FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Mercer Financial Advice (Australia) Pty Ltd [2023] FCA 1453

File number(s):	VID 366 of 2022
Judgment of:	**MCEVOY J**
Date of judgment:	23 November 2023
Catchwords:	**CORPORATIONS** – where defendant holds an Australian financial services licence – defendant contravened ss 962P, 962S(1), 912A(1)(a) and (c) of the *Corporations Act 2001* (Cth) and ss 12DB(1)(a), (e) and (i) of the *Australian Securities and Investments Commission Act 2001* (Cth) – defendant charged ongoing fees to certain clients after the deemed termination of their arrangement, failed to give certain clients a "fee disclosure statement" and made certain false and misleading representations – where defendant admitted contravening the relevant legislative provisions and parties jointly proposed declarations of contravention – where plaintiff sought imposition of single pecuniary penalty of $20 million and defendant proposed single penalty of $8.5 million – consideration of whether the proposed declarations appropriate – consideration of appropriate penalty in the circumstances – penalty of $12 million found to be appropriate – consideration of adverse publicity order – adverse publicity order made in form of a press release
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAB(1), 12DB(1), 12GBA, 12GBB, 12GBCA, 12GLB *Corporations Act 2001* (Cth) ss 761A, 766B(3), 962A(1), 962C(1), 962F, 962G, 962H, 962P, 962S(1), 912A(1), 1101B, 1317E, 1317G, Pt 7.7A *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) *Crimes Act 1914* (Cth) s 4AA *Evidence Act 1995* (Cth) ss 191 *Federal Court of Australia Act 1976* (Cth) s 21 *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth)
Cases cited:	*Australian Building and Construction Commissioner v*

Construction, Forestry, Mining and Energy Union (2017) 254 FCR 68; [2017] FCAFC 113

Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (2018) 262 CLR 157; [2018] HCA 3

Australian Building and Construction Commissioner v Pattinson (2022) 274 CLR 450; [2022] HCA 13

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (2015) 327 ALR 540; [2015] FCA 330

Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union [2007] ATPR 42-140; [2006] FCA 1730

Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3) (2005) 215 ALR 301; [2005] FCA 265

Australian Competition and Consumer Commission v MSY Technology Pty Ltd (2012) 201 FCR 378; [2012] FCAFC 56

Australian Competition and Consumer Commission v Multimedia International Services Pty Ltd (2016) 243 FCR 392; [2016] FCA 439

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (2016) 340 ALR 25; [2016] FCAFC 181

Australian Competition and Consumer Commission v Telstra Corporation Ltd (2010) 188 FCR 238; [2010] FCA 790

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640; [2013] HCA 54

Australian Competition and Consumer Commission v Yazaki Corporation (2018) 262 FCR 243; [2018] FCAFC 73

Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 4) (2020) 148 ACSR 511; [2020] FCA 1499

Australian Securities and Investments Commission v Allianz Australia Insurance Limited [2021] FCA 1062

Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2) (2020) 377 ALR 55; [2020] FCA 69

Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited (2022) 164 ACSR 64; [2022] FCA 1115

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3) [2020] FCA 1421

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited [2023] FCA 256

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited [2023] FCA 1150

Australian Securities and Investments Commission v Aware Financial Services Australia Ltd [2022] FCA 146

Australian Securities and Investments Commission v Axis International Management Pty Ltd (2009) 178 FCR 485; [2009] FCA 852

Australian Securities and Investments Commission v BT Funds Management Limited [2021] FCA 844

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 790

Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2) [2021] FCA 966

Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd [2022] FCA 1105

Australian Securities and Investments Commission v Financial Circle (2018) 131 ACSR 484; [2018] FCA 1644

Australian Securities and Investments Commission v GE Capital Finance Australia [2014] FCA 701

Australian Securities and Investments Commission v GetSwift Limited (Penalty Hearing) [2023] FCA 100

Australian Securities and Investments Commission v Healey (No 2) (2011) 196 FCR 430; [2011] FCA 1003

Australian Securities and Investments Commission v MLC Limited [2023] FCA 539

Australian Securities and Investments Commission v MLC Nominees Pty Ltd (2020) 147 ACSR 266; [2020] FCA 1306

Australian Competition and Consumer Commission v Murray Goulburn Co-Operative Co Ltd [2018] FCA 1964

Australian Securities and Investments Commission v National Australia Bank Limited [2021] FCA 1013

Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3) [2015] NSWSC 1527

Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 3) (2022) 158 ACSR 321; [2022] FCA 84

Australian Securities and Investments Commission v Westpac Banking Corporation (No 3) (2018) 131 ACSR 585; [2018]

FCA 1701

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

Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus) [2022] FCA 515

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

Australian Securities Commission v Donovan (1998) 28 ACSR 583

Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex relatione Corporate Affairs Commission (1981) 148 CLR 121

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482; [2015] HCA 46

Construction, Forestry, Maritime, Mining and Energy Union v Richard Crookes Constructions Pty Ltd [2022] FCA 992

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421;

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

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

Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2) (2014) 97 ACSR 412; [2014] FCA 27

Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler (2002) 42 ACSR 80; [2002] NSWSC 483

Rural Press Limited v ACCC (2003) 216 CLR 53; [2003] HCA 75

Singtel Optus Pty Ltd v Australian Competition and Consumer Commission (2012) 287 ALR 249; [2012] FCAFC 20

Stuart v Construction, Forestry, Mining and Energy Union (2010) 185 FCR 308, [2010] FCAFC 65

Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2) (1993) 41 FCR 89

Trade Practices Commission v CSR Ltd (1991) ATPR 41-076

viagogo AG v Australian Competition and Consumer Commission [2022] FCAFC 87

Wellington Capital Limited v ASIC (2014) 254 CLR 288;

[2014] HCA 43

Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	166
Date of hearing:	5 December 2022
Counsel for the Plaintiff:	Mr C Truong KC and Mr D Luxton
Solicitor for the Plaintiff:	Holding Redlich
Counsel for the Defendant:	Mr P Crutchfield KC, Mr A Hanak KC and Mr N Walter
Solicitor for the Defendant:	MinterEllison

ORDERS

VID 366 of 2022

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**MERCER FINANCIAL ADVICE (AUSTRALIA) PTY LTD (ACN 153 168 293)** Defendant

ORDER MADE BY:	**MCEVOY J**
DATE OF ORDER:	**23 NOVEMBER 2023**

THE COURT NOTES THAT:

In these orders, the following definitions apply:

'ASIC Act' means the *Australian Securities and Investments Commission Act 2001* (Cth).

'**Corporations Act**' means the *Corporations Act 2001* (Cth).

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

'**FDS Period**' means the period ending on the day that was no more than 60 days before that on which the fee disclosure statement was to be given (for the purposes of s 962H(1)(b) of the Corporations Act).

'**MFA**' means the Plaintiff.

'**Ongoing Service Arrangement**' means the contractual arrangement between MFA and a client, pursuant to which MFA was to provide financial product advice, also being an 'ongoing fee arrangement' within the meaning of s 962A(1) of the Corporations Act.

'**Penalty Period**' means 1 July 2016 to 30 June 2019.

'**Pre-FOFA Client**' means a client not being a Post-FOFA Client.

'**Post-FOFA Client**' means a client first provided advice services after 1 July 2013.

'**Relevant Period**' means 6 January 2012 to 30 June 2019.

'**Review Meeting**' means the formal review meeting to be provided to a client pursuant to the Ongoing Service Arrangement.

THE COURT DECLARES THAT:

1. Pursuant to s 21 of FCA Act, s 1317E of the Corporations Act 2001, and/or s 12GBA of the ASIC Act (as in force on and from 13 March 2019; in respect of contraventions of the ASIC Act occurring on and from 13 March 2019), MFA:

    (a) contravened s 962P of the Corporations Act on each of the 1,237 occasions during the Penalty Period that MFA charged an ongoing fee to a Post-FOFA Client after the deemed termination of their Ongoing Service Arrangement;

    (b) contravened s 962S(1) of the Corporations Act on each of the 2,933 occasions during the Penalty Period that MFA failed to give a Pre-FOFA Client a 'fee disclosure statement' within the meaning of s 962H;

    (c) contravened s 12DB(1)(i) of the ASIC Act:

        (i) on each of the 1,144 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that a binding Ongoing Service Arrangement was on foot with contractual rights to services and obligations to pay for services, which representations were false or misleading in that the Ongoing Service Arrangement had been terminated by operation of s 962F(1);

        (ii) on each of the 1,144 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that in respect of the FDS Period, MFA was contractually entitled to charge and such client was contractually obliged to pay the ongoing fees, which representations were false or misleading in that MFA was not contractually entitled to charge, and such client was not contractually obliged to pay, the ongoing fees,

    and which were representations concerning the existence or effect of a right.

    (d) contravened ss 12DB(1)(a) and (e) of the ASIC Act, on each of the 3,593 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that it had provided to the client all service entitlements as per the terms of the Ongoing Service Arrangement,

which representations were false in that MFA had not provided to the client all service entitlements as per the terms of the Ongoing Service Arrangement, and which were representations that:

(i) services were of a particular standard or quality; and

(ii) services had performance characteristics, uses or benefits.

2. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, on each occasion MFA contravened ss 962P or 962S(1) of the Corporations Act, or s 12DB(1) of the ASIC Act, as referred to in paragraph 1 above, MFA failed to comply with financial services laws and thereby contravened s 912A(1)(c) of the Corporations Act.

3. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, by its conduct during the Penalty Period, in:

(a) failing to have in place adequate systems, practises and or policies capable of preventing the contraventions referred to in paragraph 1 above; and

(b) failing to provide approximately 842 clients with an invitation to a Review Meeting,

MFA breached its obligations to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

THE COURT ORDERS THAT:

4. MFA pay pecuniary penalties to the Commonwealth:

(a) pursuant to s 1317G(1E)(b)(iv) of the Corporations Act as in force until 12 March 2019, and s 1317G(1) of the Corporations Act as in force from 13 March 2019, in respect of its contraventions of s 962P of the Corporations Act referred to in declaration 1(a) above;

(b) pursuant to s 1317G(1E)(b)(v) of the Corporations Act as in force until 12 March 2019, and section 1317G(1) of the Corporations Act as in force from 13 March 2019, in respect of its contraventions of s 962S(1) of the Corporations Act referred to in declaration 1(b) above;

(c) pursuant to s 12GBA(1) of the ASIC Act as in force until 12 March 2019, and s 12GBB of the ASIC Act as in force from 13 March 2019, in respect of its

contraventions of s 12DB(1) of the ASIC Act referred to in declaration 1(c) above,

in the amount of $12,000,000.

5. Pursuant to s 12GLB(1)(a) of the ASIC Act and s 1101B of the Corporations Act, within 30 days of this order MFA publish, at its own expense, a written adverse publicity notice in the terms set out in Annexure 1 in the form of a press release.

6. There be liberty to apply, as necessary, in relation to the arrangements for the publication of the adverse publicity notice which is the subject of order 5.

ANNEXURE 1

MISCONDUCT ALERT

Ordered by the Federal Court of Australia

The Court found that Mercer Financial Advice (Australia) Pty Ltd (ACN 153 168 293) (**MFA**) had committed contraventions of the *Corporations Act 2001* and the *Australian Securities and Investments Act 2001* in relation to the inadequate issuing and contents of fee disclosure statements, the charging of ongoing fees for financial advice services without entitlement, and related system deficiencies.

On 23 November 2023, Justice McEvoy of the Federal Court ordered MFA to pay a pecuniary penalty of $12 million to the Commonwealth. From 1 July 2016 to 30 June 2019, MFA had committed:

- 1,237 contraventions of s 962P of the Corporations Act by continuing to charge ongoing fees to 761 retail clients, despite the applicable ongoing fee arrangement having been terminated through MFA's failure to provide them with a fee disclosure statement;
- 2,933 contraventions of s 962S(1) of the Corporations Act by failing to give 1,578 retail clients a fee disclosure statement as required by that provision; and
- 5,881 contraventions of s 12DB(1) of the Australian Securities and Investments Act, by making false or misleading representations within fee disclosure statements provided to retail clients.

MFA failed to provide fee disclosure statements to certain retail clients. Other retail clients received fee disclosures statements that were deficient in that they failed to adequately disclose and were misleading as to significant financial services to which the client had been entitled but had not used.

Affected clients suffered $14,465,343 in inappropriate ongoing fees.

MFA has remediated these clients and others affected earlier. It cooperated with ASIC in the investigation, commencement and finalisation of the proceeding. MFA made full admissions at the earliest opportunity.

The Court ordered MFA to publish this Misconduct Alert.

Further information

For further information, visit ASIC's media release [insert link].

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

REASONS FOR JUDGMENT

MCEVOY J:

1 By an originating application dated 29 June 2022 the plaintiff, the Australian Securities and Investments Commission, alleges multiple contraventions by the defendant, **Mercer** Financial Advice (Australia) Pty Ltd, of ss 962P, 962S(1) (as in force at the relevant time) and 912A(1)(a) and (c) of the ***Corporations Act*** *2001* (Cth) and s 12DB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). The contraventions relate to the inadequate issuing and contents of fee disclosure statements, the charging of ongoing fees for financial advice services without entitlement, and related system deficiencies.

2 Mercer has admitted to these contraventions, and on 21 September 2022 the parties jointly filed a statement of agreed facts and admissions (**SAFA**) in support of liability pursuant to s 191 of the ***Evidence Act*** *1995* (Cth). The parties disagree, however, on the pecuniary penalty that ought to be imposed on Mercer for these contraventions, and whether any adverse publicity order should be made. These are the primary issues to be determined in this proceeding.

3 ASIC seeks declarations of contraventions of the relevant provisions, an aggregate pecuniary penalty of $20 million, an adverse publicity order, and its costs. The primary documents relied upon by ASIC in support of these orders are as follows:

(a) the SAFA;

(b) amended submissions dated 9 November 2022;

(c) the affidavits of Kimberly MacKay, solicitor, sworn on 21 October 2022 and 30 November 2022; and

(d) amended proposed orders dated 5 December 2022

4 Having regard to its admissions, Mercer accepts that there should be declarations of contraventions of the relevant provisions, however its position is that the aggregate pecuniary penalty to be imposed should be $8.5 million. Mercer also contends that an adverse publicity order should not be made. The primary documents relied upon by Mercer are as follows:

(a) the SAFA;

(b) submissions dated 14 November 2022; and

(c) the affidavit of Gregory Carfoot, solicitor, sworn on 14 November 2022.

5 For the reasons that follow there will be declarations substantially in the terms sought by ASIC and not opposed by Mercer. Insofar as the pecuniary penalty is concerned, I have formed the view that $8.5 million would be insufficient, but that a penalty of $20 million would be, in all the circumstances, excessive. Weighing matters carefully, I have determined that Mercer should be ordered to pay a pecuniary penalty of $12 million. There will also be an adverse publicity order, but in the form of a press release to be issued by Mercer substantially in the terms proposed by ASIC and set out in Annexure 1 to the orders.

THE CONTRAVENTIONS

Summary

6 ASIC has alleged that from 6 January 2012 to 30 June 2019 (the **Relevant Period**) Mercer repeatedly contravened the Corporations Act and the ASIC Act. Within this period, from 1 July 2016 to 30 June 2019, reflecting the statutory limitation period under the Corporations Act and the ASIC Act (the **Penalty Period**), Mercer admits that it committed the following contraventions:

(a) 1,237 contraventions of s 962P of the Corporations Act by continuing to charge ongoing fees to 761 retail clients, despite the applicable ongoing fee arrangement having been terminated by operation of s 962F and s 962G of the Corporations Act by Mercer's failure to provide the relevant clients with a fee disclosure statement;

(b) 2,933 contraventions of s 962S(1) of the Corporations Act by failing to give 1,578 retail clients a fee disclosure statement as required by that section;

(c) 5,881 contraventions of s 12DB(1)(a), (e) and/or (i) of the ASIC Act, by making false or misleading representations within fee disclosure statements provided to retail clients;

(d) failure to do all things necessary to ensure that the financial services covered by Mercer's financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the Corporations Act, in that it:

  (i) failed to have in place systems, practices and or policies capable of preventing the contraventions referred to in (a) to (c) above; and

  (ii) failed to provide certain clients with invitations to review meetings; and

(e) failure to comply with the financial services laws insofar as the contraventions at (a) to (c) above are concerned, in contravention of s 912A(1)(c) of the Corporations Act.

7 A table summarising the figures relevant to the contraventions Mercer has admitted is to be found at Annexure B to the SAFA and is included as Annexure A to these reasons.

Relevant background

8 The following findings are based on the SAFA and the affidavit evidence.

9 Mercer is part of the **Mercer Australia Group**, being a subsidiary of Mercer (Australia) Pty Ltd (**MAPL**) which is itself a subsidiary of Marsh Mercer Holdings (Australia) Ltd. The ultimate parent company of Mercer, and the Mercer Australia Group, is **Marsh & McLennan** Companies Inc, a United States publicly listed company.

10 At all material times Mercer held an Australian Financial Services License (**AFSL**) and has been a major provider of financial services. Mercer distributed financial products and provided financial advice to clients. Mercer provided financial products and advice through financial advisers, who were employed by another entity in the Mercer Australia Group, rather than Mercer itself. Mercer provided financial advice to clients either on an ongoing basis or on a one-off transactional basis through these financial advisers. This proceeding is concerned with Mercer's arrangements in relation to the provision of financial advice to clients on an ongoing basis.

11 Mercer provided financial product advice to clients, as retail clients, on an ongoing basis pursuant to certain "Ongoing Service Arrangements" (**OSA**). It is accepted by both parties that the OSAs were "ongoing fee arrangements" within the meaning of s 962A(1) of the Corporations Act in that:

(a) Mercer gave personal advice within the meaning of s 766B(3) of the Corporations Act to retail clients;

(b) the clients had entered into an arrangement, being the applicable OSA, with Mercer; and

(c) under the terms of the OSA, a fee was to be paid during a period of more than 12 months.

12 Further, the fee payable under each relevant OSA was an "ongoing fee" within the meaning of s 962B of the Corporations Act. For each relevant OSA Mercer was the "fee recipient" within the meaning of s 962C of the Corporations Act in that Mercer had entered into an ongoing fee

arrangement and Mercer's rights under the arrangement had not been assigned to another person.

13 During the Relevant Period, Mercer provided seven different OSA packages to its clients, each of which made provision for a number of services to be provided to the client. The service inclusions in the various OSA packages were set out in an engagement letter and, or alternatively, an authority to proceed. Amongst other services, each OSA client was entitled to a formal **Review Meeting** at agreed intervals to assist in tracking the client's progress against their original financial plan and to review their financial position. The Review Meetings were to occur half-yearly, annually or biennially depending upon the relevant OSA package.

14 It was Mercer's practice to send correspondence to clients ahead of their Review Meeting. This correspondence would ask the client to fill out a questionnaire and noted that once the client had responded to the questionnaire Mercer would be in touch to arrange a time for the Review Meeting. However, Mercer accepts that during the Penalty Period it failed to send such correspondence in relation to, or an invitation to, the relevant Review Meeting to approximately 842 clients. Mercer also accepts that on approximately 7,824 occasions it failed to conduct the required Review Meeting with the client in accordance with the OSA. Approximately 4,886 of these occasions fell within the Penalty Period.

15 During the Relevant Period Mercer issued various purported fee disclosure statements (**FDS**) to OSA clients. From 1 July 2013 Mercer, as the fee recipient, was obliged to issue annual FDSs in a standalone document to OSA clients: ss 962C(1) and 962G of the Corporations Act. Mercer issued these using a template letter and a template FDS. Mercer accepts that it contravened s 962S of the Corporations Act by either failing to provide a valid FDS to clients within a prescribed period, or by the FDS being inadequate in that it did not include the prescribed information required by s 962H for a statement to be a "fee disclosure statement" within the meaning of that section. These contraventions are considered in more detail below.

16 Additionally, the OSA made provision for Mercer to charge ongoing fees for the provision of the services. These fees were to be paid during a period of more than 12 months, and were paid either directly by clients, or through automatic deductions from the client's superannuation account. Mercer accepts that during the Relevant Period it continued to charge certain clients an ongoing fee, notwithstanding that those clients had been subject to FDS failures resulting in the deemed termination of the applicable OSA, in contravention of s 962P of the Corporations Act. These contraventions are also considered in more detail below.

Contraventions of ss 962S(1) and 962P of the Corporations Act

17 Part 7.7A of the Corporations Act is concerned with the "best interests" obligations and remuneration of providers of financial advice. It contains ss 962F, 962G, 962P and 962S.

18 At all material times, s 962P was in the following terms:

> **962P Civil penalty provision—charging ongoing fees after arrangement terminated**
>
> If an ongoing fee arrangement terminates for any reason, the current fee recipient in relation to the arrangement must not continue to charge an ongoing fee.
>
> Note: This section is a civil penalty provision (see section 1317E).

19 Sections 962F and 962G of the Corporations Act are relevant to the operation of s 962P and the alleged contraventions of that section. Pursuant to s 962G, as relevantly in force, the fee recipient was required to give a fee disclosure statement to a client in relation to the arrangement:

> **Section 962G. Fee recipient must give fee disclosure statement**
>
> (1) The current fee recipient in relation to an ongoing fee arrangement must, before the end of a period of 60 days beginning on the disclosure day for the arrangement, give the client a fee disclosure statement in relation to the arrangement.
>
> (2) The regulations may provide that subsection (1) does not apply in a particular situation.

20 Section 962F as relevantly in force provided that the ongoing fee arrangement will terminate if s 962G was not complied with:

> **Section 962F. Arrangement terminates if this Subdivision not complied with**
>
> (1) It is a condition of the ongoing fee arrangement that the arrangement terminates if section 962G (the disclosure obligation) or section 962K (the renewal notice obligation) has not been complied with in relation the arrangement, whether by the current or a previous fee recipient.
>
> (2) The client is not taken to have waived the client's rights under the condition (subject to subsection (3)), or to have entered into a new ongoing fee arrangement, if the client makes a payment of an ongoing fee after a failure to comply with section 962G or section 962K in relation to the ongoing fee arrangement.
>
> (3) However, if the client makes a payment of an ongoing fee after a failure to comply with section 962G or section 962K in relation to the ongoing fee arrangement, the fee recipient is not obliged to refund the payment.
>
> Note: A Court may order that the fee recipient refund the amount (see section 1317GA).

21 At all material times, s 962S(1) of the Corporations Act fell within Subdivision C in Division 3 of Part 7.7A of the Corporations Act. Subdivision C was substituted by s 3 and Schedule 1 of the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* (Cth), with effect from 1 July 2021. The present Subdivision C is not relevant for the purposes of this proceeding.

22 At all material times, s 962S(1) provided:

> **Section 962S. Fee recipient must give fee disclosure statement**
>
> (1) The current fee recipient in relation to the ongoing fee arrangement must, before the end of a period of 60 days beginning on the disclosure day for the arrangement, give the client a fee disclosure statement in relation to the arrangement.
>
> Note: This subsection is a civil penalty provision (see section 1317E).

23 At all material times from 1 July 2013, Mercer was required to give OSA clients a FDS within the meaning of s 962H of the Corporations Act each year, no later than 30 days (prior to 19 March 2016) or 60 days (from 19 March 2016), following either:

(a) the anniversary of the day on which the ongoing fee arrangement was entered into, where no FDS had been given since the arrangement was entered into; or

(b) the anniversary of the day immediately after the last FDS was given to the client, where a FDS in relation to the ongoing fee arrangement had been given since the arrangement was entered into.

See ss 962G(1) and 962S(1) of the Corporations Act (as in force during the Relevant Period).

24 For a FDS to be a valid FDS within the meaning of s 962H of the Corporations Act, it was required to:

(a) relate to a period of 12 months ending on a day that was no more than 60 days before that on which the statement was given (**FDS Period**); and

(b) include, amongst other things, information about the services that the client was entitled to receive, and did receive, from Mercer under the arrangement during the FDS Period.

25 Mercer accepts that during the Relevant Period, it failed to provide any FDS to 1,598 clients (**No FDS Clients**) within the periods referred to in paragraph 23 above, on 1,974 occasions. Within this, Mercer accepts that during the Penalty Period, it failed to provide any FDS to 504 of the No FDS Clients on 512 occasions.

26 During the Relevant Period, Mercer purported to provide a FDS to 2,475 clients (**No Compliant FDS Clients**) on 6,090 occasions. However, Mercer now accepts that these documents were not FDSs within the meaning of s 962H of the Corporations Act in that they did not include:

(a) information about the services the client was entitled to receive from Mercer under the arrangement during the previous year, in particular that:

(i) the FDS did not state that the client had been entitled to receive a Review Meeting; it instead stated that clients were entitled to an *invitation* to a Review Meeting; and

(ii) certain FDSs incorrectly indicated that the client had received an invitation to a Review Meeting, when in fact they had not; and

(b) information about the services the client had received from Mercer under the arrangement during the previous year, in particular that the FDS did not refer to whether a Review Meeting had or had not been conducted.

27 Within this, during the Penalty Period Mercer accepts that it provided FDSs to 2,297 No Compliant FDS Clients on 3,593 occasions where the documents were not FDSs within the meaning of s 962H of the Corporations Act.

28 Consistently with the SAFA I will refer to the No FDS Clients and the No Compliant FDS Clients collectively as the **FDS Affected Clients**.

Effect of the Future of Financial Advice Reforms

29 The legislation relating to FDSs applies differently to OSA clients depending on whether they entered into an OSA before or after the implementation of the reforms to the Corporations Act introduced by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) (**FOFA**) on 1 July 2013. In particular:

(a) for clients who entered into an OSA with Mercer before 1 July 2013 or had been provided with personal advice as a retail client by Mercer or its representatives before 1 July 2013 (**Pre-FOFA FDS Affected Clients**), by failing to provide a valid FDS Mercer contravened s 962S(1) of the Corporations Act as to the applicable arrangement (which carried a civil penalty); and

(b) for clients who entered into an OSA with Mercer on or after 1 July 2013 and had not been provided with personal advice as a retail client by Mercer or its representatives

before 1 July 2013 (**Post-FOFA FDS Affected Clients**), a failure to provide a valid FDS caused Mercer to fail to comply with s 962G(1) and consequently the applicable OSA terminated automatically by operation of s 962F(1) of the Corporations Act. Mercer accepts that by continuing to charge such clients an ongoing fee notwithstanding the termination resulted in it contravening s 962P of the Corporations Act (which carried a civil penalty).

30 Mercer accepts that by failing to give 1,578 Pre-FOFA FDS Affected Clients a FDS within the meaning of s 962H within the time provided, it contravened s 962S(1) of the Corporations Act. Mercer accepts that during the Penalty Period it contravened s 962S(1) as in force during the Relevant Period on 2,933 occasions.

31 Mercer accepts that in failing to give Post-FOFA FDS Affected Clients a FDS within the meaning of s 962H, within the time provided, it contravened s 962G(1) of the Corporations Act. Mercer accepts also that upon this failure, the applicable arrangement terminated by operation of s 962F(1) of the Corporations Act. Mercer accepts that during the Penalty Period it continued to charge an ongoing fee on 1,237 occasions notwithstanding the termination of the arrangement to 761 Post- FOFA FDS Affected Clients, in contravention of s 962P of the Corporations Act.

32 Although in some cases, there was some evidence of activity on client files which might suggest that a Review Meeting had taken place, for the purposes of this proceeding Mercer accepts that these cases are instances of contraventions.

Contraventions of ss 12DB(1)(a), (e) and (i) of the ASIC Act

33 At all material times, s 12DB of the ASIC Act provided that:

> (1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> (a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
>
> …
>
> (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits; or
>
> …
>
> (i) make a false or misleading representation concerning the existence,

> exclusion or effect of any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); or…

34 Subsections 12DB(1)(a), (e) and/or (i) of the ASIC Act relate to Mercer's admitted contraventions insofar as it made false or misleading representations within fee disclosure statements provided to retail clients.

35 In issuing a FDS to the No Compliant FDS Clients, Mercer accepts that it represented to those clients that:

(a) a binding ongoing fee arrangement was on foot, with contractual rights to services and obligations to pay fees for services (**Binding Contract Representation**);

(b) in respect of the FDS Period, Mercer was contractually entitled to charge, and the No Compliant FDS Clients were contractually obliged to pay, the ongoing fees (**Entitlement to Fees Representation**); and

(c) in respect of the FDS Period, Mercer had provided to the No Compliant FDS Clients all service entitlements in accordance with the terms of the OSA (**All Services Provided Representation**);

(collectively, the **Representations**).

36 Mercer accepts that it made the Representations in trade or commerce and in connection with the supply or possible supply of "financial services" within the meaning of s 12BAB(1) of the ASIC Act, being the provision of financial product advice: s 12DB(1) of the ASIC Act.

37 Mercer accepts that the Binding Contract Representations were false or misleading in that there was no binding ongoing fee arrangement on foot. By making the Binding Contract Representations to Post-FOFA FDS Affected Clients, Mercer accepts that on 1,144 occasions it made a false or misleading representation concerning the existence or effect of a right, in contravention of s 12DB(1)(i) of the ASIC Act.

38 Mercer accepts that the Entitlement to Fees Representations were false or misleading in that it was not contractually entitled to charge, and the relevant No Compliant FDS Client was not contractually obliged to pay, the ongoing fees. By making the Entitlement to Fees Representations to Post-FOFA FDS Affected Clients, Mercer accepts that on 1,144 occasions it made a false or misleading representation concerning the existence or effect of a right in contravention of s 12DB(1)(i) of the ASIC Act.

39 Mercer accepts that the All Services Provided Representations were false in that in respect of the FDS Period it had not provided to the No Compliant FDS Client all service entitlements pursuant to the terms of the OSA. By making the All Services Provided Representations to No Compliant FDS Clients, Mercer accepts that on 3,593 occasions it made a false or misleading representation that:

(a) services were of a particular standard or quality, in contravention of s 12DB(1)(a) of the ASIC Act; and/or

(b) services had performance characteristics, uses or benefits, in contravention of s 12DB(1)(e) of the ASIC Act.

40 Once, again, although in some cases there was some evidence of activity on client files which might suggest that a Review Meeting had taken place, for the purposes of this proceeding Mercer accepts that these cases are instances of contraventions.

Contraventions of ss 912A(1)(a) and (c) of the Corporations Act

41 Materially during the Relevant Period, s 912A(1)(a) and (c) of the Corporations Act provided:

> **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; …

42 At all material times, s 761A of the Corporations Act defined "financial services law" to include, amongst other things, a provision of Ch 7 of the Corporations Act (which includes s 962P and s 962S) or Div 2 of Pt 2 of the ASIC Act (which includes s 12DB(1)). Therefore, a contravention of ss 962P and 962S of the Corporations Act and s 12DB of the ASIC Act results in a failure to comply with financial services laws and is, itself, a contravention of s 912A(1)(c) of the Corporations Act.

43 Pursuant to s 912A(1)(c) of the Corporations Act, Mercer is obliged to comply with the financial services laws. Therefore, in accepting that it committed the contraventions of the Corporations Act and the ASIC Act set out above, Mercer also accepts that it contravened its obligation to comply with the financial services laws (that is to say that it contravened s 912A(1)(c) of the Corporations Act).

44 Further, ASIC has alleged and Mercer accepts that Mercer failed to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the Corporations Act. In particular, Mercer accepts that it failed to have in place adequate systems, practises and/or policies capable of preventing the contraventions of the Corporations Act and the ASIC Act as set out above, and also failed to provide certain clients with invitations to Review Meetings.

45 It is relevant to note that during the Relevant Period, Mercer introduced certain systems, policies, procedures and standards which were intended to ensure that its clients received the services which it had contracted to provide. These systems, policies, procedures and standards were concerned with notifying financial advisers of their obligations to convene Review Meetings, the steps to be taken to convene such meetings, the steps to be taken where an invitation for a Review Meeting was deferred, declined, or no response was received, Mercer's lines of responsibility and accountability, and Mercer's risk management framework. Additionally, Mercer's financial advisers were provided with monthly reminders about upcoming Review Meetings to be scheduled, and financial advisers and team leaders received monthly reports showing the meetings that were overdue.

46 Mercer accepts that during the Relevant Period and up to 2017, annual client file audits were performed by Mercer, however no FDS issues were identified. From 2017 Mercer outsourced the auditing of client files to KPMG, however Mercer accepts that KPMG was not (until 2019) instructed to look for fee for no service issues, and so no FDS issues were identified. Indeed, Mercer accepts that it was not until November 2018 that it identified any issues concerning ongoing fees and Review Meetings. While it is not submitted by ASIC that Mercer's failures were intentional, it is submitted that these failures were caused by Mercer's inadequate policies, systems and procedures, as well as human error. More alarmingly, ASIC notes that Mercer's systems and records have not allowed it to identify the root cause of the issue, or the circumstances in which the compliance deficiencies arose.

47 Mercer accepts that by failing to have in place adequate systems, practises and/or policies capable of preventing the relevant contraventions of the Corporations Act and the ASIC Act, and by failing to provide certain clients with invitations to a Review Meeting, it has failed to do all things necessary to ensure that the financial services covered by its AFSL were provided efficiently, honestly and fairly in contravention of s 912A(1)(a) of the Corporations Act. It is

important to note, however, that Mercer has since modified its policies and processes, and taken active steps to prevent the recurrence of the above failures.

DECLARATIONS

48 ASIC seeks declarations as to the above contraventions which Mercer has admitted. Mercer does not oppose the making of the declarations proposed by ASIC (although Mercer submits that the reference to s 12DI(1)(i) of the ASIC Act in proposed declaration 1(c) should be a reference to s 12DB(1)(g) of that Act). It appears, however, that the relevant section is in fact s 12DB(1)(i) of the ASIC Act.

The Court's power

49 The Court has a wide discretionary power to make declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**): *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 at [152] (Beach J) (***ASIC v CBA***). See also s 1101B(1) of the Corporations Act and *Wellington Capital Limited v ASIC* (2014) 254 CLR 288, [2014] HCA 43 at [10] (French CJ, Crennan, Kiefel and Bell JJ); *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527 at [478] (Sackville AJA); *Australian Securities and Investments Commission v* ***Financial Circle*** (2018) 131 ACSR 484, [2018] FCA 1644 at [155] (O'Callaghan J).

50 Section 1317E(1) of the Corporations Act requires the Court to make a declaration of contravention if it is satisfied that a person has contravened a civil penalty provision of that Act. Subsection 1317E(2) prescribes the matters which must be specified in the declaration.

51 Similarly, for conduct on or after 13 March 2019, s 12GBA of the ASIC Act requires the Court to make a declaration of contravention if it is satisfied that a person has contravened a civil penalty provision of the ASIC Act.

Relevant principles

52 The utility of declarations which set out the particular liability found and the basis for the penalties ordered is well established: see *Australian Securities and Investments Commission v Axis International Management Pty Ltd* (2009) 178 FCR 485 at 491 – 496 [26]-[43] (Gilmour J) and, more generally, ***Rural Press*** *Limited v ACCC* (2003) 216 CLR 53 at 92 [95] (Gummow, Hayne and Heydon JJ); *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex relatione Corporate Affairs Commission* (1981) 148 CLR 121 at 125 (Mason J), 144-5 (Wilson

J); *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 97-9 (Sheppard J), 106 (Foster J), 107 (Hill J); *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308, [2010] FCAFC 65 at 322 [35] (Moore J), 334 [94] (Besanko and Gordon JJ); *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378, [2012] FCAFC 56 at 388 [35] (Greenwood, Logan and Yates JJ); and *Australian Securities and Investments Commission v Allianz Australia Insurance Limited* [2021] FCA 1062 at [120]-[121] (Allsop CJ).

53 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 (***ABCC v CFMEU***), the Full Court stated (at 87 [90]):

> The fact that the parties have agreed that a declaration of contravention should be made does not relieve the Court of the obligation to satisfy itself that the making of the declaration is appropriate. … It is not the role of the Court to merely rubber stamp orders that are agreed as between a regulator and a person who has admitted contravening a public statute...
>
> (Citations omitted.)

The Full Court continued (at 87 [93]):

> Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions…
>
> (Citations omitted.)

54 In ***Forster*** *v Jododex Australia Pty Ltd* (1972) 127 CLR 421, Gibbs J stated (at 437 – 438) three requirements that should be satisfied before the discretion is exercised in favour of making a declaration:

(a) the question must be a real and not a hypothetical or theoretical one;

(b) the applicant must have a real interest in raising it; and

(c) there must be a proper contradictor.

See also *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [76] (Gordon J); *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* (2020) 147 ACSR 266, [2020] FCA 1306 at 284 [110] (Yates J) (***ASIC v MLC)***; *Rural Press* at 92 [95]; *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2007] ATPR 42-140, [2006] FCA 1730 at [6] (Nicholson J) and the cases there cited, applied in *ABCC v CFMEU* at 87 [93].

The proposed declarations

55 ASIC proposes that declarations be made in the following terms:

1. Pursuant to s 21 of FCA Act, s 1317E of the Corporations Act 2001, and/or s 12GBA of the ASIC Act (as in force on and from 13 March 2019; in respect of contraventions of the ASIC Act occurring on and from 13 March 2019), MFA [as it has defined Mercer]:

    (a) contravened s 962P of the Corporations Act on each of the 1,237 occasions during the Penalty Period that MFA charged an ongoing fee to a Post-FOFA Client after the deemed termination of their Ongoing Service Arrangement;

    (b) contravened s 962S(1) of the Corporations Act on each of the 2,933 occasions during the Penalty Period that MFA failed to give a Pre-FOFA Client a 'fee disclosure statement' within the meaning of s 962H;

    (c) contravened [s 12DB(1)(i)][see paragraph 48 above] of the ASIC Act:

        (i) on each of the 1,144 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that a binding Ongoing Service Arrangement was on foot with contractual rights to services and obligations to pay for services, which representations were false or misleading in that the Ongoing Service Arrangement had been terminated by operation of s 962F(1);

        (ii) on each of the 1,144 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that in respect of the FDS Period, MFA was contractually entitled to charge and such client was contractually obliged to pay the ongoing fees, which representations were false or misleading in that MFA was not contractually entitled to charge, and such client was not contractually obliged to pay, the ongoing fees,

    and which were representations concerned the existence or effect of a right.

    (d) contravened ss 12DB(1)(a) and (e) of the ASIC Act, on each of the 3,593 occasions during the Penalty Period that MFA represented to a relevant client (by way of a purported fee disclosure statement) that it had provided to the client all service entitlements as per the terms of the Ongoing Service Arrangement, which representations were false in that MFA had not provided to the client all service entitlements as per the terms of the Ongoing Service Arrangement, and which were representations that:

        (i) services were of a particular standard or quality; and

        (ii) services had performance characteristics, uses or benefits.

2. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, on each occasion MFA contravening ss 962P or 962S(1) of the Corporations Act, or s 12DB(1) of the ASIC Act, as referred to in paragraph 1 above, MFA failed

to comply with financial services laws and thereby contravened s 912A(1)(c) of the Corporations Act.

3. Pursuant to s 21 of the FCA Act and/or s 1317E of the Corporations Act, by its conduct during the Penalty Period, in:

   (a) failing to have in place adequate systems, practises and or policies capable of preventing the contraventions referred to in paragraph 1 above; and

   (b) failing to provide approximately 842 clients with an invitation to a Review Meeting,

   MFA breached its obligations to do all things necessary to ensure that the financial services covered by its financial services licence were provided efficiently, honestly and fairly, and thereby contravened s 912A(1)(a) of the Corporations Act.

56 Section 1317E of the Corporations Act applies in respect of ss 962P and 962S(1) (as then in force) of the Corporations Act. Section 12GBA of the ASIC Act (as in force from 13 March 2019) applies to contraventions of s 12DB(1) occurring on and from 13 March 2019. In each instance, the Court must make declarations of contravention where it is satisfied that Mercer has contravened.

57 In respect of Mercer's admitted contraventions of s 912A(1) of the Corporations Act, and of s 12DB(1) of the ASIC Act which occurred during the Penalty Period up to 12 March 2019, the requirements referred to above at paragraph 54 are met.

58 I am satisfied that the contraventions that are the subject of the proposed declarations are established by the facts and admissions set out in the SAFA, and that there would be utility in making them. No adjudication of the relevant facts is necessary in circumstances where relevant admissions have been made: see s 191 of the Evidence Act and *ASIC v CBA* at [12] (Beach J).

59 I therefore consider it appropriate to make declarations substantially in the terms ASIC proposed (allowing for the incorrect reference to s 12DI(1)(i) in declaration 1(c)). The preconditions for the making of the declarations set out above are satisfied. Declarations in these terms will identify the contravening conduct and record the Court's disapproval of it.

PECUNIARY PENALTIES

60 As has been mentioned, ASIC seeks pecuniary penalties for Mercer's contraventions of ss 962P and 962S(1) of the Corporations Act (as then in force), and s 12DB(1) of the ASIC Act. At all

relevant times ss 962P and 962S(1) of the Corporations Act and s 12DB(1) of the ASIC Act were civil penalty provisions: s 12GBA of the ASIC Act and s 1317E of the Corporations Act.

The Court's power

61 Part 9.4B of the Corporations Act is concerned with the civil consequences of contravening civil penalty provisions. Section 1317G(1) of the Corporations Act gives the Court power to impose a pecuniary penalty in respect of the contravention of a civil penalty provision. Prior to 13 March 2019 and the enactment of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (**Treasury Laws Amendment Act**), the relevant provision was s 1317G(1E) of the Corporations Act. The Court also has power to impose pecuniary penalties for contraventions of subdivisions C, D, or GC (other than s 12DA) of Division 2 of Part 2 of the ASIC Act under s 12GBA(1) (as it stood immediately prior to 13 March 2019) and s 12GBB of the ASIC Act (as in force on and from 13 March 2019).

Relevant principles

62 The power to impose a penalty is to be exercised judicially, that is, fairly and reasonably: *Australian Building and Construction Commissioner v* ***Pattinson*** (2022) 274 CLR 450 at 467 [40] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). Bearing in mind that the discretion to be applied in setting a pecuniary penalty must be guided by the relevant statutory provisions, the legal principles that govern the assessment of the quantum of a pecuniary penalty that should be imposed for civil contraventions are well established. These principles may be summarised as follows.

Deterrence

63 The primary or sole purpose of civil penalties is deterrence, both specific and general: *Pattinson* at 457 [9]-[10], 459-460 [15]-[18]; *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (the ***Agreed Penalties Case***) at 506 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), referring to *Trade Practices Commission v* ***CSR*** *Ltd* (1991) ATPR 41-076 at 52,152 (French J). See also *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v* ***Adler*** (2002) 42 ACSR 80 at 114-116 [125]–[126] (Santow J).

64 Specific deterrence is for the purpose of deterring repetition of the contravening conduct by the contravener and general deterrence is for the purpose of deterring others who might be tempted to engage in similar contraventions: *Pattinson* at 457 [9], 459 [15], 468 [42], 470 [47]-[48]; the

Agreed Penalties Case at 506 [55] and 523-524 [110] (Keane J); *Australian Competition and Consumer Commission v* ***TPG*** *Internet Pty Ltd* (2013) 250 CLR 640 at 659 [65] (French CJ, Crennan, Bell and Keane JJ); *viagogo AG v Australian Competition and Consumer Commission* [2022] FCAFC 87 at [129] (Yates, Abraham and Cheeseman JJ). Penalties will be imposed to promote the public interest in compliance: the *Agreed Penalties Case* at 506 [55], referring to *CSR* at 52,152. The penalty imposed should be no greater than necessary to achieve this objective: *Pattinson* at 457 [10], 610 [40]; *Australian Securities Commission v Donovan* (1998) 28 ACSR 583 at 608 (Cooper J).

65 While the civil penalty should not be so high that it is oppressive, it should not be so low as to be regarded by the contravener as "an acceptable cost of doing business": *Pattinson* at 460 [17], 467-468 [40]-[41]; *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at 195-196 [116] (Keane, Nettle and Gordon JJ); *TPG* at 659 [66]; ***Singtel Optus*** *Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 at 265 [62]-[63] (Keane CJ, Finn and Gilmour JJ); *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 293 (Burchett and Kiefel JJ); *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 (***ASIC v Westpac Banking***) at [255] (Wigney J). Whatever penalty is to be imposed must be "proportionate" and "appropriate" in the sense that it strikes a reasonable balance between oppressive severity and deterrence in the circumstances of the case: see *Pattinson* at 467-468 [40]-[41], 470 [46].

Maximum penalty

Maximum penalty for contravention of ss 962P and 962S(1) of the Corporations Act

66 Until 12 March 2019 the maximum penalty for a contravention of s 962P or s 962S(1) of the Corporations Act, by a corporation, was $250,000: s 1317G(1G)(b) (as it stood immediately prior to 13 March 2019). From 13 March 2019 (until at least the end of the Penalty Period), the maximum penalty for a contravention of s 962P or s 962S(1) of the Corporations Act, by a corporation, was the greatest of:

(a) 50,000 penalty units (equating to $10.5 million until 30 June 2020, the value of a penalty unit at that time being $210);

(b) the benefit derived or the detriment avoided, multiplied by three;

(c) either:

(i) 10% of the company's annual turnover; or

(ii) if 10% of the company's annual turnover is greater than an amount equal to 2.5 million penalty units, then 2.5 million penalty units (equating to $525 million until 30 June 2020, the value of a penalty unit at that time being $210).

See s 1317G(4) of the Corporations Act (as relevantly in force) and s 4AA of the ***Crimes Act 1914*** (Cth).

Maximum penalty for contraventions of s 12DB(1) of the ASIC Act

67 Until 12 March 2019 the maximum penalty for a contravention of s 12DB(1) of the ASIC Act, by a corporation, was 10,000 penalty units ($1.8 million until 30 June 2017 and $2.1 million from 1 July 2017 to 12 March 2019): see s 12GBA of the ASIC Act as then in force and s 4AA of the Crimes Act. From 13 March 2019 the maximum penalty for a contravention of s 12DB(1) of the ASIC Act, by a corporation, was the greatest of:

(a) 20,000 penalty units (equating to $4.2 million until 30 June 2020, the value of a penalty unit at that time being $210);

(a) the benefit derived or the detriment avoided, multiplied by three;

(b) either:

(i) 10% of the company's annual turnover; or

(ii) if 10% of the company's annual turnover is greater than an amount equal to 2.5 million penalty units, then 2.5 million penalty units (equating to $525 million until 30 June 2020, the value of a penalty unit at that time being $210).

See s 12GBCA(2) and 12GB(1) of the ASIC Act as relevantly in force and s 4AA of the Crimes Act.

Significance of prescribed maximum penalty

68 The Court should have regard to the prescribed maximum penalty, however it should not start with the maximum penalty and then proceed by way of making proportional deductions from this amount: ***Markarian*** *v The Queen* (2005) 228 CLR 357 at 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ). Rather, consideration of the maximum penalty allows the Court to make comparison between the worst possible case and the case that it is being asked to address: *Australian Securities and Investments Commission v Westpac Securities Administration Limited* (2021) 156 ACSR 614 (***ASIC v Westpac Securities***) at 619 [24] (O'Bryan J), citing

Markarian at 372 [31]. As the plurality emphasised in *Pattinson* at 457 [10], citing *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 at 63 [156], the maximum penalty is not reserved only for the most serious examples of offending conduct. What is required is that there be "some reasonable relationship between the theoretical maximum and the final penalty imposed": *Pattinson* at 457 [10]. The requisite relationship will be established where the maximum penalty does not exceed what is reasonably necessary to deter future contraventions of a like kind by the contravener, and by others: *Pattinson* at 457 [10]. Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind: *Pattinson* at 471 [50].

Factors to be considered

69 Self-evidently the Court exercises its discretion when determining the size of the penalty and must consider a series of factors: *Pattinson* at 460-461 [18]-[19], 470 [46]-[48]; *Adler* at 114-116 [126]. No one factor is decisive, and all of the circumstances should be weighed: *Australian Securities and Investments Commission v GE Capital Finance Australia* [2014] FCA 701 at [75] (Jacobson J). The Court is not generally assisted by a comparison of penalties imposed in other cases, due to the widely differing circumstances of each case: *Singtel Optus* at 264 [60], citing *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238 at 275 [215] (Middleton J). However, as ASIC submits, this does not mean that penalties imposed in other cases are never relevant: see *Australian Competition and Consumer Commission v Multimedia International Services Pty Ltd* (2016) 243 FCR 392 at 417 - 418 [123] (Edelman J). The parity principle, as developed in the criminal law, should ensure that like offenders are treated in a like manner. It promotes the predictability of outcomes thereby avoiding contested litigation, and it assists in the assessment of what penalty is reasonably necessary to deter future contraventions.

70 The Court must also have regard to the totality principle, which requires a level of satisfaction that the total aggregate penalty is not unjust or disproportionate to the conduct, having regard to the circumstances of the case: *Pattinson* at 467 - 468 [40]-[41], 470 [46]; *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* (2014) 97 ACSR 412 at 437 [198] (Jacobson J).

71 The factors that the Court should take into consideration, keeping in mind the objective of the pecuniary penalty provisions, have been essayed in numerous cases. In *Pattinson* at 460 [18] the

plurality endorsed the factors identified by French J in *CSR*, that is (and noting that these should not be regarded as a "legal checklist": *Pattinson* at 460-461 [18]-[19], 472 [54]):

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.
3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the contravention and the period over which it extended.
7. Whether the contravention arose out of the conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

72 In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* (2018) 131 ACSR 585 at 594 [49], (***ASIC v Westpac***) Beach J formulated the factors to be taken into account in the following terms:

(a) the extent to which the contravention was the result of deliberate or reckless conduct by the corporation, as opposed to negligence or carelessness;

(b) the number of contraventions, the length of the period over which the contraventions occurred, and whether the contraventions comprised isolated conduct or were systematic;

(c) the seniority of officers responsible for the contravention;

(d) the capacity of the defendant to pay, but only in the sense that whilst the size of a corporation does not of itself justify a higher penalty than might otherwise be imposed, it may be relevant in determining the size of the pecuniary penalty that would operate as an effective specific deterrent;

(e) the existence within the corporation of compliance systems, including provisions for and evidence of education and internal enforcement of such systems;

(f) remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention;

(g) whether the directors of the corporation were aware of the relevant facts and, if not, what processes were in place at the time or put in place after the contravention to ensure their awareness of such facts in the future;

(h) any change in the composition of the board or senior managers since the contravention;

(i) the degree of the corporation's cooperation with the regulator, including any admission of an actual or attempted contravention;

(j) the impact or consequences of the contravention on the market or innocent third parties;

(k) the extent of any profit or benefit derived as a result of the contravention; and

(l) whether the corporation has been found to have engaged in similar conduct in the past.

See also *Australian Securities and Investments Commission v MLC Limited* [2023] FCA 539 at [83] – [91] (Moshinsky J); *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2023] FCA 256 at [63] – [72] (O'Bryan J); *Australian Securities and Investments Commission v GetSwift Limited (Penalty Hearing)* [2023] FCA 100 at [34] – [48] (Lee J); *Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited* (2022) 164 ACSR 64; [2022] FCA 1115 at 85-86 [103] – [108] (Moshinsky J) (***ASIC v AMP***); *Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 3)* (2022) 158 ACSR 321 at 325-326 [20]-[21] (Moshinsky J) (***ASIC v RI Advice)***, citing *Adler* at 114 [126] and *CSR* at 52,152; *ASIC v Westpac Securities* at 617-619 [17]-[25]; *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 377 ALR 55 at 95-96 [156]-[160] (Lee J) (***ASIC v AMP (No 2)***); *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 4)* (2020) 148 ACSR 511 at 521-524 [38]-[51] (Beach J) (***ASIC v AGM***); *ASIC v Westpac Banking* at [253]-[272]; *Financial Circle* at 517-518 [178]-[182] (O'Callaghan J).

73 It may also be relevant to consider "whether the company has disgorged any profit or benefit received as a result of the contravention, or made reparation"; see *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2023] FCA 1150 at [99] (Beach J) (***ASIC v ANZ***).

74 ASIC emphasises that Mercer's size and financial position is relevant in the present circumstances in the sense that the penalty required to achieve the necessary deterrence is likely to be larger for a company with significant resources: see *ASIC v AMP (No 2)* at 101 [185], 106-107 [220], 108 [230] (Lee J); *ASIC v MLC* at 306 [214] (Yates J); *Australian Securities and Investments Commission v* ***BT Funds*** *Management Limited* [2021] FCA 844 at [44] (Wheelahan J); *ASIC v Westpac Securities* at 634 [84] (O'Bryan J); *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301 at 309 [39]

(Goldberg J). It may be accepted, however, that while the contravener's size and financial resources are a relevant consideration, they do not alone justify a higher penalty than might otherwise be imposed: see *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540 at 560 [92] (Allsop CJ).

75 The industry in which the contravener operates is also a relevant factor when considering the matter of deterrence. In *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2020] FCA 1421 at [74] (***ASIC v ANZ (No 3)***), Allsop CJ made the following observation which is of obvious relevance in the present circumstances:

> The deterrent nature of the penal response is the central, if not the sole, purpose of an object of the penalty. A number of matters need to be stated about that here. The banking industry is large and involves consumer choices. There should be, and is, by the agreed penalty, a strong deterrent as to conduct which risks the rights of consumers and customers, by reference to any approach which risks their interests against the interests of the Bank. The considerations of the contract of adhesion and its administration, to which I have referred, are central in this regard. Put in economic terms, the market efficiency upon which consumer confidence rests, relies on reliability, good faith, fairness and honesty of conduct. It should be made clear to all businesses – here, banks, but all businesses – that the consumer should be dealt with in a way that accords with the Australian business conscience for which Parliament has legislated, and here, banks should be, as the submissions make clear, left in no doubt of the need for proper and strong compliance programs, sufficient to detect and address conduct of the present kind. The penalties to be imposed will also play their part in persuading the public, more broadly, that banks should be held to proper account in the level of appropriate penalties for breaches of the statute involving the commercial standard of unconscionability. The submissions refer to specific deterrence. The reality was that the Bank's systems were not robust enough to prevent wrongdoing, and, for whatever reason, those who appreciated that there was a risk did not take steps to ensure the Bank came to a view that it was required to come to about the appropriateness of charging the fees.

Mandatory considerations

76 Section 1317G(6) of the Corporations Act (as in force on and from 13 March 2019), s 12GBA(2) of the ASIC Act (as it stood immediately prior to 13 March 2019) and s 12GBB(5) of the ASIC Act (as in force on and from 13 March 2019), each contain a non-exhaustive list of considerations to be taken into account in determining the appropriate pecuniary penalty. While s 1317G(6) of the Corporations Act and s 12GBB(5) of the ASIC Act did not come into effect until 13 March 2019, and so were not in force for the majority of the Relevant Period and the Penalty Period, it may be accepted that the relevant considerations were already ones which the case law required to be considered in a penalty determination.

77 Section 1317G(6) of the Corporations Act requires the Court to consider (relevantly), for conduct occurring after 13 March 2019 in contravention of ss 962P or 962S(1) as then in force:

> (a) the nature and extent of the contravention;
>
> (b) the nature and extent of any loss or damage suffered because of the contravention;
>
> (c) the circumstances in which the contravention took place; and
>
> (d) whether the person has previously been found by a court (including a court in a foreign county) to have engaged in similar conduct.

78 Section 12GBA(2) of the ASIC Act as then in force requires the Court to consider (relevantly), for conduct occurring before 13 March 2019 in contravention of s 12DB(1) as then in force:

> (a) the nature and extent of the act or omission any of any loss or damage suffered as a result of the act or omissions; and
>
> (b) the circumstances in which the act or omission took place; and
>
> (c) whether the person has previously been found by the Court in proceedings under [Subdivision G of Division 2 of Part 2 of the ASIC Act] to have engaged in any similar conduct.

79 Section 12GBB(5) of the ASIC Act requires the Court to consider (relevantly), for conduct occurring after 13 March 2019 in contravention of s 12DB(1) as then in force:

> (a) the nature and extent of the contravention; and
>
> (b) the nature and extent of any loss or damage suffered because of the contravention; and
>
> (c) the circumstances in which the contravention took place; and
>
> (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

Course of conduct principle

80 In *Pattinson* at 469 [45] the plurality recognised that some concepts familiar from criminal sentencing, including the course of conduct principle, may usefully be deployed in the enforcement of the civil penalty regime. The course of conduct principle requires the Court to consider whether the multiple contravening acts arise out of the same course of conduct or the one transaction in determining whether it is appropriate that a "concurrent" or "single penalty" should be imposed for the contraventions: *ASIC v Westpac Securities* at 619 [25], citing *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 at 296 [234] (Allsop CJ, Middleton and Robertson JJ). In *ABCC v CFMEU* the Full Court observed at 100 [149]:

> It may be appropriate for the Court to impose a single penalty in such circumstances, for example, where the pleadings and facts reveal that the contraventions arose from a course of conduct and the precise number of contraventions cannot be ascertained, or the number of contraventions is so large that the fixing of separate penalties is not feasible, or there are a large number of relatively minor related contraventions that are most sensibly considered compendiously.

The parties' respective positions on penalty

ASIC's submissions

81 In seeking pecuniary penalties in the aggregate sum of $20 million, ASIC submits that Mercer's contravening conduct was extensive, with thousands of contraventions committed affecting many clients. ASIC submits that the contraventions were very serious, including the charging of fees by Mercer to clients which it was not entitled to charge, failing to provide FDSs to clients or providing FDSs to clients which were inaccurate or incomplete, and making false and misleading representations to clients within the relevant FDSs.

82 In particular, ASIC submits that:

(a) the contraventions of s 962P concerning Mercer's charging of ongoing fees to Post-FOFA FDS Affected Clients without entitlement after the deemed termination of the clients was a serious failure;

(b) each deemed termination of the client's OSA (for the purposes of s 962P contraventions) was the consequence of the failure to provide any FDS at all or to give accurate and complete information in the FDS as to the client's entitlement to a Review Meeting, non-receipt of an invitation to a Review Meeting, or whether the client had received a Review Meeting;

(c) the contraventions of s 962S(1) concerned similar serious failures by Mercer to provide any FDS, or the FDS provided was inaccurate or incomplete in relation to Pre-FOFA Affected Clients; and

(d) the contraventions of s12DB(a), (e) and (i) concerning misleading representations as to there being an ongoing OSA on foot, Mercer being entitled to charge and the client being obliged to pay ongoing fees, and Mercer having provided all service entitlements in accordance with the terms of the OSA, were also objectively serious.

83 ASIC points to the fact that many clients were not told that they were entitled to a Review Meeting or whether such a meeting had taken place in the prior period. ASIC submits that the impact on clients not receiving FDSs was that they did not receive any up-to-date information

on the services they were receiving for the fees they were paying. The clients who received inaccurate or incomplete information because they were not told they were entitled to a Review Meeting or whether a Review Meeting had taken place in the prior period were similarly deprived of meaningful information to determine whether or not to continue with the OSA. As to the false or misleading representations, ASIC submits they had the capacity to lead clients into error as to their rights and entitlements in respect of services, namely the Review Meeting.

84 ASIC submits that the Review Meetings were a valuable service, and formed a significant part of any OSA package offered by Mercer, pricing them at around $3,000 (increasing over the Relevant Period). ASIC draws particular attention to the fact that the contraventions occurred over a prolonged period, with Mercer admitting to contraventions from the start of the Relevant Period.

85 ASIC accepts, however, that because most of the contraventions occurred prior to 13 March 2019, it is appropriate to penalise the entirety of the contraventions by reference to the penalty regime applying before that date. This is a significant concession having regard to the fact that penalties increased substantially for conduct from 13 March 2019. ASIC also accepts that given the large number of contraventions it would not be appropriate to impose a penalty for each contravention, and nor would it be utile to impose a penalty in respect of each contravened provision. Rather, ASIC contends, the penalty to be imposed is best assessed by reference to other factors which promote specific and general deterrence.

86 ASIC submits that the contraventions arose from concerning deficiencies in Mercer's policies, procedures, and systems. It is said that these systems, and Mercer's internal audit processes, were incapable of identifying the failures or raising alerts, and, most significantly, that Mercer's systems and records have not allowed it to identify the genesis of the deficiencies. ASIC contends that this should have important consequences in relation to penalty determination. ASIC claims that this failure to identify the genesis of the problem makes it more difficult for the Court to be satisfied that Mercer has fully understood what went wrong so as to ensure this type of conduct is not repeated, and that it is unclear whether Mercer has placed itself in a position to avoid or minimise the prospect of similar contraventions occurring again. ASIC submits also that there is no evidence that Mercer has taken steps to improve its systems and records.

87 ASIC points to the fact that both Mercer and the wider Mercer Australia Group are significant providers of financial services, drawing particular attention to Mercer's revenue and profit/loss

during the Relevant Period. ASIC notes that Mercer made a profit of between about $2.6 million and $6.9 million each year from 2012 to 2019, then made a large loss of approximately $18 million in 2020, and a significant profit of approximately $29 million in 2021. These large variations in profit/loss in 2020 and 2021 are due to redemption payments made to Mercer's clients in 2020, and capital contributions and intercompany loans received from its parent company (MAPL) in 2021. ASIC highlights that MAPL made a profit of around $26.76 million in 2020 and $80.98 million in 2021, and that its ultimate parent entity in the US made a profit of around USD $2 billion in 2020 and USD $3.14 billion in 2021. ASIC highlights that despite the resources of Mercer and the Mercer Australia Group, Mercer failed to ensure that its systems were capable of preventing the conduct in question or identifying the issue until late 2018, after a period of six year.

88 ASIC also submits that Mercer's failures and contraventions caused financial harm to clients. During the Penalty Period, the Post-FOFA FDS Affected Clients suffered loss and damage in the amount of $4,764,110 in ongoing fees paid after the termination of their OSA and despite not having been provided with complete information as to their OSA. The Pre-FOFA FDS Affected Clients suffered loss and damage in the amount of $9,701,233 in ongoing fees despite not having been provided with complete information as to their OSA. In addition, the 1,598 No FDS Clients received false or misleading information as their OSA. The misleading information concerned a service (the Review Meeting) that each client was contractually entitled to receive during the previous year.

89 On the other hand, however, ASIC acknowledges a number of mitigating factors. These include that:

(a) Mercer has not been found to have engaged in similar conduct in the past. Neither has it, nor any entity within the Mercer Australia Group, been the subject of previous regulatory action.

(b) Mercer has cooperated with and voluntarily assisted ASIC during its investigation prior to the commencement of this proceeding (including beyond mere compliance with compulsory notices) and has apologised for its conduct.

(c) Mercer has developed and implemented a review and remediation program. The program involved the review of all client files for 8,625 OSA clients for the period 6 January 2012 to 30 June 2019. The focus of the review was the ascertainment of whether Review Meetings had been conducted.

(d) Once the relevant issues were identified, Mercer worked promptly to investigate and address the errors, and to remediate affected clients. In total, Mercer has paid $30,383,536 in remediation and $14,794.254 in interest, with $8,764,976 of remediation and $4,288.849 of interest relating to clients where there was some evidence of their having received the Review Meeting. Mercer has accepted that these clients should nonetheless be regarded as not having received a Review Meeting. Further, as to remediation for failures within the Penalty Period, Mercer has refunded fees in the amount of $14,596,640.13 to OSA clients where there was no evidence or insufficient evidence to substantiate substitute the provision of a Review Meeting and has also paid $4,158,729.04 in interest.

90 ASIC accepts that this significant level of cooperation by Mercer and its remediation program are relevant to the assessment of penalty. ASIC maintains that but for such cooperation and remediation, a significantly higher penalty would have been sought.

91 Despite the limitations of the parity principle, ASIC submits that it retains importance and that like authorities offer some guidance as to the appropriate penalty. It refers in this regard to *Australian Securities and Investments Commission v National Australia Bank Limited* [2021] FCA 1013 (Davies J) (***ASIC v NAB***), where the Court imposed a pecuniary penalty of $18.5 million in respect of admitted contraventions of ss 962P and 962S of the Corporations Act, and s 12DB(1) of the ASIC Act. The conduct in question concerned NAB's failure to provide clients with all ongoing services in a relevant period and the failure to issue proper FDSs in time or at all.

92 In *ASIC v NAB*, Davies J noted that the seriousness of the contraventions lay "in the fact that the statutory objectives of the disclosure requirements…were not met" (at [86]). Her Honour viewed as important a potential loss of confidence in the reliability and accuracy of disclosure statements which was similar to banking customers' reliance on the integrity and good faith of their banks. ASIC submits that the same concerns are engaged in the present circumstances, all the more so given the nature and extent of the relevant contraventions.

93 In analogising the present case with *ASIC v NAB*, ASIC contends as follows:

(a) **Nature and extent of contravening conduct:** The contravening conduct in *ASIC v NAB* related to NAB's failure to provide clients with all ongoing services in a relevant period, and its failure to issue proper FDSs in time or at all. Compared to the current

proceeding against Mercer, ASIC notes that there were significantly fewer contraventions committed by NAB, much less financial harm resulting to NAB's clients, and the contraventions were not as serious in critical respects. *ASIC v NAB* did not involve contraventions where NAB charged for services that were not provided. Rather, its clients received their contracted review meeting, but only after the statement period. ASIC acknowledges, however, that other aspects of NAB's contraventions were more serious, in particular, the FDSs in that case were seriously misleading.

(b) **Compliance systems:** NAB accepted that its policies, procedures and systems were inadequate to identify whether review services were provided to clients in accordance with the relevant arrangements, whether FDSs were provided to clients in accordance with its statutory obligations, whether the FDSs provided accurate information to the clients, and whether it was prohibited from charging any ongoing fees to particular clients. Mercer has admitted to similar deficiencies in its systems. However, NAB's systems deficiencies were the result of identified and articulated procedural failings. Mercer's systems and records, by contrast, have not allowed it to identify the causes or origins of the failings. ASIC submits that this aspect makes the present wrongdoing by Mercer more troubling than the conduct committed by NAB.

(c) **Knowledge:** ASIC acknowledges that NAB's contraventions were aggravated by a higher degree of knowledge than that in the present case, and does not contend that Mercer's contraventions were in any way intentional. In *ASIC v NAB* senior management were aware of relevant deficiencies in its systems, but the contraventions continued for some months after that. In the present case, once Mercer's management became aware of the relevant issues they conducted a series of reviews to identify the extent of the issues, and began developing a remediation plan shortly thereafter. ASIC submits, however, that Mercer's lack of knowledge cannot be a mitigating factor given the state of its records and systems. Rather, ASIC contends that Mercer's lack of knowledge can equally be said to be a consequence of its systemic deficiencies in recognising and raising alarms as to its own contravening conduct.

(d) **Remediation, contrition and cooperation:** ASIC accepts that as occurred in *ASIC v NAB*, Mercer has made generous remediation to relevant clients, admissions of the relevant contraventions, has co-operated with ASIC in its investigations, has been contrite, and has made public acknowledgements of its failing. ASIC accepts that Mercer's cooperation is relevant to penalty.

(e) **Financial stature:** While Mercer's financial stature is not of the same magnitude as that of the NAB, ASIC submits that its group resources are still significant and there is a substantial degree of interconnectedness within the group. Mercer's financial reports show that it has been directly supported by its parent entity (MAPL) with annual revenues in the hundreds of millions of Australian dollars (through the provision of a capital contribution in February 2021 and an intercompany loan in March 2021), and is indirectly supported by its ultimate parent entity, with annual revenues in the billions of US dollars.

94 It is ASIC's position that a higher penalty is required in the present case than that imposed in *ASIC v NAB,* by reason of the higher number of contraventions involved, the greater financial harm to clients, and the more serious deficiencies in Mercer's compliance systems.

95 ASIC submits finally that the course of conduct principle is of little assistance in the present case where thousands of different customers were affected over a long period of time. ASIC also notes that the course of conduct principle was not applied in *ASIC v NAB*. ASIC contends that the proposed penalty has already taken various mitigating factors into account and does not require any moderation by reference to the totality principle.

96 ASIC maintains that despite the various substantial mitigating factors which have saved considerably in public expenditure, the objective seriousness of Mercer's contraventions calls for a significant pecuniary penalty to satisfy general and specific deterrence. As to general deterrence, ASIC submits that the proposed penalty is intended to create a strong disincentive for large financial institutions to engage in similar conduct, and/or fail to maintain adequate processes and systems. As to specific deterrence, ASIC submits that the proposed penalty will encourage Mercer to ensure that its systems are adequate and to identify proactively and address compliance issues, mitigating the prospects of further contraventions.

97 In oral submissions senior counsel for ASIC noted that while Mercer may now no longer offer OSAs to clients and require them to opt-in to the services provided each year, a substantial penalty is still required in the interests of specific deterrence. ASIC submits that Mercer still enters into fixed term advisory arrangements for six or 12 months where the clients receive review services and pay monthly fees, and there remains a risk of contraventions reoccurring in relation to these arrangements. Additionally, ASIC submits that there is still a need to ensure that documents issued and template documents used are accurate and compliant with legislative requirements. Consequently, ASIC contends that a higher penalty is required to deter the same

or similar contraventions, especially in circumstances where the root cause of the failures have not been identified.

98 Ultimately, it is ASIC's position that the $20 million penalty it seeks is required to impose the necessary "sting or burden" upon a financial service provider of Mercer's size, which is also a part of a far larger and very profitable group.

Mercer's submissions

99 Mercer contends that the penalty it proposes of $8.5 million is appropriate and consistent with judicial authority. It submits that such a penalty would strike a reasonable balance between oppressive severity and deterrence in all the circumstances because there is no need for specific deterrence, there are a number of mitigating factors which support the imposition of a reduced penalty, and an $8.5 million penalty is sufficient to satisfy the requirements of general deterrence. A penalty in this amount, Mercer submits, would represent approximately 1.4 to 2.1 years of normalised profits, and is equivalent to approximately one fifth of Mercer's net assets.

100 In this regard Mercer notes that there are no suggestions that its contravening conduct was intentional, and that at the time of the contraventions it had detailed systems and policies in place. These systems and policies, Mercer submits, have now been carefully reviewed, developed and improved and substantial time and resources have been allocated to this exercise.

101 Critically, Mercer makes the point that it admitted the contraventions at an early stage and co-operated extensively with ASIC. As soon as the relevant conduct came to the attention of management it was quickly escalated, investigated, self-reported to ASIC and resolved. This, Mercer submits, puts it in a different category to other financial service businesses which have been the subject of prosecution because they have frequently had knowledge of contraventions and were slow or reluctant to address them. Mercer also submits, and this is common ground, that it has not been found to have engaged in similar conduct in the past.

102 Mercer also points to the fact that since the contravening conduct occurred, its board, board committees, senior management and management committees have been almost entirely "refreshed", and that similar changes have occurred throughout the broader Mercer Australia Group.

103 Mercer notes also that it has conducted a comprehensive remediation campaign to compensate, with interest, all affected clients. This has included clients with statute-barred claims, and clients where there was evidence that Mercer had provided some of the services it had contracted to provide. Thus it cannot be said that it delivered any "benefit" from the contravening conduct. Mercer points to the fact that it has made a public apology which continues to appear on its website.

104 In addition, Mercer submits, it no longer offers OSAs. It now requires clients to opt into services every year. Thus it is said that it is not possible for the contravening conduct to recur.

105 Mercer contends that in circumstances where the central consideration for the Court is specific and general deterrence, specific deterrence does not justify the penalty proposed by ASIC. Although Mercer acknowledges that there is a need to deter other businesses from engaging in like conduct, it submits that whatever penalty is imposed should be no greater than is necessary to achieve this objective – it should be sufficient to deter, but not so onerous as to oppress: *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430 at 433 [7] (Middleton J).

106 Mercer further contends that ASIC's proposed publicity orders are unnecessary in circumstances where it has publicly apologised for its conduct, where that apology remains displayed on its website, and where it has written to all current and former OSA clients about the remediation.

107 Insofar as pecuniary penalties are concerned post *Pattinson*, Mercer draws particular attention to aspects of the plurality's reasoning in that case, and to the observations of Wigney J in *Construction, Forestry, Maritime, Mining and Energy Union v Richard Crookes Constructions Pty Ltd* [2022] FCA 992 at [160] that the seriousness of the contravening conduct is only relevant to determining the penalty required to achieve the object of deterrence.

108 In relation to the nature and extent of the contravening conduct, Mercer accepts that it was extensive, occurred over a long period of time and affected many clients. Nonetheless, Mercer submits that the contraventions differ in their level of severity. It contends that the contraventions where clients were charged fees in circumstances where the OSA had terminated, and those occasions where clients were not provided with an FDS despite the statutory obligation to do so, can be characterised as serious. Mercer also accepts that the contraventions of s 12DB(1)(a), (e) and (i) of the ASIC Act by making misleading

misrepresentations in relation to the contractual entitlement to charge clients and the obligations on clients to pay, can be characterised as serious. Mercer submits, however, that these contraventions did not involve wilful breaches of the law and were not at the egregious scale of seriousness, noting that ASIC does not contend that the contraventions should be characterised in that way.

109 Mercer also submits in this regard that it has been acknowledged that contraventions of ss 962P and 962S of the Corporations Act give rise to relatively less serious offences than, for example, a breach of the best interest obligation: *ASIC v NAB* at [106].

110 By contrast, Mercer submits that contraventions which arose from an inaccurate FDS, which incorrectly referred to an "invitation to a formal annual review meeting" rather than stating that the client was entitled to a review meeting itself, fall into a different category and are of a lower order of seriousness. Mercer contends that the impact of such conduct must be assessed in its proper context, and that it can be inferred that the relevant clients would have understood that they were entitled to a review meeting and that any impact on them was likely to be minimal. Mercer suggests that ASIC's submission that this error deprived clients of meaningful information necessary to determine whether or not to continue with the OSA is unlikely to be correct and should be rejected.

111 Mercer challenges ASIC's submission that the FDS did not say whether the relevant client had received a review meeting in the previous 12 months, thus depriving the relevant clients of meaningful information necessary to determine whether or not to continue with the OSA. Mercer contends that the actual error was the statement in the FDS to all clients that a review meeting had taken place in the previous 12 months, when for some clients that was not so. This, it is said, was more likely to highlight the fact that they had not received a review meeting rather than conceal this fact. On this basis Mercer submits that this conduct is of a lower order of seriousness.

112 Mercer makes the further point as to the nature and extent of the contravening conduct that clients typically missed a relatively small number of reviews, rather than being entirely disengaged. It is said therefore that the relevant conduct was not "the archetypal conduct" which the FOFA reforms sought to prevent.

113 Mercer submits also that the basis upon which ASIC seeks to assign a price to the Review Meeting, and thus determine the value of the Review Meeting and the seriousness of the

contraventions, is problematic. Mercer says that ASIC's approach in this regard fails to acknowledge that the two packages being compared by ASIC had different service offerings. Mercer also contends that there is no proper basis for assigning a price to individual components of the package and thus for assigning a "price" to the meeting. Mercer submits that ASIC's approach ignores correspondence sent to clients prior to each Review Meeting which expressly advised that the review meeting was an important part of the services provided by Mercer to each client. It is said that any impact of the statements made in the FDS was reduced as a result of this correspondence.

114 Mercer emphasises that ASIC does not contend that the relevant contraventions were intentional and that ASIC has not led evidence to suggest that its conduct was reckless. It is submitted that these are mitigating factors supporting the imposition of a lower penalty. Mercer notes that it is common ground that the relevant failures were caused by inadequate policies and procedures, and human error, and that the circumstances in which the compliance deficiencies arose cannot be identified.

115 On the subject of ASIC's submission that there is no evidence that Mercer has taken steps to improve its systems, Mercer contends forcefully to the contrary. It points to the following conduct in this regard:

(a) requiring clients to opt into to advice agreements each year;

(b) conducting internal reviews;

(c) replacing key employees responsible for financial advice clients;

(d) implementing organisation changes to ensure stronger management oversight;

(e) upgrading compliance and risks systems;

(f) introducing more targeted Mercer board oversight procedures;

(g) revising Mercer financial advice standards and policies;

(h) revising processes for invitation to review meetings;

(i) introducing quarterly assurance reviews to confirm that service have been delivered to clients;

(j) expanding the mandate of external audits by KPMG;

(k) updating its software systems to specifically target service gaps; and

(l) implementing improved reporting systems.

116 Mercer submits that all of these steps evidence improvements in its systems and procedures, which ASIC accepts have been taken to prevent the contravening conduct from happening again. Mercer contends that these reforms support the conclusion that a lower penalty is appropriate and that ASIC's submission that there is a lost opportunity to minimise the prospect of the relevant contraventions occurring in the future is without foundation having regard to the changes which have been made.

117 On the subject of the seniority of the officers responsible for the contravention, Mercer submits that this consideration is of limited assistance in setting a penalty in the present case given that the contravening conduct was caused by inadequate policies or procedures and human error (even though the circumstances in which the deficiencies arose have not been identified).

118 Insofar as its capacity to pay and its resources are concerned, Mercer submits that the relevant authorities do not explain how "group" resources should be weighed when assessing an appropriate penalty: see *ASIC v RI Advice* at 333 [44]-[45] (Moshinsky J); *BT Funds* at [44] (Wheelahan J); *ASIC v Westpac* at 610 [128] (Beach J); *Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd* [2022] FCA 1105 at [66] (McEvoy J).

119 Noting that there is no submission that any other entity in the wider Mercer group has benefited from the relevant conduct, Mercer submits that the most ASIC can say in support of its contention that the court ought look beyond Mercer's assets is that MAPL has made $27 million available to Mercer to conduct the remediation program. It is submitted that there is no evidence of the availability of further resources, and that the evidence establishes that Mercer is a separate legal entity with a separate board and that the services Mercer obtains from (and provides to) other entities within the Mercer Australia Group are provided pursuant to formally documented agreements. Thus Mercer submits that it is not appropriate to conflate its resources with profits or revenues generated by other entities.

120 Insofar as compliance systems, education and internal enforcement is concerned, Mercer points to the fact that it had detailed compliance policies and its advisers participated in continuing professional development. Mercer submits that it allocated considerable resources to establishing, maintaining and administering these policies and systems, and that it monitored whether advisers were meeting their training obligations. Indeed, Mercer points to the fact that it was the compliance systems it had in place which picked up the fact that the review meetings

were not being provided to clients (albeit that the problem should have been identified earlier than it was).

121 In relation to the knowledge of its directors, Mercer notes that there is no suggestion that directors had knowledge of the relevant conduct at the time it occurred. Rather the directors became aware of the problems when Mercer's risk reporting system identified the issue, and the board took immediate action. Mercer notes that it has now upgraded its risk management functions so that rather than being monitored by board committees they are monitored by the board itself.

122 On the subject of its cooperation with ASIC, Mercer emphasises that it notified ASIC promptly of the conduct which is the subject of this proceeding and has cooperated fully with ASIC during its investigation, thereby saving considerable time, costs and court resources. Mercer points also to the comprehensive remediation program it has put in place, and the fact that it has made assumptions in favour of clients where there has been doubt as to whether a service has been provided. Mercer submits that these matters together with its admission and public apology, provide strong evidence of its contrition.

123 In relation to the course of conduct principle, Mercer submits that there are aspects of the contravening conduct which can be categorised as a course of conduct: see *ASIC v NAB* at [78] and [102]. In particular, the contraventions which arose from the error in the FDS template giving rise to a misalignment between the FDS and the authorities to proceed and letters of engagement. Mercer contends that it was this error that resulted in the provision of defective FDSs and the consequent incorrect representations that contracts remained on foot. Mercer therefore submits that the course of conduct and totality principles are of application, and the penalty should take into account the overlap of these contraventions and assess them in aggregate.

124 On the subject of parity, Mercer submits that while the Court may have regard to the principle of parity in setting a pecuniary penalty, such a consideration will generally be of limited utility: *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515 at [140] (Beach J) (***ASIC v Westpac (Omnibus)***).

125 Insofar as ASIC attempts to analogise the present case to the decision of Davies J in *ASIC v NAB,* and then rely on that case to justify a penalty higher than that ordered against the NAB, Mercer contends that such an approach is flawed. Mercer points to the material differences

between the two matters, and the fact that the reasoning in *ASIC v NAB* does not provide an explanation of how these differences impact on the penalty ultimately awarded. Mercer advances the following key difficulties with the approach suggested by ASIC:

(a) first, that the nature and character of the contravening conduct differed and the conduct in *ASIC v NAB* was more serious;

(b) secondly, that the NAB continued to charge fees after it was aware that its compliance systems were deficient, whereas Mercer did not;

(c) thirdly, that the NAB had historic underinvestment in operational risk and compliance frameworks which was relevant to the penalty ultimately awarded, whereas this is not a relevant consideration in the case of Mercer because there is no evidence before the Court to support such a comparison;

(d) fourthly, that the NAB was slow to take steps to improve its systems and processes, whereas Mercer acted quickly to make improvements;

(e) fifthly, that the NAB is far larger than Mercer in terms of profit and market capitalisation; and

(f) sixthly, that the NAB or its related entities had been found to have engaged in prior contraventions (unlike Mercer or any other entity within the Mercer Australia Group).

126 Mercer submits that for these reasons ASIC's attempt to draw comparisons between Mercer's conduct and the contraventions in *ASIC v NAB* to justify a penalty which is higher than that ordered in NAB are highly problematic and should be rejected.

The appropriate pecuniary penalty

127 The process of having regard to the various relevant factors in deriving a penalty figure is one of intuitive synthesis: *Australian Competition and Consumer Commission v Murray Goulburn Co-Operative Co Ltd* [2018] FCA 1964 at [36] (Beach J); *ASIC v AGM* at 523 [47] (Beach J). The process requires a consideration of all factors taken together by reference to the civil penalty provisions contravened, in their statutory context.

128 As I have indicated, in all the circumstances I accept ASIC's submission that the seriousness of Mercer's contraventions calls for a significant pecuniary penalty to satisfy general and specific deterrence. Having said that, however, and taking all relevant matters into account, I consider that a pecuniary penalty of $20 million would be excessive and thus inappropriate. Yet nor do I consider that a pecuniary penalty of $8.5 million would be adequate. As I explain

below, I consider that an aggregate pecuniary penalty of $12 million is appropriate in all the circumstances.

Maximum penalty

129 The case has proceeded on the basis that the maximum penalties imposed for conduct prior to 13 March 2019 should be regarded as being applicable to the entirety of the relevant conduct, given that the greater part of the penalty period occurred prior to that date. Given the number of contraventions involved the maximum penalties would be very substantial, even at the pre-13 March 2019 rate (as to which see paragraphs 66 and 67 above).

130 In considering the quantum of the pecuniary penalty to be imposed on Mercer I have had regard to the maximum penalty prescribed by the legislation up until 13 March 2019, and also to the statements of the plurality in *Pattinson*, including those to the effect that:

(a) there is no place for a "notion of proportionality" in a civil penalty regime (at 457 [10] and 468 [41]-[42]);

(b) insistence upon the deterrent quality of a penalty should be balanced by insistence that it "not be so high as to be oppressive" (at 467-468 [40]);

(c) it is necessary to have regard to the circumstances of the contravenor and the contravention (at 474 [60]);

(d) contrition and substantial changes in an organisation's personnel may mean that a more modest penalty is appropriate (at 470 [47]); and

(e) what is required is "some reasonable relationship between the theoretical maximum and the final penalty imposed" which will be established where the penalty does not exceed what is reasonably necessary to achieve the purpose of the provision, being the deterrence of future contraventions of a like kind by the contravener and others (at 457 [10]).

131 What follows should be understood in this context.

The nature, extent and circumstances of the contravening conduct

132 There can be no doubt that, when considered as a whole, the conduct which is the subject of the proceeding and which has been described above was extensive and serious. There were thousands of contraventions over the Relevant Period affecting many clients. ASIC submits, and I accept, that the failures leading to each contravention were serious failures. The failures

occurred over a protracted period and arose of out deficiencies with Mercer's policies, procedures and systems. They should not have been allowed to occur.

133 Although Mercer has submitted that contraventions of ss 962P and 962S of the Corporations Act may be less serious than other contraventions, and that the contraventions arising from inaccurate FDSs are of a lower order of seriousness, I am not convinced that these points should be regarded as significantly affecting the objective seriousness of Mercer's conduct when that conduct is assessed as a whole. I do accept however, if it be relevant, that ASIC's assignment of a price to the Review Meetings as an aspect of its assessment of the seriousness of the conduct is problematic for the reasons Mercer advances.

134 In considering the circumstances of the contravening conduct it is, however, important to bear in mind that there is no suggestion that the relevant contraventions were intentional and there is no evidence that they were reckless. These are important mitigating factors which justify a lower penalty than ASIC proposes; albeit not as low as Mercer proposes.

135 It may also be accepted in this regard that while Mercer may have failed to identify a root cause of the deficiencies in its processes which caused the contraventions, Mercer has taken substantial and meaningful steps to improve its systems and processes. These steps have been described above. As Mercer submits, these reforms to its systems and processes tend to support the imposition of a lower penalty than ASIC proposes. It is difficult to see how ASIC can contend, having regard to what Mercer has done, that there has been a lost opportunity to minimise the prospect of the relevant contraventions occurring in the future.

136 It is also important to note, in mitigation, that Mercer acted extremely promptly to investigate and address the mistakes which had been made, to modify its systems and processes, and to remediate the affected clients. Mercer self-reported the contraventions at an early stage and it has co-operated fully with ASIC. These are, in my assessment, matters of real significance. I regard these aspects of Mercer's conduct as also supporting a lower penalty than ASIC proposes.

Course of conduct and totality principle

137 As has been mentioned, Mercer has argued that there are aspects of the contravening conduct that can be categorised as being a part of a "course of conduct" on its part, particularly those contraventions arising from the error in the FDS template that gave rise to a misalignment between the FDS and the authorities to proceed and letters of engagement, and that the penalty

should take this into account. In all the circumstances, however, I do not consider that the course of conduct principle should be accorded much significance in assessing the appropriate penalty. As Moshinsky J observed in *ASIC v AMP* at 91 [122]:

> [T]he "course of conduct" principle does not have paramountcy in the process of assessing an appropriate penalty. It cannot operate as a de facto limit on the penalty to be imposed for contraventions of civil penalty provisions of (in this case) the ASIC Act. The present case is one where, even if the conduct can be described as a single "course of conduct", the contravening conduct affected a large number of members and involved the wrongful deduction of (in total) a substantial sum of money. In my view, in the circumstances of this case, the preferable approach is to have regard to the nature and extent, and the circumstances, of the contravening conduct, including its common features, rather than determining whether the conduct constitutes a single "course of conduct".

138 Moshinsky J's observations in *ASIC v AMP* have considerable resonance in the circumstances of this case.

139 Insofar as the totality principle is concerned, it may be accepted that the various contraventions overlap in the sense that Mercer's conduct has had the effect of contravening several statutory provisions. The penalty for the various contraventions should thus properly be assessed in aggregate and in coming to the penalty amount I adopt this approach.

Harm / loss caused to clients

140 There can be no doubt, and Mercer accepts, that its conduct caused harm to its clients insofar as they suffered loss in making payments they should not have had to make. Mitigating against this, however, is the comprehensive and prompt remediation program that Mercer put in place. It will be recalled that Mercer has paid around $30 million in remediation and almost $15 million in interest. A portion of this remediation amount (and interest) has been paid to clients where there was some evidence of their having received the Review Meeting, and some clients where there was no or insufficient evidence to substantiate the provision of a Review Meeting. It is also the case that the remediation Mercer has paid related to conduct both within and prior to the Penalty Period. In all the circumstances therefore I consider that while the harm suffered by Mercer's clients was initially significant, the fact that this has subsequently been so comprehensively remediated supports the imposition of a penalty lower than that sought by ASIC.

Deterrence

141 Bearing in mind the importance of ensuring that the penalty achieves a reasonable balance between achieving specific and general deterrence and oppressive severity, the following matters are significant.

Specific deterrence

142 I do not accept, as Mercer contends, that there is no need for specific deterrence in the present circumstances. Although Mercer now requires clients to opt in to services every year, I do not conclude that this is a matter which is a significant consideration in relation to considerations of specific deterrence. In light of what has occurred it is important that Mercer ensure that it has robust systems in place across the gamut of financial services it provides, even if its capacity to engage in identical contraventions to those in issue here is reduced. This is an important matter which makes considerations of specific deterrence relevant to the penalty to be imposed.

143 Nonetheless, it must also be regarded as significant in the context of specific deterrence that there has been considerable personnel changes at Mercer at a senior level and within the wider Mercer Australia Group, and that Mercer has taken the substantial steps described above to reform its systems and processes.

General deterrence

144 Mercer accepts, correctly, that there is a need to impose a penalty to deter other businesses in a similar position from engaging in such conduct. This is a consideration of the highest importance. Having regard to the major failings of systems and processes which have occurred, it is necessary that the penalty ordered be significant (without being oppressive), and signal the Court's disapproval of the contraventions. It must also be sufficient to convey to market participants the standard of corporate behaviour which is expected, and the importance of ensuring that systems and processes are adequate to ensure compliance with regulatory requirements.

Size and resources of Mercer

145 Insofar as ASIC submits that in determining the appropriate pecuniary penalty it is relevant to considerations of both specific and general deterrence that Mercer and the wider Mercer Australia Group is a major provider of financial services, the following may be said. Plainly Mercer's capacity to pay and its resources are relevant considerations in determining the size

of the penalty. I accept that these are not inconsiderable. However, in circumstances where there is no suggestion that any other entity in the wider Mercer group has benefited from the relevant conduct, I do not consider that it would be appropriate to conclude that Mercer's resources should be conflated with the profits or revenues generated by other entities in the wider group in settling upon a penalty, and I have not done so.

146 Nonetheless, I consider that a penalty higher than the approximately 1.4 to 2.1 years of Mercer's normalised profits represented by an $8.5 million penalty is appropriate having regard to the significant systems failures which have occurred.

Comparison with ASIC v NAB

147 Insofar as ASIC submits that *ASIC v NAB* provides a "serviceable analogue" to the present case in relation to the total penalty, I do not accept that this is so. It is well established that the parity principle is generally of limited assistance in cases concerning pecuniary penalties. As Beach J observed in *ASIC v Westpac (Omnibus)* (at [140]), it can be "conceptually problematic to look at penalties in other cases to calibrate a figure in the present case when all that one has from the other cases are single point determinations produced by opaque intuitive synthesis". In this instance the comparisons drawn by ASIC to *ASIC v NAB* are not especially helpful. To the extent that any comparisons might be drawn, I accept Mercer's submissions that there are real difficulties in doing so.

Conclusion as to pecuniary penalty

148 I have accepted that the contraventions in the present case were extremely serious. They were large in number, many clients were affected, large sums were involved, and they continued over a long period of time.

149 As a sizable provider of financial services, Mercer is a substantial player in the Australian market for financial services. As Allsop CJ observed in *ASIC v ANZ (No 3*), market efficiency, upon which consumer confidence rests, relies on reliability, good faith, fairness and honesty of conduct (at [74]). These obligations are of fundamental importance, and they underpin the functioning of the Australian economy. It is important not to lose sight of them. It must be made clear to Mercer, and to all businesses, that consumers are to be dealt with in the way for which Parliament has legislated. The community is entitled to expect that robust systems and processes will be put in place and maintained in the market for financial services to ensure that conduct of the kind which has occurred in this case does not occur.

150 Although Mercer's failure to comply with legislated norms of corporate behaviour was not intentional or reckless, the fact remains that it occurred. For whatever reasons the systems and processes which were in place did not prevent it. Mercer's conduct is deserving of a stern penalty to achieve the objectives of specific and general deterrence in light of what has occurred.

151 I accept, however, that there are significant mitigating factors in play. These affect the deterrent calculus. As I have outlined, Mercer reported the relevant breaches at a very early stage and worked with ASIC in investigating them. Significant changes have been made to Mercer's systems and processes designed to ensure that the relevant contraventions will not recur. And since the time of the contraventions there have been substantial personnel changes at a high level within Mercer. In addition, Mercer has comprehensively remediated, with interest, the affected clients. Mercer has also demonstrated contrition and has made a public apology which is able to be seen on its website. It is also important to bear in mind that Mercer has not been found to have engaged in similar conduct in the past.

152 It is in weighing all these matters, and endeavouring to balance the need for specific and general deterrence with the importance of ensuring that the amount of the pecuniary penalty is not so high as to be oppressive, that I consider the pecuniary penalty of $12 million to be appropriate in the circumstances of this case.

ANCILLARY ORDERS: ADVERSE PUBLICITY NOTICE

153 ASIC contends, finally, that there should be an adverse publicity order. Mercer's position is that having regard to the apologies it has made, an adverse publicity order is unnecessary and is not required.

The Court's power

154 Section 12GLB(1)(a) of the ASIC Act gives the Court power to make adverse publicity orders in relation to a person who has been ordered to pay a pecuniary penalty under s 12GBA of the ASIC Act (as relevantly in force). An "adverse publicity order" is defined in s 12GLB(2) of the ASIC Act. A corresponding power is given to the Court by s 1101B(1) of the Corporations Act, in respect of contraventions of Chapter 7 of that Act. Sections 912A, 962P and 962S of the Corporations Act are to be found within Chapter 7. Such powers are discretionary.

ASIC's position

155 ASIC seeks to have the Court make an order for Mercer to publish, within 30 days, a written adverse publicity notice on its website in the following terms:

> **MISCONDUCT ALERT**
>
> **Ordered by the Federal Court of Australia**
>
> The Court found that Mercer Financial Advice (Australia) Pty Ltd (ACN 153 168 293) (MFA) had committed contraventions of the Corporations Act 2001 and the Australian Securities and Investments Act 2001 in relation to the inadequate issuing and contents of fee disclosure statements, the charging of ongoing fees for financial advice services without entitlement, and related system deficiencies.
>
> On [date], Justice McEvoy of the Federal Court ordered MFA to pay a pecuniary penalty of $[20] million to the Commonwealth. From 1 July 2016 to 30 June 2019, MFA had committed:
>
> - 1,237 contraventions of s 962P of the Corporations Act by continuing to charge ongoing fees to 761 retail clients, despite the applicable ongoing fee arrangement having been terminated through MFA's failure to provide them with a fee disclosure statement;
> - 2,933 contraventions of s 962S(1) of the Corporations Act by failing to give 1,578 retail clients a fee disclosure statement as required by that provision; and
> - 5,881 contraventions of s 12DB(1) of the Australian Securities and Investments Act, by making false or misleading representations within fee disclosure statements provided to retail clients.
>
> MFA failed to provide fee disclosure statements to certain retail clients. Other retail clients received fee disclosures statements that were deficient in that they failed to adequately disclose and were misleading as to significant financial services to which the client had been entitled but had not used.
>
> Affected clients suffered $14,465,343 in inappropriate ongoing fees.
>
> MFA has remediated these clients and others affected earlier. It cooperated with ASIC in the investigation, commencement and finalisation of the proceeding. MFA made full admissions at the earliest opportunity.
>
> The Court ordered MFA to publish this Misconduct Alert.
>
> **Further information**
>
> For further information, visit ASIC's media release [insert link].

156 Originally ASIC sought orders simply that Mercer "publish" on its website a "written adverse publicity notice" in the terms set out above.

157 At the hearing, however, ASIC proposed revised orders in the following terms:

> 5. Pursuant to s 12GLB(l)(a) of the ASIC Act and s 1101B of the Corporations Act, within 30 days of this order, MFA publish, at its own expense, a written adverse publicity notice in the terms set out in Annexure 1 to appear on:

a. for a period no less than 90 days, in font no less than 10 point, in an immediately visible area of the following web address: https://www.mercer.com.au/; and

b. for a period no less than 365 days, in font no less than 10 point, in an immediately visible area of the webpages to appear after a person uses credentials to log into the secure on line service via the "member" or "employer" sections of the webpage (to the extent applicable).

158 ASIC submits that an order in these terms is appropriate as the publication will serve the purposes of correcting any misapprehensions or false impressions created by Mercer's conduct, alerting customers to Mercer's conduct, and preventing Mercer from engaging in such conduct in the future. ASIC notes that the conduct the subject of the proposed order is the relevant conduct for the purposes of the contraventions alleged (and admitted) and the penalty sought to be imposed. ASIC submits that the proposed order is not unduly burdensome in that it does no more than require Mercer to publish a notice on the appropriate part of its website.

159 ASIC's position was further articulated by counsel orally. It was submitted that such a publication is appropriate to expose and publicise Mercer's contravening conduct, and that this will serve both general and specific deterrence. As to Mercer's apology already made and currently displayed on its website, ASIC says that this is hard to find and that it is not sufficient to alert the public, and Mercer's own customers, to the contravening conduct.

Mercer's position

160 Mercer submits that ASIC's proposed publicity order is unnecessary in circumstances where it has already publicly apologised for its conduct, where it has apologised in open court, where its apology remains displayed on the Mercer Australia website, and in circumstances where it has written to all its current and former OSA clients about the remediation.

161 Mercer notes that the purpose of adverse publicity orders is both punitive and protective (in the sense of dispelling incorrect or false impressions and/or alerting consumers to the fact of contravening conduct): *Australian Securities and Investments Commission v Aware Financial Services Australia Ltd* [2022] FCA 146 at [35] (Moshinsky J); see also *Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2)* [2021] FCA 966 at [7]-[17] (Lee J).

162 In oral submissions senior counsel for Mercer highlighted particular concerns about the form of a possible adverse publicity notice on its website. ASIC's amended proposed orders seek to have such a notice published "in an immediately visible area" on Mercer's homepage for a

period of at least 90 days, and on sections of the webpage available to members and employers for a period of at least 365 days. Mercer pointed to the fact that it has one website for the whole group, and thus that there are other corporate entities not before the Court which would be affected by the making of an order in the terms sought by ASIC. It was also submitted that the adverse publicity order was not necessary in circumstances where Mercer has cooperated with ASIC, conceded that a pecuniary penalty should be imposed, and where the details of the pecuniary penalty will otherwise be in the public domain through the extensive media coverage likely to follow from the publication of these reasons. If such an order were to be made, senior counsel for Mercer submitted that it should be in an alternative medium such as a newspaper, or in the form of an agreed press release.

Determination

163 I am not persuaded that it is necessary for there to be an order of the kind contemplated by ASIC that would require an adverse publicity notice to be posted on the Mercer website in an "immediately visible area" (whatever that means) for 90 days and in a separate part of the website for no less than 365 days. Mercer is to pay a substantial pecuniary penalty and it is all but certain that this will receive significant national publicity in the press. Any order that there be a notice on the website for an extended period of time would, in my assessment, be problematic, including in circumstances where other Mercer entities would also be affected. At least on the basis of the wording of the proposed order, it may also give rise to problems of interpretation.

164 As was traversed in argument with senior counsel for Mercer and junior counsel for ASIC at the conclusion of the hearing, I consider that the preferable course is for Mercer to be required to issue a press release along the lines of the adverse publicity notice proposed by ASIC. I will reserve liberty to apply in the unlikely event that the parties are not able to agree on how this is to occur.

COSTS

165 ASIC submits that Mercer should pay its costs of and incidental to these proceedings. Such an order would seem to be appropriate, but I will defer making it for seven (7) days in the event that Mercer wishes to make some contrary submission.

166 There will otherwise be orders as set out at the commencement of these reasons.

I certify that the preceding one hundred and sixty-six (166) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McEvoy.

Associate:

Dated: 23 November 2023

ANNEXURE A

Contravention	Admitted contraventions	No evidence of review activity on file	Some evidence of review activity on file
Civil penalty allegations within the Penalty Period (1 July 2016 to 30 June 2019)			
Breaches of s 962P of the Corporations Act Occasions on which MFA charged Post-FOFA clients ongoing fees, notwithstanding earlier termination of the OSA	1,237	981	256
Breaches of s 962S of the Corporations Act Occasions on which MFA provided Pre-FOFA clients with a non-compliant FDS (or no FDS)	2,933	2,229	704
Breaches of s 12DB of the ASIC Act Occasions on which MFA made false and misleading representations to clients in FDSs, because those FDSs said:			
a binding fee arrangement was on still foot	1,144	888	256
MFA was contractually entitled to charge fees	1,144	888	256
all services had been provided	3,593	2,655	938
Other matters alleged within Penalty Period (1 July 2016 to 30 June 2019)			
Number of times MFA failed to conduct a review meeting	4,886	3,300	1,586
Number of times MFA failed to provide an FDS	512	512	-
Number of times MFA provided a non-compliant FDS (arising out of a failure to refer to non-provision of review meeting)	3,593	2,655	938
Number of times MFA failed to invite clients to attend a review meeting (NB: This is an extrapolated figure based on a sampling exercise)	842	842	-
Harm suffered by Post-FOFA FDS Affected Clients (being fees paid after termination of OSA, up until 30 June 2019) (fully remediated)	$4,764,110	$3,908,775	$855,335
Harm suffered by Pre-FOFA FDS Affected Clients (being fees refunded for periods where a review was not provided, up until 30 June 2019) (fully remediated)	$9,701,233	$7,063,617	$2,637,616