the trustee of that SMSF to borrow moneys and purchase real property, which was not advice appropriate to Ms PP.

Division 4 contraventions

Adviser YY – 2017

25. The defendant separately contravened s 963E of the Act on each of the following occasions that Adviser YY being a representative for whom the defendant was the responsible licensee accepted the following conflicted remuneration:

No.	Date	Amount of Bonus
1	01/08/2016	\$1,000
2	29/08/2016	\$1,000
3	12/09/2016	\$750
4	12/09/2016	\$1,000
5	12/09/2016	\$1,000
6	26/09/2016	\$1,000
7	26/09/2016	\$1,000
8	24/10/2016	\$1,000
9	24/10/2016	\$1,000
10	24/10/2016	\$750
11	07/11/2016	\$1,000
12	07/11/2016	\$1,000
13	05/12/2016	\$750
14	05/12/2016	\$1,000
15	05/12/2016	\$750
16	05/12/2016	\$750
17	16/12/2016	\$750
18	16/12/2016	\$1,000
19	13/02/2017	\$1,000
20	22/05/2017	\$1,000
21	22/05/2017	\$1,000
22	05/06/2017	\$1,000
		\$20,500

26. The defendant separately contravened s 963J of the Act on each of the following occasions that it gave Adviser YY, its employee and representative, the following conflicted remuneration:

No.	Date	Amount of Bonus
1	01/08/2016	\$1,000
2	29/08/2016	\$1,000
3	12/09/2016	\$750
4	12/09/2016	\$1,000
5	12/09/2016	\$1,000
6	26/09/2016	\$1,000
7	26/09/2016	\$1,000
8	24/10/2016	\$1,000
9	24/10/2016	\$1,000
10	24/10/2016	\$750
11	07/11/2016	\$1,000
12	07/11/2016	\$1,000
13	05/12/2016	\$750
14	05/12/2016	\$1,000
15	05/12/2016	\$750
16	05/12/2016	\$750
17	16/12/2016	\$750
18	16/12/2016	\$1,000
19	13/02/2017	\$1,000
20	22/05/2017	\$1,000
21	22/05/2017	\$1,000
22	05/06/2017	\$1,000
		\$20,500

Adviser ZZ – 2017

27. The defendant separately contravened s 963E of the Act on each of the following occasions that Adviser ZZ being a representative for whom the defendant was the responsible licensee accepted the following conflicted remuneration:

No.	Date	Amount of Bonus
1	01/08/2016	\$1,000
2	29/08/2016	\$750
3	29/08/2016	\$1,000
4	26/09/2016	\$750
5	24/10/2016	\$1,000
6	16/12/2016	\$750
7	16/12/2016	\$1,000
8	16/12/2016	\$1,000
9	17/01/2017	\$1,000
10	13/02/2017	\$750
11	13/02/2017	\$1,000
12	13/02/2017	\$1,000
13	13/03/2017	\$750
14	13/03/2017	\$750
15	10/04/2017	\$1,000
16	22/05/2017	\$1,000
17	22/05/2017	\$1,000
18	19/06/2017	\$1,000
19	19/06/2017	\$1,000
20	19/06/2017	\$1,000
		\$18,500

28. The defendant separately contravened s 963J of the Act on each of the following occasions that it gave Adviser ZZ, its employee and representative, the following conflicted remuneration:

No.	Date	Amount of Bonus
1	01/08/2016	\$1,000
2	29/08/2016	\$750
3	29/08/2016	\$1,000
4	26/09/2016	\$750
5	24/10/2016	\$1,000
6	16/12/2016	\$750
7	16/12/2016	\$1,000
8	16/12/2016	\$1,000
9	17/01/2017	\$1,000
10	13/02/2017	\$750
11	13/02/2017	\$1,000
12	13/02/2017	\$1,000
13	13/03/2017	\$750
14	13/03/2017	\$750
15	10/04/2017	\$1,000
16	22/05/2017	\$1,000
17	22/05/2017	\$1,000
18	19/06/2017	\$1,000
19	19/06/2017	\$1,000
20	19/06/2017	\$1,000
		\$18,500

Adviser XX – 2018

29. The defendant separately contravened s 963E of the Act on each of the following occasions that Adviser XX being a representative for whom the defendant was the responsible licensee accepted the following conflicted remuneration:

No.	Date	Amount of Bonus
1	03/07/2017	\$750
2	06/11/2017	\$750
3	06/11/2017	\$750
4	06/11/2017	\$750
5	18/12/2017	\$750
6	18/12/2017	\$750
7	18/12/2017	\$750
8	22/12/2017	\$750
9	29/01/2018	\$750
10	30/01/2018	\$750
11	12/02/2018	\$750
12	07/05/2018	\$750
13	18/06/2018	\$750
		\$9,750

30. The defendant separately contravened s 963J of the Act on each of the following occasions that it gave Adviser XX, its employee and representative, the following conflicted remuneration:

No.	Date	Amount of Bonus
1	03/07/2017	\$750
2	06/11/2017	\$750
3	06/11/2017	\$750
4	06/11/2017	\$750
5	18/12/2017	\$750
6	18/12/2017	\$750
7	18/12/2017	\$750
8	22/12/2017	\$750
9	29/01/2018	\$750
10	30/01/2018	\$750
11	12/02/2018	\$750
12	07/05/2018	\$750
13	18/06/2018	\$750
		\$9,750

Adviser YY – 2018

31. The defendant separately contravened s 963E of the Act on each of the following occasions that Adviser YY being a representative for whom the defendant was the responsible licensee accepted the following conflicted remuneration:

No.	Date	Amount of Bonus
1	03/07/2017	\$1,000
2	03/07/2017	\$1,000
3	14/08/2017	\$1,000
4	29/08/2017	\$1,000
5	11/09/2017	\$1,000
6	23/10/2017	\$1,000
7	06/11/2017	\$1,000
8	06/11/2017	\$1,000
9	06/11/2017	\$1,000
10	20/11/2017	\$1,000
11	20/11/2017	\$1,000
12	20/11/2017	\$1,000
13	20/11/2017	\$1,000
14	05/12/2017	\$1,000
15	05/12/2017	\$1,000
16	05/12/2017	\$1,000
17	18/12/2017	\$1,000
18	18/12/2017	\$1,000
19	18/12/2017	\$1,000
20	18/12/2017	\$1,000
21	18/12/2017	\$1,000
22	18/12/2017	\$1,000
23	18/12/2017	\$1,000
24	22/12/2017	\$1,000
25	22/12/2017	\$1,000
26	22/12/2017	\$1,000
27	22/12/2017	\$1,000
28	29/01/2018	\$1,000

29	29/01/2018	\$1,000
30	12/02/2018	\$1,000
31	12/02/2018	\$1,000
32	26/02/2018	\$1,000
33	26/02/2018	\$1,000
34	12/03/2018	\$1,000
35	12/03/2018	\$1,000
36	12/03/2018	\$1,000
37	26/03/2018	\$1,000
38	10/04/2018	\$1,000
39	10/04/2018	\$1,000
40	22/04/2018	\$1,000
41	22/04/2018	\$1,000
42	22/04/2018	\$1,000
43	07/05/2018	\$1,000
44	21/05/2018	\$1,000
45	18/06/2018	\$1,000
		\$45,000

32. The defendant separately contravened s 963J of the Act on each of the following occasions that it gave Adviser YY, its employee and representative, the following conflicted remuneration:

No.	Date	Amount of Bonus
1	03/07/2017	\$1,000
2	03/07/2017	\$1,000
3	14/08/2017	\$1,000
4	29/08/2017	\$1,000
5	11/09/2017	\$1,000
6	23/10/2017	\$1,000
7	06/11/2017	\$1,000
8	06/11/2017	\$1,000
9	06/11/2017	\$1,000
10	20/11/2017	\$1,000
11	20/11/2017	\$1,000
12	20/11/2017	\$1,000
13	20/11/2017	\$1,000
14	05/12/2017	\$1,000
15	05/12/2017	\$1,000
16	05/12/2017	\$1,000
17	18/12/2017	\$1,000
18	18/12/2017	\$1,000
19	18/12/2017	\$1,000
20	18/12/2017	\$1,000
21	18/12/2017	\$1,000
22	18/12/2017	\$1,000
23	18/12/2017	\$1,000
24	22/12/2017	\$1,000
25	22/12/2017	\$1,000
26	22/12/2017	\$1,000
27	22/12/2017	\$1,000
28	29/01/2018	\$1,000
29	29/01/2018	\$1,000
30	12/02/2018	\$1,000

31	12/02/2018	\$1,000
32	26/02/2018	\$1,000
33	26/02/2018	\$1,000
34	12/03/2018	\$1,000
35	12/03/2018	\$1,000
36	12/03/2018	\$1,000
37	26/03/2018	\$1,000
38	10/04/2018	\$1,000
39	10/04/2018	\$1,000
40	22/04/2018	\$1,000
41	22/04/2018	\$1,000
42	22/04/2018	\$1,000
43	07/05/2018	\$1,000
44	21/05/2018	\$1,000
45	18/06/2018	\$1,000
		\$45,000

Adviser ZZ - 2018

33. The defendant separately contravened s 963E of the Act on each of the following occasions that Adviser ZZ being a representative for whom the defendant was the responsible licensee accepted the following conflicted remuneration:

No.	Date	Amount of Bonus
1	03/07/2017	\$1,000
2	01/08/2017	\$1,000
3	14/08/2017	\$1,000
4	11/09/2017	\$1,000
5	09/10/2017	\$1,000
6	06/11/2017	\$1,000
7	06/11/2017	\$1,000
8	06/11/2017	\$1,000
9	06/11/2017	\$1,000
10	06/11/2017	\$1,000
11	20/11/2017	\$1,000
12	20/11/2017	\$1,000
13	18/12/2017	\$1,000
14	18/12/2017	\$1,000
15	18/12/2017	\$1,000
16	18/12/2017	\$1,000
17	15/01/2018	\$1,000
18	15/01/2018	\$1,000
19	29/01/2018	\$1,000
20	12/02/2018	\$1,000
21	12/03/2018	\$1,000
22	12/03/2018	\$1,000
23	12/03/2018	\$1,000
24	12/03/2018	\$1,000
25	26/03/2018	\$1,000
26	26/03/2018	\$1,000
27	10/04/2018	\$1,000
28	10/04/2018	\$1,000

29	10/04/2018	\$1,000
30	10/04/2018	\$1,000
31	10/04/2018	\$1,000
32	22/04/2018	\$1,000
33	22/04/2018	\$1,000
34	04/06/2018	\$1,000
35	04/06/2018	\$1,500
36	18/06/2018	\$1,000
		\$36,500

34. The defendant separately contravened s 963J of the Act on each of the following occasions that it gave Adviser ZZ, its employee and representative, the following conflicted remuneration:

No.	Date	Amount of Bonus
1	03/07/2017	\$1,000
2	01/08/2017	\$1,000
3	14/08/2017	\$1,000
4	11/09/2017	\$1,000
5	09/10/2017	\$1,000
6	06/11/2017	\$1,000
7	06/11/2017	\$1,000
8	06/11/2017	\$1,000
9	06/11/2017	\$1,000
10	06/11/2017	\$1,000
11	20/11/2017	\$1,000
12	20/11/2017	\$1,000
13	18/12/2017	\$1,000
14	18/12/2017	\$1,000
15	18/12/2017	\$1,000
16	18/12/2017	\$1,000
17	15/01/2018	\$1,000
18	15/01/2018	\$1,000
19	29/01/2018	\$1,000
20	12/02/2018	\$1,000

21	12/03/2018	\$1,000
22	12/03/2018	\$1,000
23	12/03/2018	\$1,000
24	12/03/2018	\$1,000
25	26/03/2018	\$1,000
26	26/03/2018	\$1,000
27	10/04/2018	\$1,000
28	10/04/2018	\$1,000
29	10/04/2018	\$1,000
30	10/04/2018	\$1,000
31	10/04/2018	\$1,000
32	22/04/2018	\$1,000
33	22/04/2018	\$1,000
34	04/06/2018	\$1,000
35	04/06/2018	\$1,500
36	18/06/2018	\$1,000
		\$36,500

THE COURT ORDERS THAT:

Division 2 contraventions

1. The defendant pay to the Commonwealth a pecuniary penalty of \$300,000 in respect of the contravention the subject of declaration 1.
2. The defendant pay to the Commonwealth a pecuniary penalty of \$320,000 in respect of the contravention the subject of declaration 2.
3. The defendant pay to the Commonwealth a pecuniary penalty of \$320,000 in respect of the contravention the subject of declaration 3.
4. The defendant pay to the Commonwealth a pecuniary penalty of \$340,000 in respect of the contravention the subject of declaration 4.
5. The defendant pay to the Commonwealth a pecuniary penalty of \$300,000 in respect of the contravention the subject of declaration 5.
6. The defendant pay to the Commonwealth a pecuniary penalty of \$320,000 in respect of the contravention the subject of declaration 6.
7. The defendant pay to the Commonwealth a pecuniary penalty of \$350,000 in respect of the contravention the subject of declaration 7.
8. The defendant pay to the Commonwealth a pecuniary penalty of \$370,000 in respect of the contravention the subject of declaration 8.
9. The defendant pay to the Commonwealth a pecuniary penalty of \$350,000 in respect of the contravention the subject of declaration 9.
10. The defendant pay to the Commonwealth a pecuniary penalty of \$370,000 in respect of the contravention the subject of declaration 10.
11. The defendant pay to the Commonwealth a pecuniary penalty of \$320,000 in respect of the contravention the subject of declaration 11.
12. The defendant pay to the Commonwealth a pecuniary penalty of \$340,000 in respect of the contravention the subject of declaration 12.
13. The defendant pay to the Commonwealth a pecuniary penalty of \$350,000 in respect of the contravention the subject of declaration 13.
14. The defendant pay to the Commonwealth a pecuniary penalty of \$370,000 in respect of the contravention the subject of declaration 14.

15. The defendant pay to the Commonwealth a pecuniary penalty of \$350,000 in respect of the contravention the subject of declaration 15.
16. The defendant pay to the Commonwealth a pecuniary penalty of \$370,000 in respect of the contravention the subject of declaration 16.
17. The defendant pay to the Commonwealth a pecuniary penalty of \$375,000 in respect of the contravention the subject of declaration 17.
18. The defendant pay to the Commonwealth a pecuniary penalty of \$395,000 in respect of the contravention the subject of declaration 18.
19. The defendant pay to the Commonwealth a pecuniary penalty of \$350,000 in respect of the contravention the subject of declaration 19.
20. The defendant pay to the Commonwealth a pecuniary penalty of \$370,000 in respect of the contravention the subject of declaration 20.
21. The defendant pay to the Commonwealth a pecuniary penalty of \$350,000 in respect of the contravention the subject of declaration 21.
22. The defendant pay to the Commonwealth a pecuniary penalty of \$370,000 in respect of the contravention the subject of declaration 22.
23. The defendant pay to the Commonwealth a pecuniary penalty of \$320,000 in respect of the contravention the subject of declaration 23.
24. The defendant pay to the Commonwealth a pecuniary penalty of \$340,000 in respect of the contravention the subject of declaration 24.

Division 4 contraventions

25. The defendant pay to the Commonwealth a pecuniary penalty totalling \$220,000 in respect of the 22 contraventions the subject of declaration 25.
26. The defendant pay to the Commonwealth a pecuniary penalty totalling \$220,000 in respect of the 22 contraventions the subject of declaration 26.
27. The defendant pay to the Commonwealth a pecuniary penalty totalling \$200,000 in respect of the 20 contraventions the subject of declaration 27.
28. The defendant pay to the Commonwealth a pecuniary penalty totalling \$200,000 in respect of the 20 contraventions the subject of declaration 28.
29. The defendant pay to the Commonwealth a pecuniary penalty totalling \$130,000 in respect of the 13 contraventions the subject of declaration 29.

30. The defendant pay to the Commonwealth a pecuniary penalty totalling \$130,000 in respect of the 13 contraventions the subject of declaration 30.
31. The defendant pay to the Commonwealth a pecuniary penalty totalling \$450,000 in respect of the 45 contraventions the subject of declaration 31.
32. The defendant pay to the Commonwealth a pecuniary penalty totalling \$450,000 in respect of the 45 contraventions the subject of declaration 32.
33. The defendant pay to the Commonwealth a pecuniary penalty totalling \$360,000 in respect of the 36 contraventions the subject of declaration 33.
34. The defendant pay to the Commonwealth a pecuniary penalty totalling \$360,000 in respect of the 36 contraventions the subject of declaration 34.

The plaintiff's interlocutory process filed 11 March 2024

35. The plaintiff's interlocutory process filed 11 March 2024 be dismissed.

Costs

36. The defendant pay the plaintiff's costs of the proceeding, save for the costs of the plaintiff's interlocutory application filed 11 March 2024, as agreed or taxed.

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

REASONS FOR JUDGMENT

GOODMAN J:

A. INTRODUCTION

1 In *Australian Securities and Investments Commission v DOD Bookkeeping Pty Ltd (in liq)*, in
the matter of *DOD Bookkeeping Pty Ltd (in liq)* [2023] FCA 1622 (**LJ or liability judgment**),
I concluded that the plaintiff (**ASIC**) had established contraventions by the defendant of:

- (1) s 961K(2), within **Division 2** of Part 7.7A of the *Corporations Act 2001* (Cth), which provided that financial services licensees contravened that section if their representatives contravened, relevantly, s 961B or s 961H of the Act. There are 24 Division 2 contraventions; and
- (2) ss 963E(2) and 963J, within **Division 4** of Part 7.7A of the Act, which concerned the provision and acceptance of conflicted remuneration. There are 272 Division 4 contraventions.

2 Those contraventions arose out of advice provided by three advisers employed by the defendant, referred to as **Advisers XX, YY and ZZ**; and from the payment by the defendant and receipt by the Advisers of bonuses. All of the contraventions arose prior to the changes to the Act introduced by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) and the reasons below address the Act in its form at the time of the contraventions.

3 These reasons for judgment, which should be read together with the liability judgment, address the declaratory relief and the penalties to be imposed in respect of the contraventions.

B. ASIC'S INTERLOCUTORY PROCESS

4 Prior to addressing those subjects, it is necessary to deal with an interlocutory application brought by ASIC.

5 ASIC seeks orders, pursuant to r 39.05 of the *Federal Court Rules 2011* (Cth), for the recall of paragraphs [216] and [237] of the liability judgment so as to: (1) add three additional columns to the **table** in LJ [216]; and (2) delete the second sentence of LJ [237(2)].

6 Those paragraphs are in the following form in the liability judgment:

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

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

...

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

- (1) the pattern of conduct of the payment of bonuses (including the number and quantum of such payments) following the purchase of properties where such purchases had been recommended by the Advisers could reasonably have been expected to have created an expectation on the part of the Advisers that future recommendations to purchase properties would similarly be rewarded by bonus payments; and
- (2) the conclusion that there was a reasonable expectation that the existence of the bonuses could reasonably have been expected to influence the Advisers' recommendations and advice is strengthened by the evidence as to the proportion of the bonus payments to the Advisers' total income. *As the table at [216] above illustrates, in many instances the bonuses comprised approximately 40 per cent of the Adviser's total remuneration.* It could reasonably have been expected that the Advisers would have been influenced to favour a course which created (or maintained) a higher income for themselves.

(italic emphasis added)

7 The proposed additional columns are as follows:

Year ended 30 June	Adviser	Salary and Wages	Bonus	Total remuneration	Bonus as a % of total remuneration	BONUS RELATED TO PURCHASE OF PROPERTY THROUGH AN SMSF	Bonus given after SMSF purchase as a % of total remuneration	Number of payments relating to SMSF purchase
2016	XX	\$18,750.03	-	\$18,750.03	-	-	-	-
2016	YY	\$147,692.29	\$98,000	\$245,692.29	39.89	\$6,000	2.44%	8
2016	ZZ	\$147,692.28	\$81,750	\$229,442.28	35.63	\$6,750	2.94%	9
2017	XX	\$74,134.72	\$24,250	\$98,384.72	24.65	\$2,500	2.54%	3
2017	YY	\$141,346.14	\$94,500	\$235,846.14	40.07	\$20,500	8.69%	22
2017	ZZ	\$147,692.29	\$101,750	\$249,442.29	40.79	\$18,500	7.42%	20
2018	XX	\$78,491.61	\$30,000	\$108,491.61	27.65	\$9,750	8.99%	13
2018	YY	\$145,075.23	\$93,500	\$238,575.23	39.19	\$45,000	18.86%	45
2018	ZZ	\$145,384.59	\$92,500	\$237,884.59	38.88	\$36,500	15.34%	36

8 Rule 39.05 provides in so far as is presently relevant:

39.05 Varying or setting aside judgment or order after it has been entered

The Court may vary or set aside a judgment or order after it has been entered if:

...

- (g) there is a clerical mistake in a judgment or order; or
- (h) there is an error arising in a judgment or order from an accidental slip or omission.

9 I am not satisfied that either the non-inclusion of the columns that ASIC seeks be added to the table, or the inclusion of the italicised sentence in LJ [237], was a clerical mistake or an error arising from an accidental slip or omission. Rather, each was the product of deliberate decisions in the drafting of the liability judgment and as such r 39.05 is inapt, particularly to correct any contended errors in the reasoning process in that judgment: see *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 [17] to [18] (Katzmann J); *Nyoni v Murphy* [2018] FCAFC 75; (2018) 261 FCR 164 at 173 [46] (Barker, Banks-Smith and Colvin JJ) and the authorities there cited. I note that the deliberate decisions referred to in the previous sentence did not include a decision to omit the columns now sought to be added – such columns did not previously exist, rather the table was the product of the Court’s own endeavours to extract information from the evidence presented.

10 It follows that the interlocutory process should be dismissed.

11 ASIC's proposed changes appear to be directed at exposing the bonuses attributable to those
payable as a result of the purchase of real property through a self-managed superannuation fund
(SMSF) – as opposed to all bonuses received by the Advisers – as a proportion of the Advisers'
remuneration. ASIC's evidence and submissions concerning the narrower set of bonuses can
(and will) be taken into account in any event in considering the issues addressed below.

C. DECLARATORY RELIEF

12 ASIC seeks declaratory relief in respect of the 24 Division 2 contraventions and the 272
Division 4 contraventions.

13 Section 1317E of the Act provided that if this Court is satisfied that a person has contravened
a civil penalty provision, then the Court must make a declaration of contravention.

14 Sections 961K(2), 963E(2) and 963J were each civil penalty provisions: s 1317E(1), items 18,
23 and 26. Thus, declarations must be made in respect of the various contraventions.

15 The declarations must contain the matters described in s 1317E(2) of the Act. For that reason,
the declarations that I will make are more specific than the draft declarations proposed by
ASIC.

D. PENALTIES

D.1 Introduction

16 I turn now to consider the penalties to be imposed for the various contraventions. As each of
ss 961K(2), 963E(2) and 963J of the Act was a civil penalty provision, s 1317G of the Act
applied to the contraventions. It provided in so far as is presently relevant:

1317G Pecuniary penalty orders

Best interests obligations and remuneration

(1E) A Court may order a person to pay the Commonwealth a pecuniary
penalty if:

- (a) a declaration of contravention by the person has been made
under section 1317E; and
- (b) the contravention is of one of the following provisions:
 - (i) subsections 961K(1) and (2) (financial services
licensee responsible for breach of certain best
interests duties);

...

(vi) subsections 963E(1) and (2) (financial services licensee must not accept conflicted remuneration);

...

(ix) section 963J (employer must not pay employees conflicted remuneration);

...

(1F) The maximum amount that the court may order the person to pay for contravening a provision mentioned in paragraph (1E)(b) ... is:

...

(b) \$1 million for a body corporate.

17 Thus, for each contravention of ss 961K, 963E(2) and 963J of the Act, in circumstances where declarations will have been made, the Court may order that the defendant (being a body corporate) pay a pecuniary penalty of up to \$1,000,000.

D.2 Relevant principles

18 The Act did not prescribe any considerations to be taken into account in setting penalties, save that the maximum penalty for each contravention is \$1,000,000. Thus, the penalties are to be set by reference to well-established general principles.

19 The approach to be taken in deciding what penalties are appropriate was explained by the High Court of Australia in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450. In *Pattinson*, the plurality (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) explained that civil penalties, in contrast to punishments imposed by the criminal justice system, are imposed primarily, if not solely, for the purpose of deterrence (specific and general): *Pattinson* at 457 ([9] to [10]) and 459 to 460 ([15] to [17]). The penalty must be sufficiently high that it is not considered to be an acceptable cost of doing business, but should not exceed what is necessary to achieve the object of deterrence: *Pattinson* at 457 [10], 460 [17] and 475 [66].

20 A penalty is not to be fixed by reference to its proportionality to the seriousness of the contravening conduct, because that reflects an objective of retribution that is not an objective of a civil penalty regime. Rather, the Court is required to ensure that the penalty imposed is “proportionate” in the sense that it strikes a reasonable balance between deterrence and oppressive severity in the particular case: *Pattinson* at 457 [10], 467 to 469 ([40] to [43]) and 470 [46].

- 21 The maximum penalty is but one “yardstick that ordinarily must be applied” among other factors: *Pattinson* at 472 ([53] to [54]). See also *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [31] and *Australian Competition and Consumer Commission v Reckitt Benckiser Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 at [155] to [156] (*ACCC v Reckitt*).
- 22 In determining what is reasonably necessary to achieve specific and general deterrence, relevant considerations may include those set out in *Pattinson* at 460 [18], being those identified by French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR¶41-076 at 52,152 to 52,153. See also *Australian Competition and Consumer Commission v Employsure Pty Ltd* [2023] FCAFC 5; (2023) 407 ALR 302 at 314 [50] (Rares, Stewart and Abraham JJ). Those factors concern both the character of the contravention and the character of the contravenor: *Pattinson* at 460 to 461 [19]. However, such factors are not to be regarded as a rigid catalogue or checklist: *Pattinson* at 460 to 461 [19]. The Court’s discretion with respect to penalties is broad but is to be exercised judicially, that is fairly and reasonably having regard to the subject matter, scope and purpose of the Act: *Pattinson* at 467 to 468 [40]. The task is to determine the appropriate penalty in the particular case: *Pattinson* at 460 to 461 [19].
- 23 The concepts of course of conduct, parity and totality may also be useful analytical tools in assessing what may be considered reasonably necessary to deter further contraventions: *Pattinson* at 469 to 470 [45].
- 24 In the present case, the defendant is, and has since October 2020 been, in liquidation: LJ [16]. A consequence of liquidation is that specific deterrence is of limited relevance as any pecuniary penalty imposed would not be admissible to proof (s 553 of the Act). Nevertheless the object of general deterrence endures, and it remains appropriate to make an order for the payment of penalties as a measure of the Court’s disapproval of the contravening conduct, and as a measure of the seriousness with which the Court regards such contraventions: see e.g., *Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liq) (No 2)* [2015] FCA 93 at [12] (Davies J); *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 4)* [2020] FCA 1499; (2020) 148 ACSR 511 at 519 to 521 ([33] to [35]) (Beach J).
- 25 The factors of particular relevance to the exercise of the Court’s discretion in the present case, focussing upon general deterrence, are discussed below.

D.3 The nature and extent of the contravening conduct and the circumstances in which it took place

26 The nature and extent of the contravening conduct is set out at length in the liability judgment which, as noted above, is to be read together with these reasons for judgment. An overview of that conduct is set out below.

27 Each of the Advisers provided advice to clients of the defendant. That advice was provided in the form of written Statements of Advice (**SOAs**) on the letterhead of the defendant. Each of the relevant clients was advised to establish an SMSF and to rollover their existing superannuation into the newly established SMSF. The SOAs followed a template format and contained a significant amount of common, or boilerplate, text. In particular, the following matters were common to each of the SOAs:

- (1) a covering letter in the same form, which included: “This Statement of Advice is a comprehensive document that contains our advice and recommendations”;
- (2) a generic summary of “risks”, which was not tailored to the individual client; and
- (3) the clients were given advice (the **usual advice**) to:
 - (a) have the trustee of the SMSF purchase a property within the SMSF; and
 - (b) borrow to fund the purchase of the property.

D.3.1 The Division 2 case and the Division 2 contraventions

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

961K Civil penalty provision—sections 961B, 961G, 961H and 961J

...

- (2) A financial services licensee contravenes this section if:
 - (a) a representative, other than an authorised representative, of the licensee contravenes section 961B, 961G, 961H or 961J; and
 - (b) the licensee is the, or a, responsible licensee in relation to that contravention.

29 Thus, as noted at [1] above, s 961K(2) imposed a direct form of liability on the defendant, *qua* financial services licensee if a representative other than an authorised representative of the defendant contravened, *inter alia*, s 961B or s 961G of the Act, and the defendant was the, or a, responsible licensee in relation to that contravention.

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.

31 Section 961G of the Act provided:

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.

32 I was satisfied that the defendant contravened s 961K(2) of the Act by dint of contraventions of ss 961B and 961G of the Act by the Advisers.

33 In this respect, the Division 2 case focussed upon the advice provided by Advisers XX, YY and ZZ to 12 client groups, identified as Mr and Mrs AA, Mr and Mrs BB, Mr and Mrs CC, Mr and Mrs DD, Mr and Mrs EE, Mr and Mrs FF, Ms GG, Mr HH and Ms JJ, Mr KK and Ms LL, Mr and Mrs MM, Mr NN and Ms OO, and Ms PP.

34 I held that:

- (1) none of the 12 client groups had an extant SMSF and each was advised to establish an SMSF;
- (2) each client group received advice in the form of an SOA;
- (3) the SOA contained advice to: establish an SMSF; roll existing superannuation into the SMSF; have the trustee of SMSF purchase real property and borrow funds to do so;
- (4) the advice was implemented; and
- (5) for each of the 12 client groups, the clients provided authority to proceed with the advice given in the SOA on the same day that the SOAs were provided to them.

35 In so far as the contraventions of s 961K of the Act rested upon s 961B of the Act I also held that each of the Advisers contravened s 961B and in particular that:

- (1) for *all* of the clients:
 - (a) the SOAs were not tailored to their needs. In this regard: (a) there was substantial repetition and use of boilerplate text within the SOAs; (b) the stated objectives for each client were essentially identical; (c) the wording in the SOAs concerning the scope of the advice was almost identical for each client; and (d) the advice given to each client was very similar and included the usual advice;
 - (b) there was no evidence of consideration of alternative investments, e.g., investing in property outside of an SMSF. There was also no evidence of

consideration of the advantages and disadvantages of alternatives as against the recommended strategy of investment in property within an SMSF;

- (c) the clients were not allowed sufficient time to understand the advice that had been recommended to them. As noted above, in each case the authority to proceed was signed by the clients on the same day as the SOA was dated. This was clearly insufficient time to consider the advice given, particularly as there is a level of complexity concerning the establishment and operation of an SMSF;
- (2) the advice provided to *each* of the clients was not in their best interests for reasons including the following:
- (a) the initial costs to establish the SMSF and recommended portfolios were excessive and would require several years for the clients to return to a break-even position (if at all);
 - (b) the ongoing costs associated with the recommended advice were well in excess of the existing costs being incurred by the clients. The average increase in costs ranged from 2.5 times to 3.3 times (depending on whether property expenses were included);
 - (c) the advice given to the clients was not presented to them in a way that they could make informed decisions;
 - (d) the defendant's files did not reveal an adequate consideration of alternatives;
 - (e) the asset allocation for the clients contained a much higher allocation to property than what was recommended by the defendant;
 - (f) the overall allocation to growth assets was higher than had been recommended by the defendant for the clients' risk profiles; and
 - (g) the Advisers did not prioritise the various objectives of the clients.

36 Additional, more specific, findings included that:

- (1) Adviser XX failed to:
 - (a) specify when Mr and Mrs DD wanted to retire, or to specify any retirement income target, in circumstances where ascertaining the living expense requirements for a client is critical in being able to prepare appropriate advice.

The SOA also inappropriately “scoped out” advice in relation to transition to retirement strategies;

- (b) identify that no information had been gathered in relation to Mr KK and Ms LL’s living expenses. Such information would have been critical in relation to the provision of advice to clients aged 64 and 57 and thus very close or close to retirement; and
 - (c) address cashflow following Mrs MM’s then very recent redundancy. This should have been a priority, particularly in relation to a client for whom Adviser XX was recommending an increase in overall debt levels;
- (2) Adviser YY failed to:
- (a) address retirement planning for Mr and Mrs AA;
 - (b) address how Mr and Mrs CC should seek to achieve their goals of building up a deposit for a home and building wealth outside superannuation;
 - (c) identify the following key issues concerning Mr and Mrs EE: (i) addressing their negative cashflow position; and (ii) presenting strategies in relation to educating their children;
 - (d) identify the following key issues concerning Mr HH and Ms JJ:
 - (i) as Mr HH and Ms JJ intended to relocate to New Zealand, Adviser YY should have gathered further information such as potential timing, likely outcomes in terms of selling their home in Australia and purchase in New Zealand and the level of importance attached to this goal;
 - (ii) some of the goals that they had identified – e.g., Mr HH and Ms JJ’s indication that they wished to fund their children’s education – were not included in the SOA. Adviser YY should have gathered information in relation to the potential timing of this goal and the likely annual amount of school fees;
- (3) Adviser ZZ failed to:
- (a) address Mr and Mrs BB’s goal of upgrading their property;
 - (b) identify the following key issues concerning Ms GG: (i) addressing the purchase of her own home, which was a priority; (ii) addressing repayment of her long-term loan; and (iii) planning for her retirement to ensure she would be

financially secure. Her superannuation balance at age 48 appeared quite low and should have been addressed as a priority;

- (c) address Ms PP's inheritance. The SOA identified that she had an inheritance of \$100,000, as well as \$85,000 in an offset account, but contained no advice in relation to this capital;
- (4) for a number of clients, there was an inappropriate deferral of advice concerning salary sacrifice, when this was part of the subject matter for the advice. In particular:
 - (a) for Mr and Mrs AA and Mr and Mrs MM – the advice was inappropriately deferred to preservation age; and
 - (b) for Mr and Mrs EE, Mr and Mrs FF, Mr HH and Ms JJ and Mr NN and Ms OO – the advice was deferred until next review.

37 In so far as the contraventions of s 961K of the Act rested upon s 961G of the Act, I also held that:

- (1) there were many areas in which the advice given was inappropriate in respect of *all* of the clients, including:
 - (a) the advice given to each client was the usual advice;
 - (b) there was an inadequate comparative analysis undertaken by the Advisers as to whether the clients' superannuation funds would be better placed as they were or in an SMSF (including initial and ongoing administration and maintenance fees, insurance options and insurance premiums);
 - (c) the absence of disclosure of such analysis and of the initial and ongoing fees for the SMSF;
 - (d) inadequate disclosure of the costs involved in the purchase of the property and the impact of such costs upon the clients' superannuation balances;
- (2) a particular feature which rendered inappropriate the advice given to each of the clients was the lack of tailoring of the advice to the particular clients. That is, each individual or pair of clients was advised to establish an SMSF and to cause the trustee of the SMSF to purchase a property, regardless of their individual circumstances. In other words, a "cookie-cutter" approach to the provision of advice was in use;

- (3) this approach was particularly evident in the asset allocations in the SOAs. The asset allocations which resulted from implementation of the advice contained in the SOAs were: (a) strikingly different from that which were expressly suggested in the SOA; (b) excessively weighted to exposure to real property assets. As I noted at LJ [177], by any measure the actual exposure of the clients to such high levels of real property assets was inappropriate. Such exposure suggested that little to no heed was paid to the particular circumstances of the clients and that the advice was instead focussed upon manoeuvring the clients into property purchases through SMSFs. Relevantly, this occurred in a context in which the Advisers were rewarded with bonus payments for each such property purchase made; and
- (4) there was a series of other areas in which the advice given to particular clients was inappropriate. For the most part those areas were a function of the central defect, being the failure to attend to the requirements of particular clients and instead to manoeuvre the clients into a pre-determined model of advice which rewarded the Advisers for doing so.

38 The contravening conduct was plainly deliberate and extended over a period of several years.

39 Some matters of particular importance in the circumstances surrounding the contraventions are:

- (1) the recipients of the advice and its consequences being persons seeking advice with respect to their superannuation, a subject matter with important and potentially long-lasting and life-changing consequences for the recipients;
- (2) the advice being given in the context of an incentivised workplace environment, which rewarded the provision of the usual advice, to the benefit of the Advisers and to the detriment of the clients;
- (3) the benefits derived by the defendant. The defendant was entitled to fees in connection with steps taken to implement certain aspects of the advice provided by the Advisers. For example the defendant charged the clients an SMSF establishment fee (either \$900 or \$1,650); SMSF Warrant costs (i.e., to establish a security trustee and bare trust to permit borrowing in the SMSF) (\$3,850); and SMSF Administration Costs (\$2,376 per annum);

- (4) the benefits derived by the defendant’s related companies. In particular:
- (a) Equiti Property, a related company (see LJ [13]), received more than \$300,000 with respect to the transactions implemented for the 12 individual and pairs of clients; and
 - (b) Mr and Mrs DD, Mr KK and Ms LL, Ms PP and Mr and Mrs MM purchased real property in the “Blue Haven” development, the vendor of which was Circle Holdings Pty Ltd. The shareholder of Circle Holdings was Travolta Holdings Pty Ltd, of which Mr Danny Assabgy (the founder of the Equiti group of companies) was the sole director and also, together with his wife, Julie Assabgy, a shareholder.

D.3.2 Division 4 case and the Division 4 contraventions

40 The Division 4 case concerned contraventions of ss 963J and 963E of the Act by reason of bonus payments – each between \$750 and \$1,500 – made by the defendant as follows:

Recipient of bonuses	Financial year	Number of bonus payments	Total value of bonuses paid
YY	2017	22	\$20,500
ZZ	2017	20	\$18,500
XX	2018	13	\$9,750
YY	2018	45	\$45,000
ZZ	2018	36	\$35,000
		Total 136	

41 Section s 963J of the Act provided:

963J Employer must not give employees conflicted remuneration

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

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

963E Licensee must not accept conflicted remuneration

...

- (2) A financial services licensee contravenes this section if:
 - (a) a representative, other than an authorised representative, of the licensee accepts conflicted remuneration; and
 - (b) the licensee is the, or a, responsible licensee in relation to the contravention.

43 I was satisfied that the defendant contravened both of those sections because the bonus payments made to the Advisers in the relevant years were “conflicted remuneration” within the meaning of that term in s 963A of the Act and:

- (1) the defendant gave the bonuses to the Advisers; and
- (2) the Advisers, as representatives of the defendant, accepted the bonuses.

44 In reaching the conclusion that the bonuses were conflicted remuneration, I found, *inter alia*, that:

- (1) the defendant maintained a spreadsheet which included details of property sales where the defendant’s clients (including the corporate trustees of the SMSFs) were the purchasers (**Property Sales Register**);
- (2) it was clear from the Property Sales Register that the bonuses were paid regularly to the relevant Adviser after the sale of a property had settled, but not otherwise;
- (3) it was plain, objectively, that the payment of such bonuses – following the purchase of properties which purchases occurred by reason of the implementation of advice given by the Advisers recommending such purchases – likely created an expectation that future purchases of property upon the recommendations of the Advisers would also produce future bonus payments;
- (4) the bonuses could reasonably have been expected to influence both the choice of financial product recommended to the defendant’s clients and the financial product advice given to those clients, when:
 - (a) the *nature* of the benefit was a monetary amount payable to the Advisers;
 - (b) the *circumstances* in which the benefits were given included:
 - (i) the employment contracts of the Advisers which contained a bonus clause;

- (ii) the fact that the bonus payments were made regularly following the purchases of the properties which the Advisers recommended be purchased;
 - (iii) the payment of bonuses being far from an isolated incident of the Advisers' employment and remuneration and likely to have played a significant role in both; and
- (5) the pattern of conduct of the payment of bonuses (including the number and quantum of such payments) following the purchase of properties where such purchases had been recommended by the Advisers could reasonably have been expected to have created an expectation on the part of the Advisers that future recommendations to purchase properties would similarly be rewarded by bonus payments.

45 The contravening conduct, again, was plainly deliberate. The bonuses were freely given – whenever a settlement of real property occurred following advice to invest in real property – and formed part of the employment contracts between the defendant and Advisers XX, YY and ZZ.

46 The contravening conduct comprising the contraventions occurred over a lengthy period, which again suggests that such conduct was deliberate.

D.4 The loss or damage caused by the contravening conduct

D.4.1 The Division 2 contraventions

47 There is no evidence of the long term impact of the advice given to the 12 client groups. Nevertheless, it may be noted that:

- (1) at least six of the 12 client groups expressly stated an objective of wanting to reduce debt, but the effect of the advice when implemented was that their debt in fact increased (via contingent liabilities they assumed under guarantees in their name). For example, in respect of Mr and Mrs DD, the advice by Adviser XX, having the effect, as it did, of increasing their debt (by another \$233,000) was inappropriate in circumstances where Mr and Mrs DD were close to retirement age and already carried substantial pre-existing debt;
- (2) the fees connected to the recommendation given to each of the 12 client groups were high, which had the consequence of significantly reducing the size of their net superannuation investments. It is likely that there would have been a significant period

of time before the portfolios of the clients returned to their starting value or generated a positive return;

- (3) the ongoing fees incurred by at least nine of the 12 client groups were high and for all of the client groups were well in excess of the existing costs being incurred by the clients (LJ [159(2)];
- (4) the SOAs did not adequately disclose other costs, such as ongoing property expenses and ongoing financial advice fees; and
- (5) for some of the client groups, the effect of implementing the recommendations given by the Advisers was that their insurance premiums increased without any disclosed reason justifying such an increase.

D.4.2 The Division 4 contraventions

48 I am not satisfied that the payment of bonuses led to any loss over and above that caused by the Division 2 contraventions with respect to the 12 client groups.

D.5 Maximum Penalty

49 As noted above, the maximum penalty for each contravention is \$1,000,000. This is to be taken into account in the manner described at D.2 above.

D.6 Course of Conduct

50 I turn now to consider whether there ought be an adjustment made on the basis that there is a relationship between separate acts sufficient to consider various contraventions to be part of the same transaction or course of conduct. In *Australian Securities and Investments Commission v Select AFSL Pty Ltd (No 3)* [2023] FCA 723; (2023) 171 ACSR 331 at 337 [21] to [22] (*ASIC v Select*), Abraham J explained:

- 21. Ordinarily, separate contraventions arising from separate acts should attract separate penalties. However, where separate acts give rise to separate contraventions that are inextricably interrelated, they may be regarded as a “course of conduct” for penalty purposes: *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243; 357 ALR 55; [2018] FCAFC 73 at [234]. This avoids double punishment for those parts of the legally distinct contraventions that involve overlap in wrongdoing: see, for example, *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1; [2010] FCAFC 39 at [39] and [41]. Whether the contraventions should be treated as a single course of conduct is fact specific, having regard to all of the circumstances of the case.

22 Characterising a number of contraventions as one course of conduct does not mean that the course of conduct is capped at the maximum penalty for one contravention. The maximum penalty for the course of conduct is not restricted to the prescribed statutory maximum penalty for any single contravening act: *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (t/a Bet365) (No 2)* [2016] FCA 698 at [24]. It does not proceed as if it is only one contravention: *Australian Competition and Consumer Commission v Unique International College Pty Ltd* [2019] FCA 1773 at [52]. The penalties ultimately imposed are of an appropriate deterrent value, having regard to the actual, substantive wrongdoing.

51 In *Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73; (2018) 262 FCR 243, to which her Honour refers, the Full Court (Allsop CJ, Middleton and Robertson JJ) explained at 296 [234]:

The “course of conduct” or “one transaction” principle means that consideration should be given to whether the contraventions arise out of the same course of conduct or the one transaction, to determine whether it is appropriate that a “concurrent” or single penalty should be imposed for the contraventions. The principle was explained by Middleton and Gordon JJ in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461; 269 ALR 1 at [39]:

The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is “the same criminality” and that is necessarily a factually specific enquiry.

D.6.1 Division 2 contraventions

52 Although there was a pattern to the Division 2 contraventions in the sense that there was a repetition of the “cookie-cutter” type advice given, it is not appropriate to regard those contraventions as a single course of conduct. Rather, the giving of financial advice to each of the 12 client groups involved a separate client interaction which does not attract the course of conduct principle.

53 However, the penalties to be imposed in respect of the Division 2 contraventions should be adjusted to take into account the fact that each contravention arose, in respect of each of the client groups, out of a single SOA: see *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 (*ASIC v Westpac 2019*) at [291] (Wigney J); *Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Pty Ltd* [2022] FCA 1105 (*ASIC v Dixon*) at [49] (McEvoy J).

54 Nevertheless, it is necessary to take into account the differences between the contraventions of s 961K deriving from the contraventions by the Advisors of s 961B(1), on the one hand, and the contraventions deriving from the contraventions by the Advisors of s 961G, on the other: see *ASIC v Westpac 2019* at [292].

D.6.2 Division 4 contraventions

55 The single course of conduct principle has a significant role to play in the determination of penalties for the Division 4 contraventions, as the conduct amounting to a contravention of each of ss 963E and s 963J of the Act was essentially the same. ASIC does not seek separate penalties for the contravention of each of those provisions and seeks, in effect, that the total penalties for the Division 4 contraventions (136 contraventions of s 963E and 136 contraventions of s 963J) reflect the penalties to be imposed for 136 contraventions, rather than for 272 contraventions. I agree that this is appropriate.

D.6.3 Division 2 and Division 4 contraventions

56 There is no basis for treating the Division 2 contraventions on the one hand and the Division 4 contraventions on the other as arising out of the same course of conduct.

D.7 Parity

57 ASIC made submissions as to penalties imposed in other cases, noting that “[t]he quantum of penalties imposed in other cases can seldom be of very much direct assistance” because each case must “be viewed on its own facts”, although, at the same time, “other things being equal, corporations guilty of similar contraventions should incur similar penalties”: see *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 at 295 (Burchett and Kiefel JJ) and the authorities there cited. In particular ASIC referred to the penalties imposed in *Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2021] FCA 1008; (2021) 156 ACSR 614 (O’Byrne J); *ASIC v Dixon*; *Australian Securities and Investments Commission v Forex Capital Trading Pty Limited* [2021] FCA 570 (Middleton J) and *ASIC v Select*. I have had regard to each of those decisions.

D.8 Conclusion as to penalties and totality

58 The factors set out above are to be taken into account as part of a multifactorial consideration that leads to a result arrived at as a result of “instinctive synthesis”: see *ACCC v Reckitt* at 37 to 38 [44]; *ASIC v Westpac 2019* at [261]; *ASIC v Select* at 337 [18].

59 Instinctive synthesis is the “method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case”: see *Markarian* at 377 to 378 [51] (McHugh J).

60 As ASIC submitted, of the various relevant factors, none are mitigating factors. On the other hand, there are several aggravating factors, including that the contravention took place in the context of advice concerning superannuation, as well as the deliberate nature of the contraventions and the substantial period over which the contraventions occurred.

61 ASIC seeks a total penalty of \$11,000,000, apportioned as follows:

- (1) \$8,000,000 for the 24 contraventions of 961K of the Act – being approximately \$400,000 for each of the 12 contraventions of s 961B of the Act and approximately \$260,000 for each of the 12 contraventions of s 961G of the Act (including a discount of 35 per cent for the contraventions of s 961G of the Act as occurred in *ASIC v Dixon*); and
- (2) \$3,000,000 for the contraventions of ss 963E(2) and 963J of the Act, on the basis that these contraventions are treated as 136, rather than 272, contraventions.

62 As to (1), ASIC’s submissions did not differentiate between the 24 contraventions of s 961K of the Act and instead treated them as uniform contraventions. However, despite the existence of many common attributes the circumstances of those contraventions were not uniform (see LJ [73] to [153]) and this should be reflected in the penalties imposed.

63 As to (2), and as noted above I agree that treating the contraventions as 136, rather than 272, contraventions is consistent with the course of conduct principle. I also agree that the contraventions are sufficiently similar that a uniform penalty should be imposed.

64 Having taken into account all of the considerations set out above, I have reached the following conclusions as to the penalties to be imposed.

65 For the Division 2 contraventions, the following penalties are appropriate:

	Clients the subject of the contraventions	Contravention of s 961K(2) via s 961B	Contravention of s 961K(2) via s 961G
1.	Mr and Mrs AA	\$300,000	\$320,000
2.	Mr and Mrs BB	\$320,000	\$340,000
3.	Mr and Mrs CC	\$300,000	\$320,000
4.	Mr and Mrs DD	\$350,000	\$370,000
5.	Mr and Mrs EE	\$350,000	\$370,000
6.	Mr and Mrs FF	\$320,000	\$340,000
7.	Ms GG	\$350,000	\$370,000
8.	Mr HH and Ms JJ	\$350,000	\$370,000
9.	Mr KK and Ms LL	\$375,000	\$395,000
10.	Mr and Mrs MM	\$350,000	\$370,000
11.	Mr NN and Ms OO	\$350,000	\$370,000
12.	Ms PP	\$320,000	\$340,000
	TOTAL	\$4,035,000	\$4,275,000

66 Thus, the total penalty for the Division 2 contraventions should be \$8,310,000.

67 For the Division 4 contraventions, a total penalty of \$2,720,000 is appropriate.

68 I turn now to consider the principle of totality. As Abraham J explained in *ASIC v Select* at 337 [23]:

The principle of totality requires the Court to make a “final check” of the penalties to be imposed on a wrongdoer, considered as a whole, to ensure that the total penalty does not exceed what is proper or appropriate for the entire contravening conduct: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238; 145 ALR 36 at 53, citing *Mill v R* (1988) 166 CLR 59; 83 ALR 1.

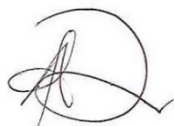
69 Having considered this principle, I am satisfied that the total penalty of \$11,030,000 (\$8,310,000 plus \$2,720,000) does not exceed the appropriate penalty for all of the Division 2 and Division 4 contravening conduct.

E. CONCLUSION

70 For the reasons set out above, declarations of contravention must be made. Orders for the payment of pecuniary penalties – in the amounts described above – are also appropriate. Costs should follow the event, with the consequence that the defendant should pay the plaintiff's costs save with respect to the plaintiff's interlocutory application. I will make orders accordingly.

I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman.

Associate:

A handwritten signature in black ink, consisting of a stylized 'A' followed by a large, sweeping loop that ends in a small checkmark.

Dated: 24 April 2025