FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Diversa Trustees Limited [2023] FCA 1267

File number: VID 573 of 2021

Judgment of: **BUTTON J**

Date of judgment: 24 October 2023

Catchwords:

SUPERANNUATION – where defendant was trustee of superannuation fund – where defendant had contractual arrangements for the administration, promotion and provision of platform functions in relation to the fund – where ASIC alleged that the defendant knew or ought to have known of certain "vices" in relation to the business practices of a particular adviser group who joined members to the fund – whether knowledge of entities performing sponsor, promotion, administration and platform provision services were attributable to the defendant – whether s 769B(3) of the *Corporations Act 2001* (Cth) applies where the state of mind is not held by the same person who engaged in the conduct

CORPORATIONS – financial services – where defendant was the holder of an Australian Financial Services Licence – where ASIC alleged contraventions of ss 912A(1)(a) and (ca) of the *Corporations Act 2001* (Cth) – obligation of licensee to do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly – obligation of licensee to take reasonable steps to ensure that its representatives comply with the financial services laws – where trustee contracted with other licensees for provision of administration, promotion and provision of platform functions in relation to the fund – whether s 912A(1)(a) applies where financial service of giving general advice said to be provided by another licensee – effect of s 911B(3) of the *Corporations Act 2001* (Cth) on who provides financial services – whether the second licensee was a "representative" of the defendant for the purposes of s 912A(1)(ca) of the *Corporations Act 2001* (Cth)

AGENCY – attribution of knowledge of agents – whether services performed by the entities with which the defendant had contractual arrangements for the administration, promotion and provision of platform functions in relation to

the fund were services performed as agent of the defendant or services provided to the defendant – where a subset of the contracts contained “no agency” clauses – no evidence of actual workings of the relationships between the defendant and the entities – evidence did not link knowledge of entities with tasks said to be undertaken as agent

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12DA

Corporations Act 2001 (Cth) ss 9, 766A, 766B, 769B, 910A, 911A, 911B, 911D, 912A, 912B, 916A, 916D, 946A–947B, 991A, 1041H, 1101B

Superannuation Industry (Supervision) Act 1993 (Cth)

Superannuation Industry (Supervision) Regulations 1994 (Cth)

Cases cited: *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133

Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3) (2020) 275 FCR 57

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 Commonwealth Bank of Australia [2022] FCA 1422

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

Australian Securities and Investments Commission v National Australia Bank (2022) 164 ACSR 358; [2022] FCA 1324

Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 2) (2021) 156 ACSR 371; [2021] FCA 877

Australian Securities and Investments Commission v Westpac Banking Corporation (No 2) (2018) 266 FCR 147

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

Australian Securities and Investments Commission v Westpac Securities Administration Ltd (2019) 272 FCR 170

Australian Securities and Investments Commission v Westpac Securities Administration Ltd (2018) 133 ASCR 1; [2018] FCA 2078

Briginshaw v Briginshaw (1938) 60 CLR 336

Certain Lloyd’s Underwriters v Cross (2012) 248 CLR 378

Commonwealth Bank of Australia v Kojic (2016) 249 FCR 421

Commonwealth v Fernando (2012) 200 FCR 1

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (2015) 230 FCR 298

Federal Commissioner of Taxation v Ludekens (2013) 214 FCR 149

Jones v Dunkel (1959) 101 CLR 298

Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563

Lek v Minister for Immigration, Local Government and Ethnic Affairs (1993) 43 FCR 100

Lisciandro v Official Trustee in Bankruptcy (1995) ATPR 41-436; [1995] FCA 716

Naismith v McGovern (1953) 90 CLR 336

Paccioco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199

Sargent v ASL Developments Ltd (1974) 131 CLR 634

South Sydney District Rugby League Football Club Ltd v News Ltd (2000) 177 ALR 611; [2000] FCA 1541

Stevens v Kabushiki Kaisha Sony Computer Entertainment (2005) 224 CLR 193

Tonto Home Loans Australia Pty Ltd v Tavares (2011) 15 BPR 29,699; [2011] NSWCA 389

Walplan Pty Ltd v Wallace (1985) 8 FCR 27

Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3) (2012) 44 WAR 1

Westpac Securities Administration Ltd v Australian Securities and Investments Commission (2021) 270 CLR 118

Young Investments Group Pty Ltd v Mann (2012) 293 ALR 537; [2012] FCAFC 107

GE Dal Pont, *Law of Agency* (LexisNexis Australia, 4th ed, 2020)

Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	388
Date of last submissions:	16 August 2023

Date of hearing:	31 July–2 August 2023
Counsel for the Plaintiff:	O Bigos KC with D Luxton and S Hogan
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendant:	R McHugh SC with J Entwisle
Solicitor for the Defendant:	Allens

ORDERS

VID 573 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**DIVERSA TRUSTEES LIMITED (ACN 006 421 638)** Defendant

ORDER MADE BY:	**BUTTON J**
DATE OF ORDER:	**24 OCTOBER 2023**

THE COURT ORDERS THAT:

1. The plaintiff's originating process dated 8 October 2021 is dismissed with costs.

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

REASONS FOR JUDGMENT

INTRODUCTION [1]

THE OPERATIONAL AND CONTRACTUAL CONTEXT [17]

AFSLs [19]

Roles and Agreements [26]

Diversa and the Fund [26]

The Administration Agreement: Diversa and Super [27]

The Sponsor Agreement: Diversa and Wealth [33]

The Promoter Agreement: Diversa and Wealth [38]

The Platform and Custody Services Agreement: Diversa and Wealth [42]

The OneVue Platform, the OneVue Platform Dealer Group Registration Form and SuperMatch [47]

THE AFSL REGIME [55]

WHAT DIVERSA SHOULD HAVE DONE AND WHEN: THE RELEVANT PERIOD [70]

DIVERSA'S COMPLAINTS ABOUT ASIC EXPANDING ON, AND DEPARTING FROM, ITS PLEADED CASE [86]

***JONES V DUNKEL* INFERENCES** [97]

ASIC'S ALLEGATIONS OF KNOWLEDGE [99]

ASIC's allegations concerning knowledge at the *start* of the Relevant Period [99]

ASIC's allegations concerning knowledge *during* the Relevant Period [105]

ASIC's aides memoire on knowledge [108]

KNOWLEDGE AND ATTRIBUTION OF KNOWLEDGE [109]

Overarching issues [109]

The end point of relevant knowledge: 17 March 2020 [109]

Whether s 769B(3) is applicable at all [112]

Whether s 769B(3) can apply where the state of mind is not held by the same person who engaged in the conduct [120]

A note on a related pleading issue [132]

Actual and constructive knowledge: approach in cases under s 912A(1)(a) and s 912A(1)(ca) [135]

THE FIRST ALLEGED S 912A(1)(A) CONTRAVENTION: ISSUING OF UNITS [141]

The "circumstances" and whether Diversa could breach its s 912A(1)(a) obligation by reason of deficiencies in the activities of the Bhandari Entities [145]

Section 912A(1)(a) as a forward-looking obligation [149]

Diversa personnel [155]

Stephen Blood [156]

Di Caldwell-Smith [160]

Andrew Loveridge [170]

Daniel Strachan [174]

Diversa's position on the attribution of knowledge of Mr Blood, Ms Caldwell-Smith, Mr Loveridge and Mr Strachan [176]

Connie Mckeage [179]

Consideration: Knowledge of Diversa (other than by attribution of the knowledge of the OneVue Entities) [180]

Hardship claims [183]

Complaints about unauthorised transactions [201]

Dummy email addresses [208]

Re-using signatures and issues regarding documentation retained by the Bhandari Entities [213]

Bhandari's business model (general advice, fees for consolidation) and ASIC's enquiries [217]

Fees for consolidation [238]

Overview: Diversa's knowledge [245]

Consideration: attribution of knowledge of the OneVue Entities [246]

ASIC's attribution case was confined to s 769B(3) [246]

ASIC's alternate attribution case relying on s 769B(1)(b) was not pleaded [247]

Consequences of ASIC's attribution case being confined to s 769B(3) [249]

The failure of ASIC's attribution case does not mean trustees can "wash their hands", as suggested by ASIC [253]

ASIC has not established a basis for aggregation of knowledge of OneVue personnel [256]

The attribution of knowledge of agents [276]

Whether the OneVue Entities were agents and, if so, the scope of the agency [295]

The documents said to establish the OneVue Entities' knowledge [308]

Conclusions on whether Diversa failed to adhere to its s 912A(1)(a) duty [318]

The knowledge case [318]

Other matters relied on regarding the contravention of s 912A(1)(a) [338]

THE SECOND ALLEGED S 912A(1)(A) CONTRAVENTION: PROVISION OF ADVICE [346]

THE ALLEGED CONTRAVENTION OF S 912A(1)(CA): DIVERSA'S ALLEGED REPRESENTATIVES [370]

CONCLUSION [387]

BUTTON J:

INTRODUCTION

1 By its originating process, the Plaintiff (**ASIC**) sought declarations that, between 13 March 2019 and 18 December 2020 (the **Relevant Period**) "in relation to the promotion and sign-up or roll-over of customers by Mr Nizi Bhandari [(**Mr Bhandari**)], Australian Super Finder (**ASF**) and the Australian Dealer Group Pty Ltd (**ADG**) to the YourChoice Super fund or their use of that fund in the superannuation aggregation business", the Defendant (**Diversa**) has contravened s 912A(1)(a) and s 912A(1)(ca) of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

2 ASF, ADG and Mr Bhandari were together referred to as the **Bhandari Entities**. Largely, the case was run without distinguishing between ASF, ADG and Mr Bhandari, although I explain the two corporate entities below.

3 Diversa was the trustee of YourChoice Super. It had various contractual arrangements with OneVue Wealth Services Ltd (**Wealth**) and OneVue Super Services Pty Ltd (**Super**) (collectively the **OneVue Entities**) concerning, inter alia, the administration, management and promotion of YourChoice Super. Diversa was previously a member of the broader OneVue Group, but was divested in mid-2019.

4 ASIC contended that Diversa contravened s 912A(1)(a) on two separate bases, and also contravened s 912A(1)(ca).

5 ASIC summarised the matters of concern to it, and the basis upon which it contended that Diversa contravened ss 912A(1)(a) and 912A(1)(ca), as follows in its opening submissions:

> The contraventions occurred in circumstances where customers were signed-up to YourChoice Super by a financial advisor firm, The Australian Dealer Group Pty Ltd (**ADG**) (whose principal was Nizi Bhandari (**Bhandari**)), which operated the Australian Super Finder business (**ASF**). (ADG, ASF and Bhandari are described collectively as the **Bhandari Entities**.) The overall effect of the promotion by the Bhandari Entities of the "free" super search on the ASF website was to lure in prospective customers to engage with the service of finding lost super. Customers who provided their details online received a telephone call from ADG's call centre staff advising them to transfer their "lost" (or other) superannuation into an account with YourChoice Super. As a result of the roll-over into YourChoice Super, ADG earned substantial fees; customers became liable to pay additional fees, risked losing their insurance benefits, and signed-up to a superannuation account that may not have been in their best interests (eg in terms of costs and returns). Many of the customers who transferred their superannuation into YourChoice Super then rolled out or withdrew the funds, including on hardship grounds.
>
> The Bhandari Entities, through their use of OneVue's secure online portal, located customers' superannuation and opened the accounts with Diversa. Diversa, through its platform and outsourcing arrangements to OneVue Super and OneVue Wealth, erected the critical infrastructure to facilitate the issuing of its superannuation product to customers who faced risks of harm resulting from the product. Diversa delegated the promotion and administration of YourChoice Super, and in doing so demonstrated failures of monitoring, oversight and in some instances turned a blind eye to potential misconduct.

6 As is apparent, the underlying conduct of concern to ASIC was that of the Bhandari Entities. None of the Bhandari Entities was a party to the proceeding. Nor were either of the OneVue Entities.

7 The key issue at the heart of ASIC's case is whether, given what Diversa knew or ought to have known about the conduct of the Bhandari Entities and the risks posed by that conduct to clients of the Bhandari Entities, Diversa should have given directions that would have cut the Bhandari Entities off, such that Diversa would no longer issue interests in YourChoice Super to clients of the Bhandari Entities.

8 The first alleged contravention of s 912A(1)(a) related to Diversa's issuing of interests in YourChoice Super. Diversa accepted that, in issuing interests in YourChoice Super, it performed a financial service pursuant to its Australian Financial Services Licence (**AFSL**). ASIC alleged that, by reason of what Diversa knew or ought to have known about the conduct of the Bhandari Entities and the potential impact of that conduct on the clients of the Bhandari Entities, Diversa failed to "do all things necessary to ensure" that it performed financial services covered by its AFSL efficiently, honestly and fairly. ASIC put its case on the basis

that, in order to comply with its obligation to "do all things necessary to ensure …", Diversa should have put a stop to allowing the Bhandari Entities to put their clients into YourChoice Super; it should have cut off the Bhandari Entities.

9 The second basis upon which ASIC contended that Diversa contravened s 912A(1)(a) related to the performance *by the* OneVue Entities of the financial service of giving general financial product advice. Each of the OneVue Entities held an AFSL that authorised it to give general financial product advice. Diversa's AFSL also authorised it to give general financial product advice, but ASIC did not allege that Diversa in fact gave general financial product advice at all. Rather, it contended that Diversa contravened s 912A(1)(a) on the basis that the service of giving general financial product advice was "covered" by its AFSL, notwithstanding that the advice was (on ASIC's case) given by the OneVue Entities. ASIC's contention was that Diversa failed to comply with its obligations under s 912A(1)(a) due to what it knew or ought to have known about the Bhandari Entities and their operations. Again, the case was put on the basis that, in order to comply with its s 912A(1)(a) obligations, Diversa should have cut off the Bhandari Entities.

10 The contravention of s 912A(1)(ca) was alleged on the basis that the OneVue Entities were Diversa's "representatives" within the meaning of s 910A of the Corporations Act, that Diversa knew or ought to have known there was a risk that the OneVue Entities were not complying with their own obligations under s 912A(1)(a) and that Diversa failed to take reasonable steps to ensure that its representatives did all things necessary to ensure that they complied with s 912A(1)(a). Again the case was put on the basis that, in order to comply with its s 912A(1)(ca) obligations, Diversa should have cut off the Bhandari Entities.

11 In respect of each alleged contravention, ASIC relied on knowledge that it contended Diversa had directly, as well as knowledge of the OneVue Entities, which ASIC contended was to be attributed to Diversa.

12 The starting date of the Relevant Period is the date upon which s 912A became a civil penalty provision. The ending date of the Relevant Period is the date when the business operated by Mr Bhandari was sold.

13 Pursuit of a civil penalty case is not without consequence. The authorities recognise that pursuit of such proceedings has consequences in a number of areas: the framing and specificity of the

allegations advanced; the nature of the proof required to make out the case; and the approach to be adopted in construing legislation.

14 A civil penalty proceeding of this kind is a serious kind of case, bearing a penal nature: *Naismith v McGovern* (1953) 90 CLR 336 at 341. To adopt observations made by the Full Court (Logan, Bromberg and Katzmann JJ) in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298 (***BHP Coal***) at [63], albeit in the context of the *Fair Work Act 2009* (Cth), "[i]n this class of case, it is especially important that those accused of a contravention know with some precision the case to be made against them. Procedural fairness demands no less". In a civil penalty proceeding, it is incumbent on the regulator to be clear and consistent regarding the allegations made; a "clear and tolerably stable body of allegations of contraventions of law" is required: *Federal Commissioner of Taxation v Ludekens* (2013) 214 FCR 149 (***Ludekens***) at [20]. It is not appropriate for the regulator to plant "a forest of forensic contingencies", or to alter the basis of the allegation of the alleged contraventions on a rolling basis in the leadup to, and during, the trial: see *Ludekens* at [20] (Allsop CJ, Gilmour and Gordon JJ).

15 Civil penalty proceedings generally involve allegations of some gravity. This case is no exception. By impugning Diversa's willingness to continue to allow the Bhandari Entities to put clients into YourChoice Super and to do so under a consolidation model, notwithstanding what it knew or ought to have known, ASIC's case involved grave and serious allegations. The gravity of the allegations involved is reflected in the application of the civil burden of proof: *Briginshaw v Briginshaw* (1938) 60 CLR 336 (***Briginshaw***) at 362 (Dixon J); *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [225] (Wigney J). As stated by the Full Court (Logan, Bromberg and Katzmann JJ) in *BHP Coal* at [63] (quoting Dixon J in *Briginshaw*), "where … the resolution of an issue exposes a respondent to a penalty, satisfaction on the balance of probabilities is not achieved by 'inexact proofs, indefinite testimony, or indirect inferences'". The conclusions I set out below do not depend on the application of any elevated standard of proof but, naturally, application of an elevated standard would only reinforce those conclusions.

16 ASIC's pursuit of a civil penalty case also brings with it the need to construe the legislation in question having regard to its penal character, and to exercise caution before accepting any "loose, albeit 'practical', construction": *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [45] (Gleeson CJ, Gummow, Hayne and Heydon JJ);

see also *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 285 FCR 133 at [88] (Allsop CJ, Besanko and McKerracher JJ); *Paccioco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [300] (Allsop CJ, with whom Besanko J and Middleton J agreed). Precision of the kind referred to by Moshinsky J in *Australian Securities and Investments Commission v RI Advice Group Pty Ltd (No 2)* (2021) 156 ACSR 371; [2021] FCA 877 (***RI Advice***) at [410]–[411] is also of particular importance in civil penalty proceedings.

THE OPERATIONAL AND CONTRACTUAL CONTEXT

17 According to its 2018 Annual Report, the OneVue group of companies (the **OneVue Group**) was engaged in "Fund Services", "Platform Services" and "Superannuation Trustee Services".

18 Diversa was a wholly owned subsidiary of the OneVue Group until 30 June 2019, at which point it was acquired by the Sargon Group. Accordingly, from 1 July 2019 (and thus for the majority of the Relevant Period), Diversa was not a related party of either of the OneVue Entities, or the broader OneVue Group.

AFSLs

19 Each of the corporate protagonists had its own AFSL. The relevant details of their AFSLs are as follows.

20 While Diversa was a member of the OneVue Group, it provided trustee services to group funds, as well as to funds that were not OneVue Group funds. Pursuant to its AFSL effective 29 June 2017, Diversa was authorised to carry on a financial services business to provide general financial product advice for, inter alia, superannuation, and deal in a financial product by "issuing, applying for, acquiring, varying or disposing of a financial product" in respect of the financial product class of superannuation, to retail and wholesale clients.

21 There were a great many subsidiaries in the OneVue Group, but it is Wealth and Super that are particularly relevant to this proceeding. Super was also previously named Super Managers Funds Administration Pty Ltd. I will refer to the entity at all times as Super.

22 Super's initial AFSL (effective 12 June 2014) and subsequent AFSL (effective 10 July 2020) both authorised it to provide financial product advice in respect of a wide range of financial product classes, including superannuation, and to deal in a wide range of financial products, including superannuation, and to do so by applying for, acquiring, varying or disposing of a

financial product on behalf of another person. Wealth's AFSL (effective 18 January 2019) was in substantially the same terms.

23 ADG was one of the Bhandari Entities. Pursuant to its AFSL (effective 27 September 2018), it was authorised to carry on a financial services business to provide general financial product advice for product classes including investment life insurance products, life risk insurance products, and superannuation. ADG was also authorised to deal in financial products by applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of life products and superannuation.

24 ADG appointed Marketing On Web Pty Ltd (**MOW**) (as trustee for the Saicare Trust) as its authorised representative. MOW traded as "Australian Super Finder". MOW's appointment as an authorised representative of ADG was effected by an Authorised Representative Deed dated 19 February 2019. By that deed, MOW was authorised to provide general financial product advice on, and deal in, superannuation and life insurance products "by applying, acquiring, varying and disposing of those products on behalf of another".

25 The Bhandari Entities' business involved assisting their clients to locate and consolidate lost super. This business was conducted under ADG's AFSL.

Roles and Agreements

Diversa and the Fund

26 The MAP Master Superannuation Plan (the **Fund**) was established in 1992. MAP Management Company Ltd (later MAP Funds Management Ltd (**MAP FM**)) became the trustee of the Fund in 1994. Diversa replaced MAP FM as trustee on 10 May 2017. YourChoice Super was a sub-plan of the Fund.

The Administration Agreement: Diversa and Super

27 At the same time that Diversa became the trustee of the Fund, the Administration Agreement (originally between Super and MAP FM) dated 8 August 2014 (the **Administration Agreement**) was novated to Diversa.

28 Under the Administration Agreement, Super provided various administration, accounting, insurance, investment, communication, online information, and banking services to the trustee (ie Diversa). The specific services to be provided by Super included all manner of administrative responsibilities relating to the day-to-day running of the Fund, and attendance

to many regulatory requirements. Those tasks included admission of new members and the establishment of their records, liaison with the trustee, calculation and processing of all benefits and payments, managing hardship claims, and attendance at up to four board meetings of the trustee per year.

29 Super was obliged to provide the specified services in accordance with the "Service Levels", but no copy of the Service Levels document has been located. ASIC invited the court to infer — and I do infer — that the service levels were similar to those specified in a similar Administration Agreement between Diversa and Super, entered into in August 2017, which related to a different fund. Those service levels made reference to the timeframes for answering client enquiries.

30 Super was also obliged to provide the services in such a way as to ensure compliance by the Trustee with the relevant Trust Deed, and the Relevant Law (which was defined to include the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) and the Corporations Act).

31 The trustee was obliged to do all things within its power and control that were reasonably necessary and required by Super for it to carry out its duties and obligations under the Administration Agreement. Super was only permitted to delegate, sub-contract or engage third party contractors to provide any of the services with the prior written consent of the trustee.

32 The Administration Agreement contained a clause providing that nothing in the agreement gave Super any authority to "bind the Trustee to any agreement, arrangement, obligation, liability, duty or understanding" or to "purport to act as agent of the Trustee".

The Sponsor Agreement: Diversa and Wealth

33 MAP Financial Planning Pty Ltd (**MAP FP**) and Diversa entered into the **Sponsor Agreement** on 18 December 2018. MAP FP was a member of the OneVue Group. That agreement was novated from MAP FP to Wealth on 24 May 2019. Each of those entities was the "sponsor" of the Fund.

34 The recitals to the Sponsor Agreement record that Diversa was appointed trustee on 10 May 2017 "and also acted as sponsor of the Fund". The recitals made no reference to Diversa previously having acted as sponsor pursuant to any written agreement. The recitals go on to record that "Diversa wishes to cease acting as the sponsor of the Fund" and that the sponsor (MAP FP and later Wealth) wished to assume those responsibilities.

35 Under the Sponsor Agreement, Diversa was to be paid fees for performing the "Diversa Core Trustee Services" and a further fee for performing the "Diversa Non-Core Trustee Services". The fee for those non-core services could only be charged by Diversa with written approval of the sponsor.

36 The sponsor was made responsible for the "sponsor services", which included operating and maintaining the Fund website (including information and legal documents made available through the website), preparing the annual report and providing a call centre for Fund members and advisors to make telephone enquiries, with the proviso that Diversa and the sponsor would consult and agree when queries were to be handled by the administrator of the Fund. The sponsor's services could not be sub-contracted, except with Diversa's approval.

37 The Diversa Core Trustee Services were set out in Sch 2 and included "Monitor Service Providers performance to seek to ensure that they meet their contractual obligations and the Relevant Requirements", which included requirements imposed by the SIS Act and the Corporations Act. The term "Service Providers" was defined to mean "any party appointed by Diversa to provide services to the Fund, including the Fund administrator, custodian, asset consultant, auditor, tax agent and any other party appointed with the consent of the Sponsor".

The Promoter Agreement: Diversa and Wealth

38 By a **Promoter Agreement** dated 6 June 2018, Diversa appointed MAP FP as promoter of the YourChoice Super sub-plan of the Fund. The Promoter Agreement was amended on 18 December 2018 and then amended again and novated to Wealth on 24 May 2019.

39 The promoter (initially MAP FP and then Wealth) warranted that it held a valid AFSL enabling it to perform the Promoter Services including but not limited to providing general advice for superannuation and life insurance financial products and dealing in superannuation and life insurance financial products.

40 The Promoter Agreement authorised delegation to an Authorised Representative (defined to pick up the authorised representative appointment process under the Corporations Act, which process is discussed further below), with certain conditions, and the appointment (with the prior written consent of Diversa) of a sub-promoter in respect of a sub-plan. The promoter warranted that it would ensure that any Authorised Representatives would be properly authorised under the Corporations Act and have undertaken and completed all necessary training as required by ASIC to perform the Promoter Services. The schedule of "Promoter Services" included the

general marketing and distribution/sales functions for the sub-plans in compliance with the Relevant Requirements (defined to include requirements of legislation including the SIS Act and the Corporations Act), preparation and implementation of a marketing/business plan, the "appointment, training and control" of the promoter's officers, employees and agents (including Authorised Representatives), as required under its AFSL and the Relevant Requirements, preparing Product Disclosure Statements (**PDSs**) as well as keeping them updated, and preparing and distributing marketing material.

41 The original version of the Promoter Agreement provided for Core Trustee Services to be performed by Diversa, however the provision of trustee services was removed from this agreement — and then provided for by the Sponsor Agreement — when the Promoter Agreement was amended on 18 December 2018 (also being the date of the Sponsor Agreement).

The Platform and Custody Services Agreement: Diversa and Wealth

42 Wealth and Diversa were also parties to the Platform and Custody Services Agreement dated 19 December 2018 (the **Platform Agreement**). Under that agreement, Diversa appointed Wealth to provide the "Platform Services", amongst other things, for fees paid by Diversa. All relevant intellectual property — including intellectual property in the platform itself — was owned by Wealth.

43 The "Platform Services" were detailed in Sch 1, which was structured so as to detail the "broad functional intent" of the "environment and the platform and administration services to be delivered to" Diversa. The matters set out included:

(a) maintaining member record files, including the members' applications, and communications, as well as a great many details about the members;

(b) admitting new members and creating their accounts;

(c) processing withdrawal requests;

(d) administration of fees;

(e) running a telephone service to answer queries (Diversa was to specify the wording of recorded messages to be played out of hours), and store call records;

(f) providing accurate responses to enquiries, and recording and responding to complaints, as well as assisting Diversa with any complaints taken to the Australian Financial Complaints Authority (**AFCA**); and

(g) reporting to Diversa the key issues raised by members and advisers in their complaints.

44 The Platform Agreement also provided for Wealth to "admit new advisers" once the adviser had been approved by Diversa, and to maintain dealer group details. Advisers were defined as "Super Wrap Member financial adviser[s]".

45 Wealth warranted that it held an AFSL "covering the provision of the financial services to be provided by OneVue under this Agreement".

46 The Platform Agreement also included a clause providing that no partnership, agency (otherwise than where stated to the contrary) or joint venture was formed.

The OneVue Platform, the OneVue Platform Dealer Group Registration Form and SuperMatch

47 The OneVue Platform was operated by Wealth and allowed for financial advisers to be granted access to the Platform to supply or facilitate the supply of products and services. The products available via the Platform were not limited to YourChoice Super.

48 ADG (then named Financial Advisers Dealer Group Pty Ltd) completed a OneVue Platform Dealer Group Registration Form, signed on 13 December 2017 (the **Registration Form**).

49 The form stated that ADG appointed "OneVue" to "supply and facilitate the supply of YourChoice Super, [and] the OneVue Platform Products and Services …". The form provided for access to the OneVue Platform to be granted to ADG, its advisers, and "Clients" (being actual or prospective clients of ADG and its advisers).

50 Pursuant to the Registration Form, OneVue was to (inter alia) provide current copies of documents including PDSs and provide assistance to ADG which was conducive to its effectively marketing and promoting (inter alia) YourChoice Super. ADG warranted that it held all necessary licenses, including an AFSL, necessary for it to perform its obligations under the agreement constituted by the Registration Form, and held insurance as required of financial services licensees (**Licensees**). ADG also undertook that all instructions given to OneVue in connection with YourChoice Super would be authorised by the relevant client and evidenced in writing.

51 Other than the Registration Form, there was no evidence of the contractual relationship between the Bhandari Entities and the OneVue Entities, or Diversa. There was no evidence addressing how it was that the Bhandari Entities were approved as a dealer group. ASIC's case

did not involve any allegations that there were due diligence, or other, deficiencies associated with the Bhandari Entities having been permitted access to the OneVue Platform and SuperMatch initially.

52 As set out above, ADG appointed MOW as its authorised representative.

53 The Bhandari Entities had access to SuperMatch. SuperMatch was an online service offered by the ATO, which allowed superannuation trustees and administrators (and their intermediaries) to identify "lost" superannuation services. Access to SuperMatch was by use of an electronic "key", and was available via the OneVue Platform. The evidence did not ultimately establish whether it was technically Diversa's entitlement to access SuperMatch (as trustee), or Super's entitlement (as administrator) that was then made available to the Bhandari Entities via the OneVue Platform.

54 The Bhandari Entities accessed SuperMatch on behalf of their clients, to locate the client's "lost" superannuation (cf ASIC's pleaded contention at [32A] of its Further Amended Statement of Claim (**FASOC**) that the Bhandari Entities accessed SuperMatch on behalf of Diversa). In that respect access to SuperMatch was integral to the Bhandari Entities' business model of consolidating their clients' "lost" superannuation accounts into a YourChoice Super account.

THE AFSL REGIME

55 Section 912A(1) prescribes the "general obligations" of Licensees. While ASIC alleges contraventions of ss 912A(1)(a) and (ca), the obligations imposed by those subsections are to be understood in the wider context of the AFSL regime, and the suite of obligations imposed by s 912A(1).

56 The AFSL regime is undoubtedly protective of the interests of those who engage with the providers of financial services, but protection of the consumers of financial services is not the only object of ch 7 of the Corporations Act. As Gordon J explained in *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 270 CLR 118 (***Westpac HC***) at [28], ch 7 was also designed to ease the administrative burden on financial service providers by introducing a single licensing regime. That licensing regime is found in pt 7.6 of the Corporations Act. It is, in some respects, a complex regime.

57 The starting point is s 911A(1): it requires that, subject to prescribed exceptions, a person carrying on a "financial services business" must "hold an [AFSL] covering the provision of the

financial services". Section 911A(2) sets out a number of exemptions, which relevantly include those who provide services "as representative" of the holder of an AFSL: s 911A(2)(a).

58 Section 911B restricts who can provide a financial service on behalf of a person who carries on a financial services business. Those persons include certain employees or directors of an AFSL holder (or a related body corporate), and a person who is an "authorised representative" of the AFSL holder principal, whose authorisation covers the provision of that service: s 911B(1)(a)–(b). In the second case, those who provide a service on behalf of the AFSL holder as an authorised representative may also provide services on behalf of a second principal as the authorised representative of that second principal in some circumstances: s 911B(b)(iv). In this way, the legislation recognises that a single provider may provide services on behalf of more than one principal.

59 The authorised representative regime enables providers of financial services to do so without obtaining their own AFSLs.

60 Another category of person who can provide services on behalf of a person who carries on a financial services business, is a provider who "holds their own [AFSL] covering the provision of the service": s 911B(1)(d). This provision is to be read in light of s 916D(1), which provides that a Licensee cannot be the authorised representative of another Licensee. A note to that section specifies that "[i]nstead, the first licensee could use their own licence to provide financial services on behalf of the second licensee", and refers to s 911B(1)(d).

61 As such, the Corporations Act recognises that a Licensee may provide services "on behalf of" another Licensee, but without being the "authorised representative" of the second Licensee. This concept is reflected in the definition of "representative" in s 910A, which, in the case of a Licensee, includes both "authorised representatives", and those who act "on behalf of" the Licensee (as well as directors and employees of the Licensee or related bodies corporate).

62 Unless an exception to s 916D applies, an "authorised representative" will not have its own AFSL, but a "representative" may, where it is providing services on behalf of a Licensee pursuant to s 911B(1)(d) (see also s 911B(2), which provides that ss 912A(1)(a)–(c) do not apply if the provider is itself a Licensee, unless the principal is an insurer and the provider is acting under a binder).

63 The Corporations Act contains a specific provision which identifies *who* provides a service when a Licensee provides services on behalf of another person who carries on a financial services business, pursuant to s 911B(1)(d). Section 911B(3) provides that (emphasis added):

> If, as mentioned in paragraph (1)(d), the provider holds their own Australian financial services licence **covering the provision of the service**, then, for the purposes of the other provisions of this Chapter, **the service is taken to be provided by the provider** (and not by the principal) unless regulations made for the purposes of this subsection provide otherwise.

64 It is important to observe that the legislation is structured so that the provision of a financial service that is covered by the licensing regime is tied to an identifiable AFSL: viz, the AFSL of the actual provider of the financial service, or the AFSL of the appointor of an authorised representative. In the former category of case, ss 911B(1)(d) and s 911B(3) make it clear that, where the financial service is provided by one AFSL holder on behalf of another AFSL holder, it is the AFSL of the actual service provider that provides the necessary authorisation for the provision of the regulated service.

65 These provisions serve to emphasise the importance of distinguishing between situations in which a Licensee provides services on its own behalf, and in which it provides services "on behalf of" another Licensee.

66 Section 766A(1) states that a person "provides a financial service" when the person does one or more of the listed things, which include the following: "provide financial product advice" and "deal in a financial product". This directs attention to what the provider of the financial service is actually doing. Linking this provision with s 911B, a person may only provide a "financial service" on behalf of a person who "carries on a financial services business" if one of the stated conditions is met. A person will carry on a financial services business in the jurisdiction where the person engages in conduct that is (inter alia) intended to induce people in the jurisdiction to "use the financial services the person provides": s 911D(1)(a). As such, it is clear that a person who carries on a financial services business will be someone who provides financial services.

67 What is important to note is that, where a Licensee provides a financial service "on behalf of" another Licensee, the scheme of pt 7.6 of the Corporations Act elects to treat the first Licensee as *the* provider of the financial service, notwithstanding that that person provided the service "on behalf of" the second Licensee (the principal): ss 911B(1)(d) and (3). This means also that the first Licensee is subject to the panoply of obligations that come with providing a financial

service, while the second Licensee is still subject to provisions such as s 912A(1)(ca) even where services are provided on its behalf by another Licensee (as a Licensee providing services on behalf of another Licensee is still a "representative", albeit not an "authorised representative").

68 The terminology of s 911A(2)(a) is also relevant. That section exempts a person who carries on a financial services business from having an AFSL covering the provision of "the financial services" if the person provides the service "as representative of" another person who is a Licensee (or is itself exempt). As such, the language used in s 911A(2)(a) focuses attention on the capacity in which the person provides the service.

69 Division 5 of ch 7 contains a regime for authorised representatives. Section 916A permits a Licensee to give a person (referred to as the "authorised representative") a written notice "authorising the person, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the licensee". The specified services may be some or all of the financial services covered by the Licensee's AFSL: s 916A(2).

WHAT DIVERSA SHOULD HAVE DONE AND WHEN: THE RELEVANT PERIOD

70 ASIC's primary case was that Diversa remained in breach of its statutory obligations until 18 December 2020, which was when ADG sold the ASF business. Its alternative case was that Diversa was in breach until 24 September 2020, when new clients stopped being signed up to YourChoice Super under Mr Bhandari's adviser code. Its final alternative case was that Diversa was in breach until March 2020 "when Diversa removed access or authority for the Bhandari Entities to sign members up to YourChoice Super and deduct adviser fees from members accounts".

71 Prior to the trial, ASIC had not identified what it contended Diversa should have done in order to comply with its "do all things necessary to ensure …" obligation under s 912A(1)(a) and its "reasonable steps to ensure …" obligation under s 912A(1)(ca). ASIC nailed its colours to the mast in the course of trial.

72 At trial, ASIC stated that the action Diversa should have taken to satisfy its obligations under both provisions was to exclude the Bhandari Entities from using YourChoice Super in the way that the Bhandari Entities had been using (or, in ASIC's submission, misusing) it. While ASIC framed what it said Diversa should have done in three ways — which I will come to — they

amount to the same thing: Diversa should have cut the Bhandari Entities off so that they could no longer put their clients into YourChoice Super.

73 The first means identified by ASIC was "removing" the Bhandari Entities' access to YourChoice Super. ASIC accepted Diversa took that step in March 2020. On 17 March 2020, Daniel Strachan (Account Executive at Diversa) sent Stephen Blood (then Executive General Manager (**EGM**) Superannuation Services and Group Chief Risk Officer at OneVue) the following email:

> Hi Stephen
>
> As you are aware over the last 6 months the Trustee has dealt with a number of matters relating to certain Dealer Groups registered to the OneVue platform which, among other services, provides their advisers and clients with access to YourChoice Super (a sub plan of the MAP Superannuation Plan). Below is an example of the work the Trustee has been involved with relating to these Dealer Groups: —
>
>> 22 January 2020 — Notice Issued under s30 of the Australian Securities and Investments Commission Act 2001
>>
>> 22 January 2020 — Notice of Direction under s912C(l) of the Corporations Act 2001
>>
>> 9 October 2019 — Complaint lodged by a YourChoice [member] following the consolidation of their Superannuation accounts with in[sic] YourChoice Super
>
> In addition to these examples there have been other regulator requests and complaints received prior to the last 6 months that have required a Trustee response. These matters have specifically related to the following Dealer Groups:
>
> - Australian Lost Super Pty Ltd
> - Financial Advisers Dealer Group Pty Ltd
>
> We understand these Dealer Groups are licensed to provide general advice, and usually receive a one off fee for consolidating members superannuation accounts in to[sic] one Fund. YourChoice Super is used to enable this consolidation along with the collection of the one off advisor fee from the member.
>
> The Trustees involvement in addressing the requirements listed above has allowed us to review the agreements, processes, operating model and actual scenarios in relation to the operations of these Dealer Groups.
>
> **As a result of these investigations and review, the Trustee has formed the opinion that any access or authority of these Dealer Groups to join members to YourChoice Super and deduct adviser fees from members accounts should be removed**. We would also request that a review of other Dealer Groups registered to the OneVue platform and with the authority to join new members to YourChoice Super be completed to identify Dealer Groups with similar operating models to those listed above. Details of these Dealer Groups should be provided to the Trustee for review.
>
> We would be happy to discuss the matter further to confirm any queries, concerns or timing of the actions required.

Regards

Daniel

74 The subject of the email was “YourChoice Super — Dealer Group Requirements”. It was copied to Andrew Peterson and Josh Haymes. Andrew Peterson became a director of Diversa following its divestment from the OneVue Group at the end of June 2019. Diversa relied on the apparent involvement of a member of the board in relation to the issue of who had the authority to cut off the Bhandari Entities.

75 ASIC contended, however, that the issuing of the 17 March 2020 email was not sufficient as the Bhandari Entities continued to sign up members for some months after that email was sent. ASIC relied on an Excel file which recorded members being signed up to YourChoice Super with the adviser name “Nizi Bhandari” into September 2020.

76 The second means identified by ASIC was to ensure there was no access to the OneVue Platform.

77 The third means identified by ASIC was cutting off access or persuading OneVue to cut off the Bhandari Entities’ access to SuperMatch. As I have noted, it was access to SuperMatch that enabled the Bhandari Entities to conduct the search for “lost” super that founded the consolidation process by which their customers came to be issued interests in YourChoice Super.

78 I do not consider that the second and third means of putting a stop to the Bhandari Entities’ activities are qualitatively different from the first. Each was a means by which (on ASIC’s case) Diversa could and should have stopped the Bhandari Entities putting clients into YourChoice Super. They are but different means of “cutting off” the Bhandari Entities.

79 In my view, on 17 March 2020 Diversa gave an unequivocal direction to cut off the Bhandari Entities. I consider that the direction given extended to cutting them off from the OneVue Platform and from access to SuperMatch via that platform. Cutting the Bhandari Entities off is exactly what ASIC contended Diversa should have done from the start of the Relevant Period, in order to comply with its obligations under s 912A(1)(a) and s 912A(1)(ca). The fact that effect was not given to Diversa’s direction promptly does not change the fact that the direction was given, and was given in unequivocal terms. Diversa did, on 17 March 2020, exactly what ASIC contended it should have done from the start of the Relevant Period.

80 It is important to note that ASIC did not contend that Diversa could or should have done more to ensure its instruction was acted on more promptly. ASIC did not seek to expose or pursue the causes of the delay in Diversa's instruction being implemented as part of its case. Rather, when asked what accounted for the delay, counsel for ASIC said the cause was unknown.

81 For these reasons, even if ASIC had made out its case prior to 17 March 2020 (which I conclude it has not), I do not consider that a civil penalty case could be sustained beyond 17 March 2020 when Diversa gave the instruction to cut the Bhandari Entities off. That is the date when Diversa did that which ASIC contended it had to do in order to comply with its obligations under s 912A(1)(a) and s 912A(1)(ca).

82 I will deal with two further, related, matters.

83 First, as noted above, ASIC identified December 2020 as the end point of the Relevant Period. ASIC did not explain how or why Diversa could be said to have contravened s 912A(1)(a) or s 912A(1)(ca) in the period between September 2020 (when members ceased being signed up to YourChoice Super under the Bhandari Entities' adviser codes) and December 2020, when ADG sold the ASF business. It was never explained how or why Diversa was in contravention of its statutory obligations beyond the point at which effect had been given to Diversa's instruction to cut off the Bhandari Entities.

84 Secondly, it should be noted that the documents suggest that Diversa's decision to cut off the Bhandari Entities arose from concerns about the regulatory focus on general advice business models, complaints received, and management time taken up with issues associated with the Bhandari Entities, rather than a view having been formed about the various vices alleged by ASIC, or non-compliance by the Bhandari Entities, or the OneVue Entities, with their obligations as Licensees. An email from Mr Blood to Mr Strachan on 24 March 2020 said he understood Diversa's concerns "given the level of regulator interest in those business models". Mr Blood went on to say:

> There has been no suggestion that those business models, if operated correctly, are not compliant. However, they have raised concerns, particularly with selling practice allegations and/or the level of fees.

85 In reporting on Diversa's decision internally at OneVue, Mr Blood said (in an email dated 24 March 2020) that Diversa had made a "**risk based decision** that those adviser groups whose business model is to find and consolidate super accounts, under a general advice model, is now outside their risk appetite" (emphasis in original). Mr Blood reported that Mr Strachan had

confirmed that Diversa had not made the decision on a compliance basis. Mr Blood told his colleagues: "I don't see that the Trustee decision can be effectively challenged. It has been made on facts and a reasonable basis". Mr Blood then made enquiries with a colleague about working to implement Diversa's decision.

DIVERSA'S COMPLAINTS ABOUT ASIC EXPANDING ON, AND DEPARTING FROM, ITS PLEADED CASE

86 On 6 June 2023, Diversa's solicitors wrote to ASIC and asked for particulars of FASOC [34A] and [42(i)]–[42(k)]. ASIC's response was delivered on 3 July 2023 along with ASIC's written submissions. It was ASIC's submissions that introduced, for the first time, the list of 11 "vices" in the Bhandari Entities' conduct. The Further and Better Particulars (**FBPs**) delivered by ASIC on 3 July 2023 ran to 30 pages. The FBPs and submissions were delivered ahead of a trial scheduled to commence (and which did commence) on 31 July 2023. In its written submissions, delivered on 19 July 2023, Diversa complained that ASIC's FBPs and written submissions impermissibly expanded the case outside the bounds of ASIC's pleaded case. The list of matters said to have been alleged, for the first time, by ASIC on 3 July 2023 was set out in an annexure to Diversa's submissions. It was a long list. ASIC responded with a document that set out the pleading references it relied on, which launched the reader on a merry trail of cross-references.

87 After the conclusion of the hearing (and with the court's permission), Diversa submitted a further document in which it set out the ways in which it considered ASIC had departed from its pleaded case. This document included, but was not confined to, the complaints advanced before the hearing. ASIC then responded with a document that addressed Diversa's further complaints and then again set out a series of 21 sets of pleading references and references to its FBPs. To the extent that ASIC's response relied on the FBPs, it failed to engage with Diversa's complaint that the provision of such extensive particulars, which advanced new allegations, could not fairly be delivered so close to the trial (despite Diversa having requested particulars of some allegations that had hitherto been unparticularised).

88 It would try the reader's patience (and sanity) for these reasons to proceed by attempting to unpick each of the 21 sets of pleading references (including their internal cross-references) to explore to what extent each matter complained of by Diversa had been fairly raised by ASIC or, if not raised before, whether that matter could fairly be raised so late. I will address some key matters arising from the complaints at a more general level but, before doing so, note that

the failure of both parties to raise this matter squarely and have it resolved before the trial left the court in the difficult position of proceeding with a trial run on uncertain foundations.

89 As will become apparent, save in some respects below where I have found that the contentions ASIC advanced at trial did go beyond the case it pleaded and articulated in its submissions, the matters raised by Diversa have not turned out, as my reasoning proceeds, to be material to the outcome. In particular, I have found that the matters known by Diversa did not reveal the "vices" contended for such that, in order to comply with its obligations under s 912A(1)(a) and s 912A(1)(ca), Diversa ought to have cut off the Bhandari Entities. Accordingly, it is not necessary or productive to attempt to trace through whether the "vices", as they were articulated in ASIC's submissions and aides memoire, were anchored in the pleaded case in all respects. That said, and while my discussion of what Diversa knew considers whether the "vices" alleged by ASIC were known by Diversa, I have, in assessing whether ASIC ultimately made out its case, considered the case against the allegations advanced in the FASOC.

90 To the extent that a number of matters that Diversa has raised relate to contentions advanced about the suitability of the YourChoice Super *product* for the clients of the Bhandari Entities (as distinct from complaints about the Bhandari Entities' processes), for reasons which I detail below, I do not consider such issues assist ASIC in its case in circumstances where the Bhandari Entities promoted YourChoice Super on a general advice model, and ASIC did not set out to establish that the features of the YourChoice Super product were objectively inferior to other products on the market.

91 To the extent that the matters raised by Diversa relate to the asserted vulnerability of the clients of the Bhandari Entities by reference to the hardship claims, that matter has always been a feature of ASIC's case (and is addressed in detail below).

92 Diversa also raised ASIC's late reliance on the records of calls between the Bhandari Entities and their clients and other customer-related documents in the FBPs. The actual content of client interactions was not a feature of ASIC's case before delivery of the FBPs. Nor had ASIC advanced a case that suggested that Diversa ought to have been aware of the contents of those calls or client documents. When a case delves into actual client interactions, it becomes important for the responding party to be able to examine the interactions and characteristics of the client fully in order to answer the allegations. Clearly, that could not occur where ASIC delivered over six pages of particulars referring to client interactions so late in the piece.

93 In any event, ASIC only referred briefly, and in a very limited way, to the transcripts of calls with one customer during the hearing and did so on the basis that Diversa's objection to the tender of the call transcripts remained on foot. For reasons that remain unexplained, after the conclusion of the hearing, Diversa withdrew its objection to the tender of the call transcripts. Be that as it may, given the way ASIC put its case, the actual content of the calls between the Bhandari Entities and their customers did not (to the limited extent the calls were even touched on by ASIC in its submissions) advance its case for the reasons already noted. ASIC did not seek to establish that the content of the calls reflected any standard operating procedure such that those in evidence constituted proof of the likely content of interactions between the Bhandari Entities and the wider group of its clients. Nor did ASIC contend that Diversa was, or should have been, aware of the content of the calls. In short, the call transcripts had no clear forensic place in ASIC's case.

94 The penultimate point I will note is that, in many (but not all) instances, ASIC's note setting out how it contended the matters about which Diversa complained had been raised in its FASOC and FBPs involved trying to shoehorn certain matters into pleaded allegations. For example, ASIC submitted that the risk that the Bhandari Entities engaged in misleading or deceptive conduct because the dominant message was that the superannuation balances would grow was sufficiently pleaded at FASOC [34(c), (d)] and FBPs [2(b)(i), (ii), (iii) and (v)]. Those paragraphs of the FASOC cited simply plead matters about ASF's website, and its claims about conducting a free superannuation search, which were then used to encourage the person to become a customer and open a YourChoice Super account. Nothing was said about superannuation being grown in the FASOC; rather, this matter was only, belatedly, raised in the FBPs.

95 Similarly, FASOC [34(g)] was said to be the pleaded basis (along with some paragraphs of the FBPs) for the contention that there was a risk that the Bhandari Entities engaged in misleading or deceptive conduct and/or provided inappropriate or deficient general advice because for some customers it was not a temporary consolidation account. The paragraph of the FASOC relied on only stated that, once the customer agreed, they were signed up to YourChoice Super as a temporary consolidation account. Nothing was said until the FBPs about that not being the actual use for some customers, or that there was anything significant about that. In any case, the FBPs that ASIC relied upon in support of the contention above were not particulars of FASOC [34(g)]. Rather, they were particulars of FASOC [34A] and FASOC [42(i)]. Nor were those FBPs cast in such a way as to directly connect them to FASOC [34]. The consequence

of this is that, even with the benefit of the FBPs, it would be difficult for one to discern the pleaded "matter" in FASOC [34] that presented the "reason" ASIC contended that for some customers the YourChoice Super account was not a temporary consolidation account. In other words, the FBPs did not expose the relevance of FASOC [34(g)] to the contention that there was a material risk the Bhandari Entities engaged in misleading or deceptive conduct and/or provided inappropriate or deficient general advice because for some customers it was not a temporary consolidation account.

96 The final point is that ASIC brought this proceeding as a civil penalty proceeding, and sought, inter alia, declarations that Diversa had contravened ss 912A(1)(a) and (ca) of the Corporations Act, and pecuniary penalties in respect of the alleged contraventions. I have referred above to the need for civil penalty cases to be advanced with clear and consistent allegations. That was not a feature of ASIC's case in this instance.

JONES V DUNKEL **INFERENCES**

97 ASIC invited the court to draw adverse *Jones v Dunkel* inferences against Diversa on the basis that Diversa did not call any witnesses, and in particular it did not call Mr Blood.

98 There are two problems with this submission. First, after the divestment of Diversa, Mr Blood was no longer in Diversa's "camp". There is an obvious potential conflict between the interests of Diversa and those of the remaining OneVue Group entities. Secondly, inferences pursuant to the principles set out in *Jones v Dunkel* (1959) 101 CLR 298 are not drawn at large and do not fill in shortfalls in the evidence. Rather, the failure of a party to call a witness may allow the court more comfortably to draw an inference that is available on the evidence: *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 124 (Wilcox J), quoted by the Full Court (Gray, Rares and Tracey JJ) in *Commonwealth v Fernando* (2012) 200 FCR 1 at [117]. ASIC did not identify any particular available inferences that it submitted the court could more comfortably draw given the failure of Diversa to call any witnesses.

ASIC'S ALLEGATIONS OF KNOWLEDGE

ASIC's allegations concerning knowledge at the *start* of the Relevant Period

99 ASIC's pleading did not separately identify the knowledge Diversa is alleged to have actually acquired, and the matters that it ought to have known.

100 By its FASOC (at [42]), ASIC contended that, by the *beginning* of the Relevant Period, Diversa "knew or ought to have known" the following matters:

(a) Mr Bhandari and ADG operated the ASF business;

(b) customers were charged upfront adviser service fees for the consolidation service;

(c) ADG was not authorised to provide personal financial product advice;

(d) Mr Bhandari, ASF and ADG, having been engaged by the OneVue Entities, used YourChoice Super in the ASF business, and promoted, and signed up or rolled over customers to, YourChoice Super;

(e) a very high number of financial hardship and other withdrawal claims were submitted on behalf of their customers;

(f) it was likely that many customers were vulnerable and/or unsophisticated;

(g) prior to their relationship with the OneVue Entities, Mr Bhandari, ADG and/or ASF had been asked to leave another Licensee, MLC, because of the way in which they conducted their superannuation aggregation business;

(h) Mr Bhandari, ADG and ASF had used "dummy" email addresses to establish new YourChoice Super accounts;

(i) there was at least a material risk that, contrary to the ADG AFSL, Mr Bhandari, ADG and ASF had provided personal financial product advice to customers in relation to YourChoice Super as part of the processes whereby customers were signed up or rolled over to a YourChoice Super account as a temporary consolidation account into which the customer's superannuation would be consolidated, and/or agreed to make a financial hardship application;

(j) Mr Bhandari, ASF and ADG were being asked questions by ASIC about their superannuation consolidation business;

(k) there was at least a material risk that:

  (i) Mr Bhandari, ASF and ADG were engaging in misleading or deceptive conduct or conduct that was likely to mislead or deceive, in contravention of s 1041H of the Corporations Act and/or s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);

(ii) Mr Bhandari, ASF and ADG were engaging in unconscionable conduct, in contravention of s 991A of the Corporations Act and/or s 12CB of the ASIC Act;

(iii) ADG as Licensee was not doing all things necessary to ensure that the financial services covered by ADG's AFSL were provided efficiently, honestly and fairly, in contravention of s 912A(1)(a) of the Corporations Act; and

(iv) ADG as Licensee was not taking reasonable steps to ensure that its representatives complied with the financial services law, in contravention of s 912A(1)(ca) of the Corporations Act;

(l) by reason of the above matters (alone or in combination), there was at least a material risk that ADG and Mr Bhandari gave or purported to give general financial product advice to customers about YourChoice Super which was inappropriate, further or alternatively was deficient, further or alternatively strayed into personal financial product advice; and

(m) by reason of the above matters (alone or in combination), Diversa was issuing interests in YourChoice Super to customers, in circumstances where there was at least a material risk that they were misinformed and prejudiced by the conduct of Mr Bhandari, ADG and ASF.

101 As to the last of these matters — the risk that customers were misinformed and prejudiced by the conduct of Mr Bhandari, ADG and ASF — ASIC referred to FASOC [34] and [34A]. FASOC [34A] pleaded that ADG and Bhandari gave or purported to give customers general financial product advice where that advice was inappropriate or deficient, or strayed into personal financial product advice. The giving of such deficient general financial product advice, and the straying into personal financial product advice, was said to arise from the following matters, pleaded at FASOC [34]:

(a) the website of ASF, which offered a "free super search" if the customer entered certain details, which would then enable the Bhandari Entities to contact the person and encourage the person to become a customer, to open a YourChoice Super account and to transfer their existing superannuation balances in existing funds and any superannuation held by the ATO into that account;

(b) customers being encouraged to make decisions about superannuation during the course of telephone calls or engagement with ASF's website;

(c) once customers were signed up or rolled over into a YourChoice Super account, they became liable to pay substantial fees, including fees associated with the YourChoice Super account and upfront consolidation service fees;

(d) customers not being informed or sufficiently informed that they could access the results of their free super search without opening a YourChoice Super account which would expose them to fees and charges;

(e) there was no sufficient or prominent communication to customers that the closing of their existing superannuation accounts would have resulted in a loss of any insurance benefits attached to those accounts;

(f) many customers had applications submitted on their behalf for withdrawal of monies, including on the basis of financial hardship; and

(g) a very high number of financial hardship and other withdrawal applications were submitted on behalf of customers of the Bhandari Entities.

102 ASIC also pleaded (FASOC [43]) that the OneVue Entities had actual or constructive knowledge of the same matters prior to the start of the Relevant Period, and that their knowledge was to be attributed to Diversa pursuant to s 769B(3) of the Corporations Act, or because the OneVue Entities were under an express or implied duty to inform Diversa of those matters. However, as explained below, ASIC did not, at trial, advance its attribution case at common law based on a duty to inform. Rather, it confined its attribution case to attribution of the knowledge of the OneVue Entities to Diversa under s 769B(3).

103 ASIC further pleaded (FASOC [44]) that ADG and Mr Bhandari knew or ought to have known of the same matters prior to the start of the Relevant Period, and that their knowledge was to be attributed to Diversa on the basis that:

(a) ADG and Mr Bhandari acted, in relation to YourChoice Super, "at the direction or with the consent or agreement (whether express or implied) of the OneVue Entities, given within the scope of their actual or apparent authority as agents of Diversa"; and

(b) accordingly, the state of mind of ADG and Mr Bhandari was to be attributed to Diversa under ss 769B(3) and 769B(1)(b) of the Corporations Act.

104 However, at trial, ASIC did not press its case on attribution of the knowledge of the Bhandari Entities to Diversa. Accordingly, I regard ASIC as having abandoned that aspect of its pleaded case.

ASIC's allegations concerning knowledge *during* the Relevant Period

105 As to the period after the start of the Relevant Period, ASIC contended that Diversa came to know, or ought to have known, additional matters: FASOC [45]. In other words, Diversa accumulated further actual or constructive knowledge such that, even if it was not in contravention of its s 912A(1)(a) and s 912A(1)(ca) obligations from the *start* of the Relevant Period, it contravened those provisions as its knowledge of issues with the Bhandari Entities' business and conduct grew.

106 The additional matters pleaded by ASIC were as follows:

(a) (from at least August 2019) that the Bhandari Entities were charging high fees, including fees that were excessive relative to the members' account balances;

(b) (from at least August 2019) that the closure of many customers' initial accounts (in connection with the consolidation into the YourChoice Super account) "would have resulted in a loss of insurance benefits attached to those accounts";

(c) (from at least August 2019) that hardship (and other) withdrawals continued to be processed;

(d) (from at least October 2019) that Mr Bhandari, ASF and ADG submitted a withdrawal request containing a false certification by re-using a signature;

(e) (from at least 5 March 2020) that:

    (i) a customer had complained to the AFCA concerning the sales tactics and fees of the Bhandari Entities; and that

    (ii) ADG and Mr Bhandari's practice in handling customer complaints was to refund the customer to prevent escalation; and

(f) (from at least 17 March 2020) that the use of the "SuperMatch" service by the Bhandari Entities resulted in the ATO's revocation of the OneVue Platform's access to that service.

107 ASIC's case on the attribution of the actual and constructive knowledge of the OneVue Entities and the Bhandari Entities was pleaded on the same basis as the attribution of knowledge to the start of the Relevant Period: FASOC [46]–[47]. Again, ASIC did not press its case regarding attribution of the knowledge of the Bhandari Entities at trial, and confined its case on attribution of the knowledge of the OneVue Entities to attribution under s 769B(3).

ASIC's aides memoire on knowledge

108 In the course of the trial, ASIC provided three aides memoire. One constituted a consolidated aide memoire on the attribution of knowledge, which identified the documents said by ASIC to show the knowledge of various persons, aligned each such document with the vices said to be exposed by the document, and stated whether the knowledge was said to be that of Diversa, OneVue, and/or Mr Blood. A further aide memoire contained the subset of documents said to show the knowledge of Diversa over the whole of the Relevant Period. The final aide memoire contained a subset of the documents said to show the knowledge of Mr Blood up until 30 June 2019, being the date when Diversa was divested out of the OneVue Group.

KNOWLEDGE AND ATTRIBUTION OF KNOWLEDGE

Overarching issues

The end point of relevant knowledge: 17 March 2020

109 The first point to make is that I do not have regard to events post-dating 17 March 2020. For the reasons set out above, I consider that to be the latest date on which Diversa could have contravened s 912A(1)(a) and s 912A(1)(ca), having regard to ASIC's case on what it was that Diversa *should have* done, in order to comply.

110 I will first consider the knowledge that Diversa had on its own account, as distinct from the knowledge of the OneVue Entities that ASIC contended should be attributed to Diversa.

111 Identifying Diversa's knowledge brings attention to the personnel involved. I will treat those who had specific roles with Diversa (as distinct from other companies in the pre-divestment OneVue Group) as employees of Diversa, while acknowledging that it was not clear which entity formally employed each person (which is not uncommon in a group setting).

Whether s 769B(3) is applicable at all

112 In broad outline, ASIC's case was that, because Diversa knew or ought to have known of various matters, by failing to stop permitting the Bhandari Entities to arrange for customers to become members of YourChoice Super, Diversa breached the obligations imposed by s 912A(1)(a) and s 912A(1)(ca). ASIC structured its pleaded case on knowledge by reference to the actual and constructive knowledge of Diversa, and the actual and constructive knowledge of the OneVue Entities (which it said was to be attributed to Diversa). As I have noted above, the plea that the knowledge of the Bhandari Entities was to be attributed to Diversa was not pursued at trial.

113 ASIC relied on the statutory attribution provision (s 769B).

114 Section 769B(3) provides as follows (emphasis added):

> (3) If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent **by whom the conduct was engaged in** within the scope of the person's actual or apparent authority, **had that state of mind**. For this purpose, a person acting as mentioned in paragraph (1)(b) is taken to be an agent of the body corporate concerned.

115 Section 769B(3) is to be read with s 769B(10)(b), which provides that "a reference to ***conduct*** is a reference to an act, an omission to perform an act, or a state of affairs" (emphasis in original) and s 769B(10)(c), which provides that "a reference to the ***state of mind*** of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose" (emphasis in original).

116 Diversa's starting point was that s 769B(3) did not apply as s 912A(1)(a) and s 912A(1)(ca) are not provisions the contravention of which involves a mental element. It then contended that, in any event, s 769B(3) would not assist ASIC as the provision operates where there is an identified person who engaged in the relevant conduct (which includes an omission) and the same person had the mental state in question. Diversa contended that ASIC had not established that any particular person had both the knowledge and the power to cut the Bhandari Entities off, such that the mental state and engagement in conduct rested with the same person.

117 Diversa also contended that s 769B(3) could not be used to attribute constructive knowledge, describing ASIC's proposition that it can as "novel and unsupported by the text of the Act or any authority".

118 Whether or not a Licensee has done "all things necessary to ensure" that financial services covered by its licence are provided efficiently, honestly and fairly (s 912A(1)(a)) or has taken "reasonable steps to ensure that its representatives comply with the financial services laws" (s 912A(1)(ca)) will depend on the factual context in which the alleged contravention is said to have occurred. The range of matters that constitute the factual context will vary from case to case. In many cases (including the present matter), what the Licensee knew will constitute part of the relevant factual context. It may be "necessary to establish" state of mind as factual context, even if there is no distinct mental element to the contravention.

119 Accordingly, I do not accept Diversa's submission that s 769B(3) cannot apply because there is no statutory mental *element* to establishing a contravention of s 912A(1)(a) or s 912A(1)(ca). While there is no mental *element* of the contravention, knowledge constitutes relevant factual context.

Whether s 769B(3) can apply where the state of mind is not held by the same person who engaged in the conduct

120 My conclusion that s 769B(3) may apply to cases brought under s 912A(1)(a) and s 912A(1)(ca) does not mean that the section will necessarily be effective to establish the knowledge of a Licensee, particularly a corporate Licensee, when a contravention of s 912A(1)(a) or s 912A(1)(ca) is alleged.

121 As Diversa's submissions highlighted, s 769B(3) anticipates that there will be an identifiable director, employee or agent who engaged in specific conduct (which may be constituted by an omission) and whose state of mind may be ascertained and attributed. In some cases, a contravention of s 912A(1)(a) or s 912A(1)(ca) may arise from the actions (or omissions) of identified individuals, but in many other s 912A(1)(a) and s 912A(1)(ca) cases involving corporate Licensees, the contravention will be said to arise from the failure of *the corporation* to do certain things. That much is obvious given s 912A(1)(a) requires a Licensee to "do all things necessary" and s 912A(1)(ca) requires a Licensee to "take reasonable steps to ensure". Necessarily, an alleged contravention of either of those provisions will point to a failure to do something.

122 The failure of a corporate Licensee to do something will be established by proving that the thing was not done. In that way, there is no need to rely on the attribution of the conduct of one or more individuals to prove that matter. In other words, it will not be a necessary or useful enquiry to embark on identifying the particular directors, employees or agents of the body corporate who failed to do that thing. Yet the identification of specific conduct (acts or omissions) of identified directors, employees or agents is an integral step in applying s 769B(3).

123 The state of mind that is attributed by s 769B(3) is the state of mind of *the* director, employee or agent who engaged in *the* conduct in question.

124 In *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 (***Kojic***), Edelman J (then a judge of the Federal Court of Australia) considered s 84 of the former *Trade Practices Act 1974*

(Cth) (**Trade Practices Act**), which was in similar terms to s 769B(3). His Honour observed (at [110], emphasis added):

> It is possible, although unnecessary to decide in this case, that although s 84 is generally broader than the common law rules of attribution, is a narrower rule in one respect. That respect, considered in detail later in these reasons, is the lack of a requirement in cases of fraud for the person who makes the representation to be the same person who knows of the fraud. **If s 84 means that attribution to the corporation requires the conduct to have been committed by the same person who has the relevant state of mind then it would be narrower than the common law in this respect**.

125 While Edelman J pointed out that the statutory attribution provision may be narrower than the common law rule in cases of fraud, this proceeding does not involve fraud, or allegations of unconscionable conduct (as did *Kojic*).

126 More to the point, in my view, s 769B(3) simply cannot be construed so as to attribute the state of mind of an agent when the agent's conduct is not the conduct in respect of which it is relevant to establish the state of mind. Section 769B(3) operates to attribute conduct of certain persons, and the state of mind of those same persons. The language of s 769B(3) is specific. It begins by referring to a proceeding "in respect of conduct engaged in by a body corporate". When the provision then refers to the "director, employee or agent by whom the conduct was engaged in", it can only be referring to the conduct which is the subject matter of the proceeding. The section also only attributes the state of mind of the director, employee or agent "by whom the conduct was engaged in".

127 While, as Edelman J observed, that may render the statutory attribution rule narrower than the common law, at least in fraud cases, that does not gainsay that the statutory attribution provisions in other respects did, as they were intended to, expand the operation of the common law. A general proposition that statutory attribution goes beyond common law attribution provides no licence to adopt a strained construction that cannot be anchored in the words of the provision. Any such approach to construction would fall into the trap of adopting a priori assumptions about what Parliament intended, rather than identifying Parliament's intention from the statutory language: *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26] (French CJ and Hayne J).

128 The answer, however, in this case is not to look at the knowledge of each person involved and ask whether that person had the power to direct that members no longer be accepted through the Bhandari Entities. That was the approach that Diversa urged, to the extent that state of mind

was relevant (contrary to its starting position). To proceed in that manner overlooks, in my view, that s 912A(1)(a) and s 912A(1)(ca) can be contravened based on a corporate Licensee's failure to do certain things, without it being necessary or useful to seek to attribute that inaction to particular directors, employees or agents. Diversa's argument would harness an attribution provision to narrow the application of s 912A(1)(a) and s 912A(1)(ca) in omission-based cases.

129 Rather, the approach that should be adopted in this case is to apply common law principles of attribution in establishing what Diversa knew by virtue of the knowledge of its own personnel. Diversa's knowledge constitutes the context in which the court is to assess whether or not failing to cut off the Bhandari Entities results in Diversa having breached s 912A(1)(a) or s 912A(1)(ca).

130 I note here that ASIC's pleaded case on Diversa's own knowledge (actual and constructive) was not pleaded in terms which limited attribution to Diversa to attribution pursuant to s 769B(3): FASOC [42].

131 When turning to ASIC's case on attribution of the knowledge of the OneVue Entities, ASIC's pleading proceeded on the basis that the knowledge of the OneVue Entities was to be attributed to Diversa pursuant to s 769B(3). However, ASIC's pleading also referred to attribution on the basis that "they [the OneVue Entities] were under an express or implied duty to inform Diversa of [matters identified by cross-reference]": FASOC [43], [46]. While ASIC's pleaded case was wide enough to allow for submissions relying on general law to attribute knowledge of the OneVue Entities to Diversa, ASIC did not make submissions on that basis. Rather, ASIC's submissions (written and oral) contended that, once the knowledge *of the OneVue Entities* had been identified by application of general law principles, the knowledge of those entities was to be attributed to Diversa pursuant to s 769B(3).

A note on a related pleading issue

132 My approach on the issues just addressed also means that it is not necessary to get caught up in an argument that emerged after the hearing, by which Diversa contended that, in its reply submissions, ASIC attempted to expand its case to one that located a breach of s 912A(1)(a) in a failure to escalate issues.

133 The passages of transcript that caused Diversa to raise that objection in its post-hearing note were submissions made by ASIC about why the knowledge of Diversa personnel other than Mr Blood ought to be attributed to Diversa. It was in support of its arguments about aggregation

of the knowledge of the Diversa personnel that the point about escalating issues was raised. From the flow of the submissions made, I understood ASIC to be making that submission both to bolster its aggregation case, and to get around the apparent difficulty presented by the connection provided for by s 769B(3) between the person engaging in the impugned conduct and the person with the requisite mental state when it was not clear who at Diversa (if anyone) had authority unilaterally to cut off the Bhandari Entities.

134 For the avoidance of doubt, however, I record that I have proceeded on the basis that the case ASIC advanced was one that took issue with Diversa's failure to cut the Bhandari Entities off based on what it knew or ought to have known. Its case was not one that proceeded by seeking to make out a contravention of s 912A(1)(a) by establishing a failure to escalate and investigate issues, or a deficiency in Diversa's policies or procedures.

Actual and constructive knowledge: approach in cases under s 912A(1)(a) and s 912A(1)(ca)

135 In many contexts, the distinction between actual and constructive knowledge will be important, if only because some liabilities are only imposed where actual knowledge is established: see the discussion in *Young Investments Group Pty Ltd v Mann* (2012) 293 ALR 537; [2012] FCAFC 107 at [11] (Emmett, Bennett and McKerracher JJ).

136 In this case, knowledge is relevant as it forms part of the *circumstances* in which Diversa performed the financial service of issuing interests in YourChoice Super. Where the enquiry is into what those circumstances are, it is actual knowledge that constitutes a fact. A conclusion that someone ought to have known something does not establish an actual factual circumstance, as it existed at the time. As counsel for Diversa put it in submissions, "[c]onstructive knowledge is not itself knowledge at all. It's a legal construct". In this way, I do not consider that it is useful to approach the question of whether Diversa contravened s 912A(1)(a) or s 912A(1)(ca) by bundling up actual and constructive knowledge. Rather, in my view, the better approach is to look at what Diversa actually knew.

137 Actual knowledge of particular matters will, in many cases, inform the analysis of whether a Licensee has complied with its obligations to do "all things necessary to ensure …", or to "take reasonable steps to ensure …", and may do so in a manner that is not dissimilar to the path of analysis that generates conclusions of constructive knowledge. In other words, a conclusion that a Licensee has not, eg, done "all things necessary to ensure …" may be reached by incorporating consideration of what actions actual knowledge should have generated. A conclusion as to what realisations and actions should have been taken need not exclude

"stepping stones" such as intermediate conclusions that should have been reached, or intermediate steps that should have been taken. In this way, focusing on actual knowledge does not shield a Licensee who should have realised something and acted on it based on knowledge it did have.

138 It may be thought that the distinction I have drawn involves splitting hairs, but I do not think so. In my view, starting, as ASIC sought to, by identifying an undifferentiated mass of actual and constructive knowledge clouds and distorts the analysis by elevating as "facts" matters that were never actually known by Diversa. This, in my view, risks distorting the analysis because it erases the qualitative distinction between actual and constructive knowledge at the outset.

139 In this case at least, I consider the proper approach to be first to identify what Diversa actually knew (by its own personnel, and then by attribution of the actual knowledge of the OneVue Entities' personnel, if appropriate). Consideration of whether Diversa failed to "do all things necessary to ensure …" because it did not refuse to accept applications coming from the Bhandari Entities at all, can then be assessed including by reference to conclusions Diversa should have drawn based on what it did know.

140 Having regard to the approach I have just outlined, it is not necessary to determine whether, as Diversa submitted, constructive knowledge cannot be attributed under s 769B(3).

THE FIRST ALLEGED S 912A(1)(A) CONTRAVENTION: ISSUING OF UNITS

141 It was common ground that Diversa provided the financial service of issuing interests in YourChoice Super.

142 ASIC's case was that Diversa contravened s 912A(1)(a) by failing to do all things necessary to ensure that the financial service of issuing interests in YourChoice Super was "provided by Diversa efficiently, honestly and fairly". ASIC did not contend that there was any failing associated with the execution of the financial service of issuing the interests per se. Rather, ASIC submitted that Diversa contravened s 912A(1)(a) because Diversa "knew or ought to have known that the circumstances in which the interests were being issued involved the vices in the Bhandari Entities' conduct" outlined earlier in ASIC's written submissions.

143 ASIC's submissions proceeded by reference to the following 11 vices:

- First Vice: the ASF website promoted a "free" super search service; there was at least a risk that customers would misapprehend whether they would be required to pay for the super consolidation service.
- Second Vice: the Bhandari Entities earnt very substantial fees — at the expense of customers.
- Third Vice: there was at least a risk that the ASF website, consolidation form and telephone calls led customers to believe that it was in their interests to open a "temporary" YourChoice Super account so as to consolidate their superannuation.
- Fourth Vice: there was at least a risk that customers were misinformed about the appropriateness of YourChoice Super as a product for them.
- Fifth Vice: there was prejudice to customers from signing up to and consolidating their superannuation in YourChoice Super where it was not an appropriate product for them; and from having their superannuation withdrawn.
- Sixth Vice: the dominant message conveyed by the ASF website was that consolidating superannuation through the Bhandari Entities would grow the customer's superannuation (whereas YourChoice Super may not have been an appropriate fund for the customer).
- Seventh Vice: the general advice given to customers was "boilerplate" and was given to customers without knowledge of, or regard to, whether YourChoice Super — a fund chosen by the adviser and not the customer — was suitable to them.
- Eighth Vice: there was a risk that contrary to the authorisation under ADG's AFSL, the Bhandari Entities gave the customers "financial product advice" that amounted to "personal advice".
- Ninth Vice: in some of their dealings on behalf of customers in relation to YourChoice Super, the Bhandari Entities engaged in conduct which appeared to be fraudulent.
- Tenth Vice: there was at least a risk that the Bhandari Entities were engaging in misleading and deceptive conduct.
- Eleventh Vice: there was at least a risk that the Bhandari Entities were engaging in unconscionable conduct.

144 In some instances, the vices did not neatly align with the knowledge alleged by ASIC in its FASOC. Diversa also contended that some of the vices had not been pleaded and could not be relied upon by ASIC. I have referred to the pleading issues above.

The "circumstances" and whether Diversa could breach its s 912A(1)(a) obligation by reason of deficiencies in the activities of the Bhandari Entities

145 At points in its submissions, Diversa appeared to contend that it could not breach the s 912A(1)(a) obligation imposed on it as a Licensee by reference to activities of another Licensee (viz, the Bhandari Entities) simply because that second Licensee provided financial services in a deficient manner.

146 In my view, s 912A(1)(a) is not limited so that the circumstances which reveal how and why it is that Diversa failed to do all things necessary to ensure that the financial services it provided were provided honestly, fairly and efficiently, are restricted to the four corners of Diversa's own operations in providing those services (here, issuing interests in YourChoice Super). If the circumstances pointing to the deficiency were restricted to a Licensee's own operations, such that operations occurring "downstream" in the operations by which customers arrived at Diversa's door, the force of pt 7.6 in achieving its statutory objects would be materially blunted.

147 Context is, however, of central importance. Whether or not deficiencies in "downstream" operations will result in a Licensee having failed to meet its s 912A(1)(a) obligation must depend on what it knew of those deficiencies, its relationships and contracts with downstream entities, and how the deficiencies in question bear on the financial service that the Licensee is providing.

148 In the present case, this requires examination of what it was that ASIC contends Diversa knew about the operations of the Bhandari Entities, and whether, as ASIC contended, the only appropriate response was for Diversa to stop issuing interests to members or potential members who came to it from the Bhandari Entities.

Section 912A(1)(a) as a forward-looking obligation

149 In *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1422 (***ASIC v CBA***), Downes J at [156] stated that s 912A(1)(a) is concerned with "the taking of steps to achieve compliance with the statutory norm before any specific instance of non-compliance has arisen". Her Honour made that observation in explaining why the failures of the bank to apply certain waivers during the relevant period did not, of themselves,

demonstrate any breach of the bank's forward-looking obligation. As Downes J also observed (at [152]), having reviewed the relevant authorities (including *Australian Securities and Investments Commission v National Australia Bank* (2022) 164 ACSR 358; [2022] FCA 1324 at [364] (Derrington J)), the obligation imposed by s 912A(1)(a) is not a standard of "absolute perfection" that excludes the possibility of error; rather, it is a reasonable standard of performance.

150 In its submissions, ASIC said this about Downes J's decision in *ASIC v CBA* (internal footnotes omitted):

> It is submitted that the provision [s 912A(1)(a)] may nonetheless be contravened by one or more specific instances of non-compliance with the statutory norm; and to the extent that Downes J decided to the contrary in *ASIC v Commonwealth Bank of Australia*, her Honour's decision should not be followed. In any event, even if her Honour was correct that one specific instance of non-compliance does not (in itself) amount to a contravention of the provision (which is denied), once instances of non-compliance recur or accumulate, they necessitate the taking of steps to achieve compliance with the statutory norm; if steps are not then taken, a contravention occurs.

151 In *ASIC v CBA*, Downes J did not specify the nature of the "specific instance of non-compliance" to which her Honour referred. However, in the context of her Honour's reasons, Downes J could only have been referring either to an instance of non-compliance with the bank's express promise to apply the waivers if certain criteria were met, or to a specific instance in which the bank did not provide its services efficiently, honestly and fairly. Either way, Downes J was clearly not referring to any circular proposition of the kind that ASIC's submission seemed to assume (ie that s 912A(1)(a) is not breached by any instance of non-compliance with the statutory norm imposed by the same section).

152 Section 912A(1)(a) requires that Licensees look ahead to how they will be providing the financial services in question, assess what issues may arise that could result in those services not being provided efficiently, honestly and fairly, and design and adopt measures to address the risk of those matters occurring, and (depending on the context) their consequences. The obligation is, however, not static. A Licensee cannot establish a procedure at the outset, and hold doggedly to it, no matter the flaws that experience may reveal.

153 To the extent that ASIC contended that, properly construed, s 912A(1)(a) is contravened whenever a Licensee provides a financial service other than efficiently, honestly and fairly, no matter the circumstances, I reject that contention. The statutory obligation is, as stated,

primarily directed to the systems and procedures of Licensees by which their standards of conduct in the provision of their services are assured.

154 In any event, ASIC's case did not rest on specific instances of the performance of financial services by Diversa as proving the contravention of s 912A(1)(a). Rather, its case was that Diversa had sufficient knowledge (actual and constructive) by the start of the Relevant Period, such that it should have stopped issuing interests to clients of the Bhandari Entities. ASIC also contended that, as the Relevant Period progressed, the issues of which Diversa had actual and constructive knowledge continued to accumulate such that it remained (or became) non-compliant with s 912A(1)(a) as time went by, as it failed to cut off the Bhandari Entities until March 2020.

Diversa personnel

155 ASIC identified four individuals as those whose knowledge could be directly attributed to Diversa on the basis that they held roles directly concerned with Diversa's operations. There was no evidence about which entity employed the various individuals involved, so I have referred to them as "Diversa personnel", for want of a better term. I have similarly referred to the other group of individuals involved (and whose knowledge ASIC argued was to be attributed to the OneVue Entities) as "OneVue personnel". That group comprises individuals who ASIC does not contend had roles directly involved in Diversa's operations.

Stephen Blood

156 Mr Blood commenced as EGM of Risk and Compliance for the OneVue Group in January 2017. In around March 2018, Mr Blood became EGM Fiduciary Services of Diversa. Mr Blood retained his role as EGM of Risk and Compliance for the OneVue Group from March 2018, but the scope of his responsibilities in that role reduced. When Diversa was divested at the end of June 2019, Mr Blood stayed with the OneVue Group. He did not move across with the divested Diversa. Once he took on his role as EGM Fiduciary Services of Diversa, Mr Blood was the most senior Diversa-specific member of staff, according to organisational charts dated August and September 2018. Mr Blood reported to Connie Mckeage, the OneVue Group's CEO.

157 ASIC contended that Mr Blood's knowledge is to be attributed to Diversa on the basis that he was an officer or employee of Diversa until 30 June 2019, but also throughout the Relevant Period, on the basis that he was an officer or employee of the OneVue Entities, which were

themselves Diversa's agents for the purposes of s 769B(3). ASIC also contended in its written submissions that it was by the direct knowledge of Mr Blood that Diversa knew or ought to have known of the "vices" in the Bhandari Entities' conduct in relation to YourChoice Super.

158 Diversa took issue with ASIC's contention that, in essence, Mr Blood retained knowledge of every piece of information about a single adviser, including information obtained years ago (as far back as 2017), and that entire store of accumulated knowledge was to be attributed to Diversa, including after Mr Blood no longer had any role with Diversa after 30 June 2019. It also submitted that the matters of which Mr Blood had knowledge before 30 June 2019 did not show he had knowledge of the "vices" identified by ASIC.

159 While ASIC contended that Diversa continued to be fixed with Mr Blood's pre-30 June 2019 knowledge even after the divestment of Diversa at the end of June 2019, as I detail below, I do not consider that Mr Blood's actual knowledge prior to 30 June 2019 is such as to support ASIC's s 912A(1)(a) case. Accordingly, it is not necessary to consider whether Diversa "lost" Mr Blood's knowledge once he no longer had any association with Diversa.

Di Caldwell-Smith

160 There was a factual issue concerning Ms Caldwell-Smith's connection with Diversa. ASIC submitted that she "straddled both Diversa and OneVue — working in the Product team and having a Diversa email address". ASIC referred to Ms Caldwell-Smith's email signature block, in which she was described as "Product & Training Manager" at OneVue. ASIC relied, as indicated, on the fact that Ms Caldwell-Smith had an email address with an "@diversa.com.au" domain both before and after the date of the divestment. ASIC also relied on the following sentence in an email sent by a Mr Craig Mills (of OneVue) on 5 February 2019, copied to Ms Caldwell-Smith, in which Mr Mills said "[t]his dovetails into the investigation by Di (in her capacity as officer for Diversa) and Product".

161 The final documents relied on by ASIC were two Form FS20s, notifying changes to the details of the "responsible manager" of Diversa. These documents showed Ms Caldwell-Smith was described as a "Marketing Manager", was appointed one of Diversa's "responsible managers" on 20 April 2017 and ceased on 6 August 2019. ASIC relied on the description of who may be nominated as a responsible manager, as set out in the ASIC Regulatory Guide 105 (December 2016 and April 2020 versions were handed up by ASIC, both of which are superseded). That regulatory guide referred to the person being appointed having "direct responsibility for significant day-to-day decisions about your financial services". Regulatory Guide 105 set out

the way in which ASIC would assess compliance with the "organisational competence" obligation of Licensees provided in s 912A(1)(e), and the ability of AFSL applicants to meet that requirement.

162 Diversa said Ms Caldwell-Smith had merely been seconded to Diversa for a short time, and that her secondment ended in February 2019, ie, before the commencement of the Relevant Period. Diversa relied on documents which established the following chronology regarding Ms Caldwell-Smith:

(a) a Diversa management report dated December 2018, which referred to human resource requirements not being adequate and stating that "secondment relief" was being provided by OneVue, including the secondment of Ms Caldwell-Smith to the Trustee, enabling Andrew Loveridge to assume other responsibilities;

(b) an email of 13 February 2019 which referred to another individual starting a secondment with Diversa, which would enable the Fund to be transitioned back from Ms Caldwell-Smith to Mr Loveridge, which was then followed by an email the next day suggesting the secondment formally end on 22 February 2019 so that there would be a "line in the sand";

(c) emails showing that, following the divestment of Diversa, IT staff were in the process of transferring email addresses from the "@diversa.com.au" domain;

(d) a "table of organisational competence" of MAP FP dated 14 August 2018, which stated that Ms Caldwell-Smith had held the role of "Product and Training Manager" with OneVue Holdings Limited from November 2016 to the present, and had been the "National Manager Sales & Marketing" with Diversa Group Limited from September 2011 to November 2016; and

(e) minutes of a meeting between Wealth and Diversa on 28 August 2019, which recorded Ms Caldwell-Smith attending with others on behalf of Wealth, and Andrew Loveridge and Daniel Strachan (referred to below) attending for Diversa.

163 The MAP FP table of organisational competence, and its reference to Ms Caldwell-Smith's initial position with Diversa between 2011 and 2016, was said to explain why she had an email address with the "@diversa.com.au" domain, despite not having any role associated with Diversa's affairs outside the period of her secondment.

164 In my view, Ms Caldwell-Smith's email address does not establish that she had any, or any particular, role with Diversa during the Relevant Period. The documents relied on by Diversa show a logical explanation for that email address, namely that that was the organisation she started with, and her email address was not changed when she assumed a role with OneVue Holdings Ltd in November 2016. Prior to mid-2019, Diversa was part of the OneVue Group (it is not clear, though, when it joined that group).

165 Nor does a single reference to Ms Caldwell-Smith in an email as "officer for Diversa" mean she was an officer, in the sense of the word used by ASIC to characterise her knowledge as knowledge of Diversa for the whole of the Relevant Period. Not only is the expression "officer for Diversa" open to interpretation (and may refer to Ms Caldwell-Smith being an officer of OneVue responsible for various interactions with Diversa), but the characterisation by Mr Mills reveals nothing more than his opinion. More importantly, the email in which Ms Caldwell-Smith was so-described was an email of 5 February 2019, at which time Ms Caldwell-Smith was on secondment to Diversa.

166 I also do not find the FS20 forms of assistance in determining just what Ms Caldwell-Smith's role was. The fact that Diversa nominated her as a responsible manager might, in view of ASIC's requirements (communicated by Regulatory Guide 105), mean that she *should* have had a certain level of responsibility within Diversa, but her nomination as a responsible manager does not show that she *did* have such responsibility.

167 In my view, the surest guide to Ms Caldwell-Smith's role, outside of the period of her secondment, is the description of her responsibilities in the table of organisational competence of MAP FP dated 14 August 2018. At that time, MAP FP was the promoter of the Fund, pursuant to the Promoter Agreement. That table stated Ms Caldwell-Smith's role as being Product and Training Manager, and stated that she was responsible for the following:

> Position title: Product and Training Manager
>
> In this role Ms Di Cardwell-Smith[sic] is a senior member of the Platforms Services Product team reporting to the Head of Product and is responsible for :
>
> - Technical escalation point for superannuation and tax under general advice Adviser Services, Sales&[sic] Relationship provision to super funds members and financial advisers.
> - Analysis, scoping, preparation of business plans and promotion Trustee reporting.
> - Training on superannuation legislation and legislative and regulatory services.

- Training presentation and material for provision to financial advisers.

168 Ms Caldwell-Smith was seconded to Diversa for a period which commenced some time before the Diversa Management Report for December 2018 was prepared and ended in late February 2019. While there is some uncertainty about her exact finishing date, the only date available on the evidence is 22 February 2019. The parameters of Ms Caldwell-Smith's role while on secondment to Diversa are not wholly clear, but the relevant emails refer to her managing "MAP, LESF and Smartsave". The minutes of the 28 August 2019 meeting also strongly support Diversa's contention that Ms Caldwell-Smith had no ongoing role with Diversa after the divestment (if indeed she had any role after the secondment ended).

169 Having regard to these conclusions, I will treat Ms Caldwell-Smith as a member of Diversa's personnel while she was seconded to Diversa (whoever her formal employer was), and as a member of the OneVue personnel otherwise. I will separately address the question of the attribution of the knowledge of OneVue personnel to Diversa.

Andrew Loveridge

170 Mr Loveridge was an Account Executive at Diversa. He appeared on the August and September 2018 Diversa organisational charts, reporting to Brian Stieg, Head of Trustee Services (August 2018) and then to Josh Haymes, Senior Account Executive (September 2018). There was no one reporting to Mr Loveridge according to the organisational charts.

171 Mr Loveridge had some role at Diversa back as far as December 2017, according to an email relied on by ASIC dated 15 December 2017.

172 Mr Loveridge and Mr Haymes attended parts of a board meeting of Diversa on 28 February 2019. Mr Loveridge and Daniel Strachan (an Account Executive at Diversa) attended the meeting between Wealth and Diversa on 28 August 2019.

173 No evidence was adduced about Mr Loveridge's role and responsibilities, beyond what may be inferred from the matters he was involved in, as shown by the documents. There is nothing to indicate his role was senior within Diversa.

Daniel Strachan

174 ASIC's written submissions stated that Mr Strachan was an Account Executive at Diversa, whose knowledge is to be attributed to Diversa. ASIC did not seek to prove when Mr Strachan started with Diversa, noting that Mr Strachan does not appear on the September 2018 Diversa

organisational chart, so it must have been some time later. Mr Strachan's earliest appearance in the emails relied on by ASIC (according to its aide memoire) was dated 8 July 2019.

175 No evidence was adduced about Mr Strachan's role and responsibilities, beyond what may be inferred from the matters he was involved in, as shown by the documents. There is nothing to indicate his role was senior within Diversa.

Diversa's position on the attribution of knowledge of Mr Blood, Ms Caldwell-Smith, Mr Loveridge and Mr Strachan

176 In relation to attribution under s 769B(3), Diversa contended that none of these individuals had the authority to cut off the Bhandari Entities (being the "conduct" element of the alleged contravention of s 912A(1)(a)), and so their knowledge could not be attributed to Diversa under that provision.

177 As to attribution under common law, Diversa's submissions were not entirely clear, but I understood it to accept that the knowledge of those individuals (including Ms Caldwell-Smith during the period of her secondment to Diversa) *could* be attributed to Diversa, but to contend that their knowledge could not be attributed at large. Rather, in Diversa's view, it would be necessary to address in each instance the purpose for which the question of attribution was being asked, in effect applying the principles concerning attribution of the knowledge of agents set out in *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29,699; [2011] NSWCA 389 (***Tonto***).

178 In my view, the documents relied on by ASIC establish that each of the four individuals (including Ms Caldwell-Smith during the period of her secondment, and Mr Blood prior to 30 June 2019) was sufficiently involved in the affairs of Diversa in connection with YourChoice Super that their knowledge is to be attributed to Diversa.

Connie Mckeage

179 Ms Mckeage was the CEO of the OneVue Group. Mr Blood reported to her. There was some dispute regarding whether, as CEO of a group that included Diversa (until the end of June 2019), knowledge of Ms Mckeage ought to be attributed to Diversa. However, this was a non-issue as the only documents in ASIC's aide memoire on Diversa's knowledge that involved Ms Mckeage (prior to the divestment of Diversa) also involved Mr Blood and were communications received or sent by Mr Blood while he had a role with Diversa.

Consideration: Knowledge of Diversa (other than by attribution of the knowledge of the OneVue Entities)

180 I turn now to the matters that arose by reference to ASIC's aide memoire specific t o the knowledge of Diversa through its own personnel (Mr Blood (to 30 June 2019)), Ms Caldwell-Smith (December 2018 to February 2019), Mr Loveridge and Mr Strachan).

181 I have included knowledge of Mr Blood prior to his taking on his Diversa-specific role in March 2018 on the basis that matters of significance that he was aware of before March 2018 would not have been forgotten by the time he took on the additional Diversa role in March 2018.

182 I have addressed the evidence by reference to the nature of the issues raised, rather than strictly chronologically. Those issues and documents are to be considered in the context of the scale of the activity of the Bhandari Entities as a source of members of YourChoice Super. Junior counsel for ASIC said in submissions that weekly Super Activity Reports were circulated at least to OneVue personnel. From this, I understood that, notwithstanding the inclusion of these reports in ASIC's aide memoire on Diversa's knowledge, ASIC was not contending, and accepted it had not established, that the reports were also provided to Diversa as trustee. Nevertheless, in my view it would be implausible to suggest that Diversa was unaware that the Bhandari Entities were a significant source of incoming members of YourChoice Super and funds under management, even if the granular weekly "roll in" and "roll out" figures were not reported to it.

Hardship claims

183 On 1 September 2017, Mr Blood was forwarded an email chain between OneVue personnel which raised two matters: first, a comment on the ASF website saying that, while "most of our competitors charge an upfront fee" to track down lost super, ASF would find out if the person had multiple superannuation accounts for free; and second, information that a high number of hardship withdrawals and rollovers out were being received from clients who had only recently been rolled in to YourChoice Super by the Bhandari Entities. In September 2017, Mr Blood had no role with Diversa specifically; he was the EGM Group Risk and Compliance at OneVue.

184 As to the first matter, the internal concern appears to have been that incorrect claims were being made by the Bhandari Entities about the conduct of their competitors. I note that ASIC did not seek to prove that, contrary to claims made by ASF, it did levy a charge to conduct the super

search (cf a charge for the service of consolidating the accounts into a YourChoice Super account).

185 As to the second concern, being the volume of hardship claims, that matter came up a number of times. At this point, Mr Blood sought details of the amounts and dates of those hardship withdrawals. That information was provided to him. A diverging email chain (to which Mr Blood was not copied) records Rob Chowdhury (Business Development Manager, Platform Services at OneVue) analysing the hardship numbers as a proportion of Nizi Bhandari's total clients and observing that "the hardship numbers are [not] that high". Mr Chowdhury suggested that steps might be taken to lessen the administrative burden of managing those claims. It seems the concern was that the numbers of hardship claims imposed a burden on OneVue in dealing with them (as distinct from the concern at that stage being about what the level of hardship claims might reveal about the client base of Mr Bhandari). It is not apparent what Mr Blood knew of the way in which the hardship claim numbers were being assessed and addressed by his OneVue colleagues.

186 At this stage, it appears that Mr Bhandari was operating through Libertas Financial Planning Pty Ltd, which was not one of the Bhandari Entities whose conduct was the focus of ASIC's case. ADG (under its former name, Financial Advisers Dealer Group Pty Ltd) only applied to register to use the OneVue Platform on 14 December 2017. Nevertheless, Diversa did not seek to make anything of Mr Bhandari not having yet (it seems) started operating through ADG at that time.

187 The matter of hardship claims came up again in mid-December 2017. On 15 December 2017, Scott Hardie (Head of OneVue Super Services, according to the title in his email signature block) emailed Mr Loveridge, copying Mr Blood. He referred to hardship withdrawals being received at rates exceeding the number for all other funds combined and went on to say:

> Also do we have an issue with money being rolled in a fee charged then the withdrawal out in such a short period? Should we be updating the PDS and doing something about the Adviser Service fee for hardship and say if money rolled out within 6 months we claw back?

188 It is apparent from this email, and emails of 22 December 2017 and 23 January 2018, that the business concern at that stage continued to be the drain on resources presented by funds being rolled in to YourChoice Super, only to be promptly rolled out, not only by way of hardship claims, but also by rollovers into the member's primary, active superannuation fund elsewhere. The concern appears to have been that fees were being paid to the adviser on the roll-in, only

for funds to be rolled out, as well as there being significant work for the "Service team" handling the number of withdrawal calls. Mr Blood referred, in his email of 22 December 2017, to the idea having been to keep a watching brief, to see if Mr Bhandari's conduct continued. He asked, "has the pattern persisted?"

189 In January 2018, work was undertaken to prepare a draft financial hardship form, which would be distributed to advisers and could serve as a factsheet for Adviser Services, to answer queries and thereby assist in managing the volume of calls. In an email of 23 January 2018, Ms Caldwell-Smith circulated a draft of the form, copying Mr Loveridge, and referring to having had a teleconference the previous day "with the Trustee's office on improving process and structure around financial hardship claims". Clearly Ms Caldwell-Smith did not see herself as representing the trustee's office at that time. Mr Blood was not copied to the email circulating and discussing this process amendment. Over the next couple of days, Craig Mills (Business Development Manager, Platform Services at OneVue) obtained information from Mr Loveridge about how the hardship claim process proceeded. Mr Loveridge explained that the member would submit an application via the Administrator, the Administrator would then submit the application to the trustee for review, whereupon the trustee would review the documentation and request the Administrator to seek more information or approve the claim. Again, Mr Blood was not involved in this email correspondence.

190 Correspondence to this point occurred before March 2018, and so took place before Mr Blood had any role with Diversa. As I have indicated, the email traffic about hardship claims primarily related to operational concerns.

191 An email from Craig Mills to various OneVue personnel, and copied to Ms Caldwell-Smith, on 18 September 2018, refers to Mr Bhandari having a call centre in the Philippines with about 50 employees, and about 10 Melbourne-based staff, with the onshore staff making the sales calls, and the Philippines staff dealing with ongoing client relationship matters, including hardship and other claims lodgement. The email also referred to Mr Bhandari having been open about the fact that ASIC had engaged with him in about March 2018 (apparently regarding concerns about the high fee for super consolidation), and stated that "The [F]old" [which is a law firm] had been on retainer since the beginning of the year, had engaged with ASIC and "all representations have been well received". At the time that Ms Caldwell-Smith was copied to this email, she was not yet on secondment with Diversa. To the extent the email referred to ASIC having engaged with Mr Bhandari, the information contained in the email was not such

that it should have triggered concerns. A law firm was on retainer and, to the extent it appeared ASIC had a concern about the level of fees being charged by Mr Bhandari for consolidation, engagement with ASIC was proceeding positively with the involvement of The Fold.

192 The matter of hardship claims came up again in November 2018. On 2 November 2018, Mr Blood sent an email titled "This week at Diversa". It is important to recall that Diversa was the trustee of a number of funds, and the email was not specific to YourChoice Super.

193 Mr Blood's email included a bullet point that said "Insurance and hardship claims — 27 completed this week (that is a lot!)". The email did not provide a breakdown of how many of the 27 claims were for insurance, as distinct from hardship. Ms Mckeage (Group CEO) replied with "Massive amount of hardship claims where are they coming from?" and requests concerning other matters. Ms Caldwell-Smith then (on 8 November 2018) requested someone provide a report showing "financial hardship claims/exits" so that they could "see how many are coming from Nizi". An Excel file provided to Ms Caldwell-Smith on 12 November 2018 of financial hardship applications since 1 July 2018, contained only one hardship claim in the week leading up to Mr Blood's email that concerned YourChoice Super. The Excel file included entries for a range of funds (including but not limited to YourChoice Super). It included 18 entries for YourChoice Super (across the four month period), all of which listed Mr Bhandari or other advisers associated with the Bhandari Entities as the adviser for the member in question.

194 In view of these matters, ASIC's emphasis on Ms Mckeage's "[m]assive amount of hardship claims" comment was misplaced. Not only was Mr Blood referring also to insurance claims in his initial email, but the file subsequently provided to Ms Caldwell-Smith does not bear out the suggestion that great numbers of hardship claims were being generated by the Bhandari Entities (even putting aside that Ms Caldwell-Smith was not yet on secondment with Diversa when she received this analysis, and there is no evidence it was provided to Mr Blood). Further, ASIC did not point to any benchmarks that would suggest that 18 hardship claims from members associated with the Bhandari Entities over approximately four months was unusual or excessive, particularly in view of the high proportion of members who came to YourChoice Super through the Bhandari Entities.

195 I do not consider that Diversa knew or ought to have known of any of the asserted "vices" by reason of the emails concerning hardship claims referred to above.

196 In circumstances where YourChoice Super was primarily being used by the Bhandari Entities as a temporary consolidation account, it is not surprising that there were high numbers of withdrawals following creation and consolidation into the YourChoice Super account. To the extent that the high number of withdrawals included many hardship-based withdrawals, I do not accept that that fact alone establishes that many of the customers were "vulnerable and/or unsophisticated" in the sense alleged by ASIC: FASOC [42(d)–(e)], [43]. In order to qualify for hardship withdrawal, the customer needed to meet the criteria, which involved having financial needs they could not otherwise meet. To the extent that ASIC sought to bolster the vulnerability contention on the basis that searches for lost superannuation could be conducted free of charge via the ATO's search facilities, that overlooks that what the Bhandari Entities were charging for was the service of arranging the consolidation of superannuation accounts, and then (in many but not all) cases, the on-payment into their client's fund of choice.

197 It is also not apparent how, even assuming the numbers of hardship claims revealed something about a portion of the clientele of the Bhandari Entities, that supports ASIC's broader case. I do not accept that high numbers of hardship withdrawals revealed something necessarily untoward with the practices of the Bhandari Entities that should have been of concern to the trustee. There is no suggestion that hardship withdrawal applications were being made by or for members who did not meet the criteria for such claims. It is not apparent why individuals who have financial needs qualifying them for hardship withdrawals should not be able to avail themselves of a superannuation consolidation service which helped them do that, even if they could have made one or more separate applications to their existing "lost" super funds to withdraw funds on hardship grounds. That is particularly so where it was not established that members making hardship withdrawals completely emptied their YourChoice Super accounts. In other words, it cannot be said that the consolidation achieved nothing, even for the group of members who did make hardship withdrawals.

198 Further, and in any event, even if Diversa knew or ought to have known that an unquantified portion of the Bhandari Entities' client base was vulnerable in some way, it is not apparent why, in order to comply with its s 912A(1)(a) duty, its ultimate response should have been to cut off the Bhandari Entities.

199 I should also note that ASIC relied on the overall level of withdrawals (not just hardship claims) as part of its pleaded case on vulnerability (although not attracting as much attention as hardship withdrawals at trial). ASIC suggested that clients of the Bhandari Entities accounted

for about 49% of non-hardship claim withdrawals in the Relevant Period. But that figure seems to me to be unreliable. It was derived by ASIC comparing an Excel file said to identify all withdrawal applications by ASF customers with the number of withdrawal applications recorded in various quarterly administration reports.

200 However, while the Excel file separately recorded hardship and non-hardship withdrawals, it did not separately record rollovers into other funds. There was no evidence about the creation of this Excel file. It is not apparent from the evidence whether the non-hardship withdrawals in the Excel file included rollovers into other funds. In oral submissions, counsel for ASIC pointed to the layout of sample withdrawal forms to submit that a "withdrawal" must mean a withdrawal of cash and not a rollover into another fund. However, the form referred to identified (at item 4) three types of "withdrawal": partial cash withdrawal, full cash withdrawal (account closure) and "rollover funds to institution of self-managed super fund". The fact that the form then contained different sections to be completed depending on which withdrawal type was selected does not establish that the term "withdrawal" in all documentation (including the Excel file) meant withdrawal of cash as distinct from rollover. On the contrary, the form's identification of rollover as a type of withdrawal means that would be a very unsafe assumption to make.

Complaints about unauthorised transactions

201 Another matter that was raised in email correspondence concerned complaints that the Bhandari Entities had engaged in transactions on behalf of customers that were not authorised.

202 On 6 April 2018, Mr Loveridge received an email from Jenny Cleary of "OneVue Super Services" which referred to a member having complained that she had been charged higher fees than she had agreed to and that she had not authorised a roll-in.

203 On 1 November 2018, Mr Loveridge received an email from Rachel Banbrook of "OneVue Super Services", referring to a phone call from a member who wished to make a complaint as "she didn't sign up to have her accounts transferred". Mr Loveridge drew the connection with the similar complaint made by a member earlier that year, but identified that the member needed to take the issue up with the adviser as the Administrator acts on the instructions received from the adviser based on the adviser having stated in the application that it has authority to act as the nominated representative of the client. Mr Loveridge reviewed and amended a draft letter to the member. He also queried the fee, asking Ms Banbrook whether it was correct that the member was deducted a $220 adviser fee on a roll-in of approximately

$500, observing that, if that was the case, “there is something not quite right”. Ms Banbrook responded that the adviser had asked that the fee be refunded, which Mr Loveridge considered positive as it otherwise “would have been a terrible look”. It appears a letter to the member was then finalised and there is no evidence of any ongoing complaint.

204 On 6 March 2019, Mr Blood received an email from AFCA regarding a complaint which raised two issues: delay in the member receiving funds which he withdrew from an account; and charges having been made in excess of the $220 fee the member said he had been advised of. The member was seeking a refund of the $536 in additional fees, which he said he had not been told about. Mr Loveridge queried whether a complaint had been made directly (cf through AFCA), to which the answer was that there was no record of such a complaint having been received. It is not apparent from the evidence what then occurred.

205 On 28 February 2020, Mr Strachan received a complaint from AFCA, which had been notified to Diversa. A description of the complaint provided by Mr Strachan to Mr Blood on 4 March 2020 referred to the member being unaware that they were consenting to roll their money into YourChoice Super and of the fee that was charged to do this. Mr Strachan’s email, by its language, appears to have been a request made on behalf of the Trustee to OneVue as a service provider. By this time, Diversa had been divested and Mr Blood did not have any role with Diversa.

206 Mr Blood then emailed Mr Bhandari to ask if he was willing to refund the fee of $330, request he explain how he ensures members receive the PDS before an account is created with the Fund, and ask whether evidence could be provided specific to that member showing the member was provided with the PDS. In an email on 5 March 2020, Mr Blood referred to Mr Bhandari having a practice of refunding fees for clients who complain, and said “[t]his is to reduce time taken to defend complaints and the risk of them escalating”. These emails were not copied to anyone at Diversa, and it is not apparent whether Mr Blood had this knowledge of, or view about, Mr Bhandari’s practices while he still had a role with Diversa.

207 In the context of the Bhandari Entities having signed up approximately 30,000 members over the entire period, I do not consider that the above complaints having been raised with Diversa means that Diversa knew or ought to have known of any of the “vices” for which ASIC contends. The evidence did not extend to what became of the complaints, or indeed whether they were found to have merit. In any event, ASIC has not contended that Diversa should have taken steps to require some kind of further verification of the instructions and authorisations

members gave their financial advisers, such that Diversa (or OneVue) should not have taken at face value the verification made by the Bhandari Entities regarding due authorisation by the member. Nor did ASIC contend that Diversa should have required some further verification process in respect of prospective members being aware of, and consenting to, the fees charged by the Bhandari Entities for the consolidation services. Further, ASIC did not contend that any of the complaints made were not handled appropriately.

Dummy email addresses

208 A further issue concerns the use of what were referred to as “dummy” email addresses.

209 On 6 November 2018, Talent Machakaire (“Head of Group AML” at “OneVue”, according to her signature block), emailed Mr Blood a “[h]eads-up” that Mr Bhandari had set up 55 YourChoice Super accounts using “noemail@noemail.com” as the email address. Ms Machakaire advised Mr Blood that, as the onboarding process was “shared between OVSS and Platform, we are trying to find the owner of the incident” and that Richard Harris-Smith had been informed of the incident. Mr Harris-Smith was the Deputy Group CEO. The issue was flagged by Rishi Ladha of “Platform services”, and copied to Ms Machakaire and others, who then gave Mr Blood the “heads up”.

210 The “dummy email” issue again came to Mr Blood’s attention on 28 March 2019, when he was copied to an email from Felix Feist (“Senior Manager, Risk and Compliance” with “OneVue”, according to his signature block) that referred to two recorded calls conducted by the Bhandari Entities having been reviewed. In one of the calls, consent was provided for ASF to receive electronic messages and then post communications on to the member. However, in the other call, there was no such consent, and the member stated he did not know how to read or write. Felix Feist’s email identified further enquiries that were being made regarding the two members’ accounts.

211 From the above, I am satisfied that Mr Blood was aware of something that would, or should, have been recognised as a *potentially* serious issue. While it is not clear from the emails whether the communications he received were sent (or copied) to him by virtue of his role as EGM of Risk and Compliance (cf his role with Diversa), I do not consider that Mr Blood’s knowledge of potentially serious issues can be bifurcated. Mr Blood had a senior role with Diversa, and he knew whatever he knew while he had that role, whether or not he was wearing a different “hat” when informed of those matters.

212 Nevertheless, as far as Mr Blood would have been aware from the foregoing, the issue had been identified, and was being treated as a serious issue by OneVue. I do not accept that these communications put Diversa on notice of conduct by the Bhandari Entities that "appears fraudulent", as ASIC suggested, even putting to one side the issue of whether ASIC had properly raised the issue of apparent fraud as part of its case.

Re-using signatures and issues regarding documentation retained by the Bhandari Entities

213 Another, related, issue concerns the re-use, by the Bhandari Entities, of signatures when submitting documentation.

214 An email from Craig Mills to Scott Hardie on 21 May 2019 referred to a colleague having identified the same signature having been used multiple times for multiple withdrawals in respect of a particular member. Mr Mills made some observations about the processes of ASF, in particular, the only verification being sighting scanned, or photographed, withdrawal forms, which Mr Mills said was clearly "a breach of our process" and would be raised in "ReadiNow" (apparently an incident management system). Mr Mills also said that Mr Blood and Talent Machakaire "have agreed that a sample of withdrawals should be investigated further". Ms Machakaire then requested a list of all withdrawals on an urgent basis. That list was provided (but not copied to Mr Blood) on 23 May 2019. The operations manager circulating that list said that they had been able to identify seven forms with potential issues concerning the signature or verification, but commented that "they apparently weren't easy to find".

215 Based on the foregoing, I am satisfied that Mr Blood was aware of a significant issue, but was also aware that steps were being taken to investigate the issue by, in the first instance, identifying a sample of withdrawals to be investigated. As with the dummy emails, it is not apparent in what capacity Mr Blood was involved in the issue, but his knowledge cannot be bifurcated when it comes to his Diversa role. Nevertheless, in view of what was communicated, and the action that was being taken, I do not consider that the communications in question establish that Diversa knew or should have known of any of the "vices" for which ASIC contended or, in particular, that there was "apparent fraud" on the part of the Bhandari Entities.

216 Mr Blood was again involved in certification issues in October to December 2019, but by this time, he no longer held any role with Diversa. Accordingly, this further chapter will be addressed in connection with the knowledge of OneVue personnel.

Bhandari's business model (general advice, fees for consolidation) and ASIC's enquiries

217 While ASIC identified a number of distinct "vices", several of them come back to two propositions: first, that there was at least a risk that customers were being put into YourChoice Super when it was not appropriate for them; and second, that there was a risk that the Bhandari Entities were giving financial product advice that was personal, and not general, financial product advice (recalling that ADG was authorised to provide general financial product advice). ASIC contended that Diversa knew, or ought to have known, of these matters. The narrative around consideration of what might be loosely described as the Bhandari Entities' "model", extended to the enquiries that ASIC was making of the Bhandari Entities.

218 ASIC relied on a number of emails concerning the Bhandari Entities' business model. One of these emails was an email of 5 June 2018 sent by Mr Mills to various individuals at OneVue. That email was copied to Ms Caldwell-Smith. However, as that email pre-dated her secondment to Diversa and concerned the proposal OneVue was discussing with Mr Bhandari concerning a "white label" arrangement, I will consider it as part of the knowledge of OneVue personnel, notwithstanding that ASIC included it in its Diversa knowledge aide memoire.

219 On 4 February 2019, Ms Mckeage, the Group CEO, forwarded an email chain to Mr Blood with the message "FYI — I think compliance should get involved". It should be recalled that, in addition to the Diversa role Mr Blood held at this time, he retained his role as EGM of Risk and Compliance for the OneVue Group.

220 That day, Ms Mckeage forwarded to Mr Blood an email from Mr Mills which said as follows:

> Good Afternoon Lisa and Connie
>
> I received a call from Nizi. He seemed very panicked that ASIC have reached out (again?). Apparently, they have asked an additional level of questions relative to their enquiry last year. Please note, this news to me. I proactively called Nizi early last year as a direct result of ASIC taking Real Wealth Pty Ltd to task. They subsequently cancelled Real Wealth's AFSL and banned the adviser for five years. Incidentally, Nizi stipulated that this investigation was in relation to his previous licence with Spectrum and then Libertas. I am not convinced that the two are unrelated.
>
> From our conversation ASIC have asked for the following:
>
> - Names and addresses of all staff (past and present)
> - Address and contact details of his office in the Philippines — he is concerned about this as one adviser was let go under acrimonious circumstances (a whistle-blower perhaps?)
> - Name and contact details of the testimonials (these run into the 1000's — see below an example where we are named)

- Dealer and/or contractual arrangements with OneVue
- It appears that[sic] have (repeatedly) been shadow-shopped as ASIC seem to have some detailed knowledge of his business
- Central to their concern is the general advice mandate. *The fold* clearly state that ASF differs from the Real Wealth scenario. ASF leave an option open (industry fund or other) to roll over their consolidated funds. But given the fact that many members choose (see passive) to leave their funds within YourChoice absolve this responsibility?

> I have asked Nizi for a formal notification to us in writing. I suggest that we also notify Adviser Services. ASIC may turn their attention (if they haven't already done so) to how we communicate with ASF advisers and support staff.
>
> The timing of ASIC's investigation should be seen as no mere coincidence. ASIC has already been granted more power and extra support. The final Royal Commission report will only add a greater level of scrutiny. ASIC will be keen to add more notches to the gun belt. To continue the metaphor, one would hope we are not also firmly within their sights.
>
> Either way, depending on the level of detail to the questions asked and his engagement with the fold may dictate how we should best respond. Happy to discuss.

221 The next day, 5 February 2019, Mr Mills sent an email to various recipients, including Ms Caldwell-Smith (who was, at this time, on secondment to Diversa), apparently arranging a meeting time. Mr Blood was not copied to the email.

222 On 12 February 2019, Mr Mills emailed Mr Blood. Mr Mills' email to Mr Blood forwarded an email which set out the books and communications that ASIC requested of Mr Bhandari. Mr Mills' email to Mr Blood commenced with "Thanks for taking the time", from which I infer that Mr Blood had had some discussion with Mr Mills, probably as a consequence of Ms Mckeage's instruction that compliance should get involved.

223 Mr Mills' 12 February 2019 email also attached an email from 16 October 2018, which forwarded an email from April 2018. The April 2018 email attached an advice of The Fold, a document review sign-off letter by The Fold, and a member summary where fees were high relative to the account balance.

224 In his covering email to Mr Blood forwarding this material, Mr Mills said, "[t]hat being the case he [Mr Bhandari] has responded to all our concerns. Of particular note is that his ASF [adviser service fees] have reduced". The advice from The Fold, which was included in the attached 16 October 2018 email, was dated 22 February 2018.

225 The Fold's advice described the "super finder service" being provided by ASF. The advice recorded the reason ASF opens a OneVue account, and the rationale for the fees charged, as follows:

> The reason you open a OneVue account is to quickly and conveniently recover all lost accounts and consolidate it into one account as it provides you and the client with the following benefits:
>
> + You can check transactions on the OneVue account to ensure that 100% of the funds in the lost accounts are recovered; and
>
> + Provides convenience to clients as they only need to sign one rollover form to move all funds to the OneVue account, instead of signing several rollover forms.
>
> If you were to process rollovers directly to the client's nominated fund, you will have no control over whether the funds have actually rolled over, and that would increase the administrative cost of contacting various funds and increasing the time it takes to provide the service.
>
> Your fee is structured based on the amount of work required for the client, including:
>
> + Chasing funds to recover their lost superannuation money as most times you have failed rollover requests;
>
> + Preparing beneficiary forms as per client instructions for nominated funds;
>
> + Preparing Super Choice Form, so employers can pay to the client's nominated fund;
>
> + Attending conference calls with super funds and the ATO if funds were not received. On average, each call takes up to 30 minutes to 1.5 hours depending on hold time;
>
> + If client has reached preservation age, you prepare their pre-filled withdrawal forms and post it out to them; and
>
> + You prepare all other paperwork required like name change documents, ID checks (you use Green ID to check IDs, authority to access documents, etc.)
>
> You deduct the one-off fee from the recovered funds and there are no out of pocket charges to the client or ongoing fees.

226 The Fold advice of February 2018 went on to record that the issue the firm had been asked to consider was whether ASF's process "is compliant with law, including specifically if this is a service limited to general advice" and whether "there are any additional steps to take to improve the robustness of compliance". The advice made several recommendations to ensure the service was limited to general advice and a further set of recommendations to "ensure the robustness of your compliance". The advice identified opening a OneVue account as a "risk area where you need to be careful to operate on a 'no advice' basis" and identified a particular phrase in ASF's "IVR" (which appears to mean interactive voice response) transcripts (and a similar

phrase in the Super Consolidation agreement) as likely to be considered by ASIC to constitute personal advice, recommending that changes be made to such phrases. The advice further differentiated ASF's service from that of Real Wealth Pty Ltd (which had seen the director banned for five years) on a number of bases, including that the OneVue account was set up for the purpose of quickly and conveniently consolidating super with clients given the option to nominate another fund into which they could rollover their consolidated funds. The advice further recommended changes to the wording concerning disclosure of fees and removing the claim that there were no out-of-pocket charges.

227 About two months after The Fold gave its advice in February 2018, that firm provided a document (dated 19 April 2018) verifying that it had reviewed ASF's Financial Services Guide, Super Search Form, IVR Transcript, and Super Consolidation Agreement. The Fold verified that, subject to some qualifications, those documents complied with requirements under the Corporations Act, *Corporations Regulations 2001* (Cth), s 12DA of the ASIC Act and "associated ASIC guidance". The qualifications to the sign-off were that The Fold had relied on information provided during its review and that the sign-off assumed all suggested changes had been implemented. The document stated that The Fold confirmed that there was an "ongoing legal advice retainer" enabling Mr Bhandari to ask for advice on any ongoing compliance issues.

228 Receipt of this package of material in February 2019 would have alerted Mr Blood to ASF having obtained a detailed and, on its face, thorough, advice from a firm of lawyers, and having engaged in a process of amending its documents and processes following receipt of that advice. It would also have revealed to Mr Blood that, having engaged in that process, Mr Bhandari had obtained a sign-off from The Fold.

229 This was the background against which the questions and document requests coming from ASIC in February 2019 were received by Mr Blood, with Ms Mckeage's instruction that compliance should get involved. Having received that package of information from Mr Mills, Mr Blood suggested they meet to go through it.

230 OneVue assisted Mr Bhandari by providing proposed responses to ASIC's questions by email on 22 February 2019. Mr Blood was copied to that email. The proposed answers supplied detail concerning ADG's access to the SuperMatch service via the OneVue Platform, with some technical detail regarding how the connection to SuperMatch occurs, and the process by which advisers access SuperMatch via the OneVue portal and manage results. The draft answers also

recorded that ADG signed a Dealer Group Agreement with OneVue, that each of ADG's authorised representatives had signed an Adviser Agreement with OneVue, that was also signed by ADG, and that ADG received statements of adviser service fees two times per month with those fees being set per member and paid to ADG with no other form of remuneration being paid to ADG. (I note that the Dealer Group Agreement and the Adviser Agreements were not in evidence.)

231 In view of the nature of the information provided by the draft answers, some of which was technical, and which otherwise related to the means by which SuperMatch was accessed, agreements between OneVue and ADG, and fee payment arrangements, I do not consider that OneVue's provision of these draft answers to Mr Bhandari carries with it the whiff of inappropriate assistance suggested by ASIC. Certainly, Mr Blood being aware that this assistance had been rendered in relation to questions asked by ASIC, does not, in my view, mean that Diversa was (through Mr Blood) aware of one or more of the alleged "vices".

232 While Mr Blood can be expected to have been conscious that the Bhandari Entities were using a general advice model and that there can be a fine line between general and personal financial advice, neither the questions asked by ASIC, nor the contents of the advice and document sign-off from The Fold mean that he knew or ought to have known of the alleged "vices".

233 The eighth vice is cast in terms of there being a "risk" that personal advice was being given. Having regard to the fine line between personal advice and general advice, it might be correct in one sense to say that Mr Blood was, or should have been aware that there was "a risk" that personal advice was being given. However, what is important in the present context is that the information available to Mr Blood suggested that the Bhandari Entities had engaged with The Fold and had received and implemented advice to address that risk. The fact that ASIC engaged with Mr Bhandari and sought information in February 2019 did not change the status quo. The questions that ASIC asked, which were provided to Mr Blood, were in the nature of information gathering questions, raised at a time when regulatory focus on superannuation (amongst other financial products and services) was increasing (as some of the emails noted).

234 Shortly after the divestment of Diversa, Mr Strachan was sent an email chain which concerned whether electronic signatures using "docu-sign" were acceptable. The trustee's view was sought. In responding that the trustee did not have a "fundamental problem" with accepting electronic documents, Mr Strachan said "the Trustee would expect the administrator to have conducted a due diligence of the service provider" and went on to ask whether OneVue was

"happy to enter into a relationship with Mr Bhandari knowing that he was the subject of an ASIC information gathering exercise".

235 While Mr Strachan queried dealing with Mr Bhandari given ASIC had engaged in an information gathering exercise, I do not consider that this query having been raised in early July 2019 advances Diversa's knowledge of the alleged "vices" any further than it stood based on Mr Blood's involvement in the period before divestment.

236 Sargon (the new parent company of Diversa) said, in a response to a statutory notice in November 2019, that it had only recently become aware that ADG held an AFSL authorising general advice, but was not previously aware of its licensing conditions. Whether or not Sargon was previously aware of ADG's AFSL conditions, there is no room to doubt that Diversa was aware (through Mr Blood) that the Bhandari Entities were using a general advice model. While ASIC hinted that Sargon's response was not credible, I do not accept that is necessarily the case. Given that giving personal financial product advice requires compliance with additional requirements, such as in relation to the provision of a statement of advice (ss 946A–947B of the Corporations Act), a person licensed to give both personal financial product advice and general financial product advice may seek to give general (rather than personal) advice. Accordingly, Diversa's knowledge that the Bhandari Entities were using a general advice model does not establish knowledge of the terms of the Bhandari Entities' AFSL.

237 On 17 March 2020, Mr Strachan was copied to an email from Brett Marsh (Head of Product and Technical at OneVue) to the ATO concerning the ATO's enquiries regarding access to SuperMatch. As that email was received the same day that Diversa directed the OneVue Entities to stop dealing with the Bhandari Entities, it does not advance ASIC's knowledge case to suggest that action should have been taken by Diversa earlier.

Fees for consolidation

238 The fees charged by the Bhandari Entities for consolidation were a significant focus of ASIC's case. ASIC characterised this matter as the second "vice": "the Bhandari Entities earnt very substantial fees — at the expense of customers".

239 ASIC's aide memoire on Diversa's knowledge identified five documents said to evidence Diversa's knowledge of this "vice". Only three of those documents were created prior to 17 March 2020.

240 The first document was an email received by Mr Blood on 25 September 2017, which attached an email of 21 September 2017, which set out a "list of financial hardship claims for YourChoice Super that are currently outstanding". It is not apparent how Mr Blood's receipt of a copy of this email evidences knowledge by Diversa of high consolidation fees having been charged by the Bhandari Entities. An additional (albeit technical) problem is that Mr Bhandari was not operating through the Bhandari Entities (as defined by ASIC) at this time, but through Libertas Financial Planning Pty Ltd.

241 The second document said by ASIC to establish Diversa's knowledge of the second vice (fees) was an email from Leanne Hunt to Scott Hardie of 23 May 2019, but that email does not discuss fees and the email chain did not involve anyone from Diversa.

242 The third document relied on by ASIC was a set of invoices for adviser fees, where the ABN of the recipient was the trustee. However, these invoices were for "Adviser Service Fees", being a fee referred to in the PDS (as confirmed by ASIC's aide memoire provided to set out the flow of fees). It was not entirely clear from the presentation of the evidence whether these fees were the same as fees charged by the Bhandari Entities for the consolidation service. In any event, while Diversa was aware of these fees charged in accordance with the PDS, the invoices presented global figures, and so did not expose the relativity between the fees and the account balances for some customers, which appeared to be the matter of concern to ASIC.

243 It may be accepted that the fees generated and obtained by the Bhandari Entities were, in aggregate, substantial. However, given the number of members associated with the Bhandari Entities and the funds under management associated with its client group, I am unable to conclude that the substantial aggregate fees generated itself revealed something untoward about the Bhandari Entities' operations.

244 A document that was not identified by ASIC as going to Diversa's knowledge of the fees in its aide memoire, but which was arguably a more important document on that topic, is an email received by Mr Blood from Mr Mills on 12 February 2019. That email noted that "[r]elative to the account balance the fees were high". However, that communication was provided to Mr Blood along with a bundle of documents which included a further email of Mr Mills and the advice of The Fold, which detailed the way in which the fees charged by the Bhandari Entities varied with the amount of work involved in consolidating the customer's various superannuation accounts as well as other observations of Mr Mills (made in connection with those fees) that Mr Bhandari had been "very attentive to each of our concerns and/or

recommendations". Mr Mills' email also explained that the high fees relative to the balance may also be explained on the basis that the Bhandari Entities were actioning TPD (total and permanent disability) claims on behalf of the client, and client consent was obtained for fees. In this context, while the concern about the fees charged by the Bhandari Entities did reach Diversa by Mr Blood, the picture was not "black and white" such that I would accept that Diversa ought to have been unwilling to continue to issue interests in YourChoice Super to those who were advised by the Bhandari Entities.

Overview: Diversa's knowledge

245 I next address ASIC's case that the knowledge of the OneVue Entities was to be attributed to Diversa. As will become clear, I reject that attribution case. To assist those more interested in the punchline, in my view, ASIC's case on the first alleged contravention of s 912A(1)(a) was not made out by reference to the knowledge held by Diversa. My reasons for reaching that view are set out below from paragraph 318.

Consideration: attribution of knowledge of the OneVue Entities

ASIC's attribution case was confined to s 769B(3)

246 As noted above, ASIC put its case on the basis that the OneVue Entities had certain knowledge, and that knowledge was to be attributed to Diversa pursuant to s 769B(3). It did not mount any argument to the effect that the knowledge of the OneVue Entities was to be attributed to Diversa under general law principles. Rather, it relied on general law to attribute the knowledge of individuals to the OneVue Entities, but from there, it relied on s 769B(3) to attribute the knowledge of the OneVue Entities to Diversa on the basis that the OneVue Entities were Diversa's agents.

ASIC's alternate attribution case relying on s 769B(1)(b) was not pleaded

247 In oral submissions, ASIC raised another basis for attribution. This basis for attribution was not pleaded, and was not raised in ASIC's written submissions. The argument was that the state of mind of individual OneVue personnel (Connie Mckeage, Lisa McCallum, Stephen Karrasch, Robert Chowdhury, Craig Mills and Brett Marsh) could be attributed to Diversa under s 769B(3) on the basis that they were relevantly acting on behalf of Diversa and fell within the expanded meaning of "agency" in s 769B(1)(b). Diversa objected to ASIC going outside its pleaded case. In my view, it was not open to ASIC to run its attribution case on this basis given the state of its pleadings and its written submissions.

248 In seeking to bring this basis for attribution within its pleaded case, ASIC pointed to the fact that its particulars to FASOC [43] named the relevant OneVue individuals, but that does not bring the basis of attribution (direct from the individuals to Diversa) within the framework of the pleaded case when the body of FASOC [43] clearly referred to the knowledge "of the OneVue Entities". In that context, reference to the individuals in the particulars identified the knowledge of the individuals that ASIC contended was knowledge of the OneVue Entities, for the purposes of its plea that the knowledge of the OneVue Entities was to be attributed to Diversa.

Consequences of ASIC's attribution case being confined to s 769B(3)

249 Given that ASIC's case on attribution of the knowledge of the OneVue Entities to Diversa arises only under s 769B(3), that immediately raises the question whether s 769B(3) can function to attribute knowledge in this proceeding, given the nature of ASIC's case.

250 Section 769B(3) refers to the state of mind of the "director, employee or agent" of a body corporate. While directors and employees will necessarily be natural persons, agents can be natural persons or corporations. The difficulty for ASIC, however, is that s 769B(3) refers to the "conduct engaged in" by the agent, and its s 912A(1)(a) case was in respect of "conduct" (here an omission) of *Diversa.* Accordingly, the person with the state of mind (each of the two OneVue Entities) is different from the entity whose conduct is in issue (Diversa).

251 As I have explained above, in my view, s 769B(3) only attributes the state of mind of the person who engaged in the conduct in question.

252 In my view, s 769B(3) does not permit the attribution of the state of mind of each of the OneVue Entities to Diversa on the basis that they were the agents of Diversa, because the *conduct* to which the proceeding relates is that of Diversa (not its agent(s)). For this reason, ASIC's first s 912A(1)(a) claim cannot succeed based on attributed knowledge where its claim failed based on knowledge of Diversa by its relevant personnel (as addressed above).

The failure of ASIC's attribution case does not mean trustees can "wash their hands", as suggested by ASIC

253 It should not, however, be thought that the consequence of my analysis is that superannuation trustees may insulate themselves by contracting with service providers. In the first place, Licensees are subject to the compensation regime in respect of the conduct of a Licensee and its representatives (s 912B).

254 Further, a failure to meet the minimum standard might be found in the very features of the outsourcing arrangement, including the extent to which those arrangements provided for the trustee to be alerted of issues that should be of concern to it in ensuring its services are provided efficiently, honestly and fairly. But that is not this case. In this proceeding, ASIC pursued a specific conduct case. The conduct in question was an omission by Diversa: the failure to do all things necessary to ensure that the financial service Diversa was providing (namely the issuing of interests in YourChoice Super) was performed efficiently, honestly and fairly by failing to cut off the Bhandari Entities when (on ASIC's case) Diversa knew or ought to have known of the various "vices".

255 In a different kind of case, for example one that anchors the alleged contravention of s 912A(1)(a) in a failure to establish structures and procedures so as to obtain relevant information, or which anchors a case in a failure to investigate and/or elevate information received, the failure to establish a basis for attribution of the knowledge of a service provider may not have any significant consequences. Similarly, if attribution of the knowledge of a service provider were pursued based on a duty to inform, there may be a foothold to explore attribution of the state of mind of a service provider (such as the OneVue Entities) to a trustee where s 769B(3) does not assist.

ASIC has not established a basis for aggregation of knowledge of OneVue personnel

256 There is a second, and independent, reason why ASIC's first s 912A(1)(a) case against Diversa does not succeed by reason of knowledge of the OneVue Entities being attributed to it. That second reason is that, contrary to ASIC's case, knowledge cannot be aggregated at the level of the OneVue Entities.

257 ASIC's case was put on the basis that the knowledge of OneVue personnel could be aggregated at the corporate level of the OneVue Entities, and then attributed to Diversa pursuant to s 769B(3). However, Australian case law does not support aggregation in the manner for which ASIC contended, and ASIC did not advance a case (other than the new contention referred to above at [247]–[248], which was outside the pleadings) that did not rely on aggregation.

258 ASIC did not make any attempt to articulate a case that any particular member of the OneVue personnel had knowledge that, without aggregation with the knowledge of other OneVue personnel, was material such that it would make out ASIC's case against Diversa, once attributed to Diversa (even leaving aside the issue of aggregation of multiple sources of knowledge at the level of Diversa). While ASIC submitted orally that its case did *not* depend

on aggregation (at either the Diversa or OneVue level) as the necessary knowledge was "abundant in any number of individuals", including OneVue personnel, it did not seek to identify and run a case based on the knowledge of specific OneVue personnel. Rather, as already stated, ASIC ran its case on the basis of a bundled-up narrative of facts derived from emails.

259 Accordingly, unless knowledge can be aggregated at the level of the OneVue Entities, there is no body of knowledge that could potentially be attributed to Diversa in a way that advances ASIC's case.

260 The sum total of ASIC's written submissions on aggregation was the following paragraph (emphasis added):

> In *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 (***Kojic***), the Full Federal Court held that the knowledge of two agents or officers of a company (specifically, two relationship managers) could not be aggregated to conclude that the company had engaged in unconscionable conduct, in circumstances where neither officer had acted unconscionably and neither and [sic] a duty to communicate to the other [*Kojic* at [31]]. However, in the BBSW case [*Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147] Beach J alluded to the possibility that the principle in *Kojic* applies only where the case turns on the defendant's knowledge of a particular plaintiff's circumstances [BBSW at [2152]]. The present case does not depend on Diversa's knowledge of a particular customer's circumstances. Further or alternatively, **the key employees referred to above were each senior "officers" (within the meaning of s 9 of the Act). Their duties to act with care and diligence required them to share information as to actual or suspected misconduct, and the aggregation of their knowledge is permissible according to *Kojic*** [*Kojic* at [66], [83]]. As set out below, the key employees often did share such information. And to the extent that information was not passed onto sufficiently senior Diversa personnel, it should have been, which may itself be an indicator of wrongdoing [*Kojic* at [145], [153]]. In any event, Diversa had sufficient actual or constructive knowledge even if the knowledge of the individuals cannot be combined.

261 In oral submissions, ASIC relied on Allsop CJ's statement in *Kojic* (at [66], internal citations omitted) that:

> Depending upon the relevant statutory context or substantive rule, it may be that separate information held by an officer or agent may be aggregated with information held by another if there is a duty and opportunity to communicate it to the other. The relevance and legitimacy of any such approach may well depend upon the statutory context or the relevant substantive rule.

262 ASIC sought to address the obstacles to aggregation identified by Edelman J in *Kojic*. It relied on Besanko J and Allsop CJ being of the view that s 84 of the Trade Practices Act did not necessarily exclude any common law principles concerning aggregation or attribution. On that

basis, ASIC submitted that s 769B(3) did not preclude aggregation (see *Kojic* at [64] (Allsop CJ) and [81] (Besanko J)). Diversa contended to the contrary.

263 As is apparent from its written submissions, ASIC's case on aggregation rested on the proposition that the "key individuals" it had just referred to (which included the OneVue personnel) were "officers" within the meaning of s 9 of the Corporations Act, *and* their duties to act with care and diligence required them to share information as to actual or suspected misconduct. As such, the obligation to share information arose from the individuals' status as "officers". That aspect of ASIC's case fails for two reasons. First, other than Ms Mckeage (CEO of the OneVue Group), no evidence was adduced to establish whether the other individuals at OneVue were officers as defined in the Corporations Act. Outside of well-established roles such as CEO and CFO, job titles alone are not generally a reliable guide to the nature and seniority of an individual's role. For example, I have no basis upon which to conclude that the person with the title "Business Development Manager" had a role that would render the person an officer of either of the OneVue Entities. ASIC did not adduce evidence of the position descriptions of the individuals at OneVue who it contended were officers.

264 Secondly, the evidence adduced by ASIC provided no basis upon which to conclude that (whether or not they were officers), those individuals had a duty to communicate information. Again, the existence of such a duty cannot be guessed at and ASIC did not seek to advance the proposition, other than by reference to their status as supposed "officers".

265 In support of its case on aggregation and its contention that there was a duty to share information, ASIC relied on the OneVue "Enterprise Risk Management Framework & Policy Manual" dated September 2018. That document contained a section dealing with "incident management". The term "incident" was defined as "an event, error, control failure, or business issue as a result of internal processes or external events that has resulted in losses to OneVue, or has resulted in or could lead to reputational damage or a breach of our regulatory obligations". One purpose of the incident management process was to identify incidents and near misses and associated control weaknesses, with "learnings" applied to prevent recurrence. The policy provided for incidents and near misses to be recorded in "ReadiNow" with identified processes applied. However, certain issues, including complaints, risk assurance review issues, and regulator review issues were excluded from that policy as they were subject to separate procedures. Another provision required further escalation by the "Owner" to the

EGM Group Risk and Compliance, and the Group CEO if the materiality of the incident or near miss was medium or high.

266 ASIC relied on the provision of the incident management procedures which required employees and contractors to escalate all incidents and near misses (as defined) to their direct manager and the relevant "Risk Manager" in the business within which the incident or near miss occurred. The materiality table identified that an incident or near miss may attract a medium or high rating depending on the financial loss to OneVue, the impact on customers or members, regulatory compliance consequences, impact on employees, or reputation.

267 This document was concerned with failures of OneVue's processes, or external events, which had caused, or might cause, loss or reputational damage to OneVue, or breach of OneVue's regulatory obligations. It does not establish any generalised duty on the part of each of the relevant OneVue personnel to share information about the Bhandari Entities.

268 In *Kojic*, Edelman J observed that the attribution of aggregated knowledge was a "relatively novel" concept which, despite having originated in the United States, "now has little support there": at [89]. His Honour observed that the currency of the concept in Australia has only arisen due to *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 having been based on a misunderstanding of the decision of the High Court in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563: *Kojic* at [89]. His Honour went on to say (at [89]) that, "[w]hether or not a concept of aggregated corporate knowledge becomes permissible in other areas, it is not a concept that can be applied in order to reach a conclusion that the corporation has acted unconscionably contrary to statutory proscriptions". Of course, this case does not involve unconscionable conduct contrary to statutory proscriptions. To that extent, *Kojic* has not shut the door on aggregation. But nor does the case stand as authority for the positive proposition for which ASIC cited it — namely that aggregation *was* permissible pursuant to *Kojic*.

269 ASIC relied on two particular passages in *Kojic* in support of its case on attribution: *Kojic* at [66] (Allsop CJ) and [83] (Besanko J). In *Kojic*, Besanko J said as follows at [83]:

> Finally, whether aggregation is possible where there is a duty to communicate was not argued in this case. It was accepted that Coombe and Barnden did not have a duty to communicate with each other. I would wish to reserve this issue for consideration in a case where it arises. When it does arise, it will, I think, raise a number of other questions concerning the type of duty in terms of source, nature and extent of the duty that might lead a court to conclude that separate pieces of knowledge should be aggregated ([*Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133] at

161–162 per Ashley AJA).

270 Contrary to the premise of ASIC's submission, his Honour did not endorse aggregation. Moreover, what Besanko J did say on the question clearly points to the need for close attention to be paid to the duty to communicate, in terms of its source, nature and extent. That close consideration was absent in this case and ASIC's global, conclusory submissions on a duty to communicate do not suffice.

271 In *Kojic*, Allsop CJ went somewhat further than Besanko J and said as follows (at [66]):

> Depending upon the relevant statutory context or substantive rule, it may be that separate information held by an officer or agent may be aggregated with information held by another if there is a duty and opportunity to communicate it to the other: *Re Chisum Services Pty Ltd* (1982) 7 ACLR 641 at 649–650; *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 161–62; and *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292 at [182]. The relevance and legitimacy of any such approach may well depend upon the statutory context or the relevant substantive rule.

272 Here, the relevant statutory context is constituted by s 912A(1)(a) of the Corporations Act. That provision imposes an obligation on Diversa, as the holder of an AFSL, to do all things necessary to ensure that the financial services covered by its licence are provided efficiently, honestly and fairly. I do not consider that the statutory context, concerned as it is with the obligations of Diversa, as a Licensee, can be harnessed to justify the aggregation of knowledge of personnel within the OneVue Entities. As has been discussed above, s 912A(1)(a) is primarily concerned with the systems and processes developed and implemented by Licensees to ensure that the financial services they provide are provided efficiently, honestly and fairly. The analysis of whether a Licensee has failed to meet that minimum standard may well take into account the nature and adequacy of its arrangements with other entities providing services to it that connect with the Licensee's provision of financial services (including mechanisms for escalation of matters of concern). However, the s 912A(1)(a) statutory context does not support any generalised aggregation of the knowledge of personnel within a service provider — whether or not classified as "outsourcing" — for the purposes of attribution to the Licensee.

273 In any event, and as already stated, ASIC has not established the duty to communicate for which it contended.

274 I also note ASIC's submission that, in *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 266 FCR 147 (***BBSW***) at [2152], "Beach J alluded to the possibility that the principle in *Kojic* applies only where the case turns on the defendant's

knowledge of a particular plaintiff's circumstances". ASIC's submission misstates what his Honour said in the paragraph referred to. There, Beach J observed a difference in the nature of the case before his Honour, and the case in *Kojic*, and then stated in the next paragraph that the case before him did not depend on aggregation at all. It is difficult to see how Beach J's passing reference to *Kojic* in *BBSW* lends any support to ASIC's case.

275 While, conceptually, knowledge of a specific individual employed by an agent may be characterised as the knowledge of the agent and then attributed via s 769B(3), ASIC did not plead and run its case on that basis. Rather, its written submissions set out a single, bundled-up narrative of "knowledge", assuming that knowledge may be aggregated and then attributed. ASIC did not attempt to set out a case based on the attribution of knowledge of the OneVue Entities that did not involve aggregation at the level of the OneVue Entities.

The attribution of knowledge of agents

276 A third reason why ASIC's first s 912A(1)(a) case against Diversa does not succeed based on attributed knowledge of the OneVue Entities is that ASIC has not established that the body of knowledge it relied on was obtained by the OneVue Entities in an agency capacity. As I will explain, ASIC did not establish a case that properly delineated the bounds of any agency on the part of the OneVue Entities when it is clear that much of what they did could not conceivably be said to have been done as agents of Diversa (cf as service providers to Diversa, or, in Wealth's case, as an entity exercising its own functions as sponsor and promoter).

277 On one view, none of this matters as I have already determined above that s 769B(3) does not assist ASIC in attributing the knowledge of the OneVue Entities due to that provision applying where the person with the mental state engaged in the conduct in question, which is not the case in this proceeding.

278 Nevertheless, even if I were wrong in that conclusion, it does not follow that any knowledge of the OneVue Entities could be characterised as knowledge of the OneVue Entities *qua* agents, for the purposes of s 769B(3).

279 When approaching s 769B(3), some framework of analysis must be put in place to identify the knowledge of the agent that may be attributed to the principal under that provision. It cannot be sufficient merely to identify that person A is the agent of person B, and then seek to attribute all of the knowledge of person A to person B, even if that knowledge was not acquired in the course of the agency. There is nothing in the terms of s 769B(3) that suggests that it was

intended to operate in such an absurd fashion. Nor, to be fair, did ASIC suggest the provision did operate in that fashion.

280 While ASIC did not advance a positive submission of that kind, it did not explain just what nexus it contended *would* be sufficient to render particular knowledge, knowledge of an agent for the purposes of attribution under s 769B(3). Rather, ASIC's submissions proceeded by contending that the OneVue Entities were agents of Diversa and then identifying all the knowledge it contended relevant personnel of the OneVue Entities had and contending that all that knowledge was to be attributed to Diversa.

281 True it is that all the knowledge ASIC identified (by its aide memoire setting out the documents it relied on as knowledge of the OneVue Entities) related to YourChoice Super (as opposed to other sub-plans of the Fund or other products the OneVue Entities were concerned with), but I do not consider that goes far enough in tying the knowledge to the asserted agency.

282 At common law, the knowledge of an agent is attributed to the principal where the agent has a duty to communicate that knowledge to the principal. In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, Mason J (as his Honour then was) said (at 658) that:

> As against a third party the law imputes to a principal knowledge gained by his agent in the course of, and which is material to, a transaction in which the agent is employed on behalf of the principal, under such circumstances that it is the duty of the agent to communicate it to the principal.

283 Likewise, s 769B(3) contains strong textual indicators that the state of mind of the agent must be a state of mind the agent had in connection with the agency. The provision refers to the state of mind held when engaging in conduct that is within the scope of the person's actual or apparent authority.

284 The difficulty here is that it is clear that the OneVue Entities did not operate *only* as Diversa's agents (if they operated in that capacity at all, which Diversa disputed) in relation to YourChoice Super. At the very least, Wealth and Diversa were in a commercial relationship that involved the provision of services to one another. ASIC's case assumed, without elaboration, a "top-down" view of superannuation structures, importing an assumption that everything that is done to operate a superannuation fund is done at the behest of the trustee. In the case of the OneVue Group, prior to its divestment, Diversa was a related party, or "in-house", trustee entity that provided trustee services to funds established by the group, as well as third party funds. Superannuation trustees are heavily regulated under the SIS Act and *Superannuation Industry (Supervision) Regulations 1994* (Cth). In the context of such

regulation, the utility of a specialised trustee entity providing trustee services to a range of funds is obvious.

285 Diversa's role as trustee services provider to Wealth was established by the terms of the Sponsor Agreement. Pursuant to that agreement, Wealth engaged Diversa to provide the "Diversa Core Trustee Services", for which it was paid a fee. Those services included acting as trustee, reporting to the authorities, approving annual documentation, maintaining the trust deed, ensuring the PDS remained compliant, and like trustee-related tasks. Prior to the Sponsor Agreement, Diversa had acted as sponsor of the Fund, but no longer had that role when it entered into the Sponsor Agreement in December 2018, which was obviously before the start of the Relevant Period.

286 The terms of the Sponsor Agreement also call into question the "top down" conception of superannuation business operations that underpinned ASIC's agency contentions. Under that agreement, the sponsor occupied the "driver's seat" and Diversa was obliged (subject to the proper discharge of its obligations as trustee) to have regard to the recommendations and opinions of Wealth in undertaking its duties as trustee: cl 3(a)(ii). Other clauses reinforced this dynamic. Diversa was, with some carve outs, obliged to implement any proposals advanced by Wealth to amend the trust deed, and was required to consult and obtain the written approval of Wealth before making any changes to the PDS: cl 5. Provision of the call centre was one of the "Sponsor Services" provided by Wealth, while acknowledging that Wealth, in consultation with Diversa, would determine when queries would be handled by the administrator of the Fund: cl 7(c).

287 As well as Wealth appointing Diversa to provide trustee services, Diversa appointed Wealth to provide "Platform Services" under the Platform and Custody Agreement: cl 2.1. The "Platform Services" included various services in respect of members (such as member records, admitting new members, processing deposits and withdrawals, calculating and applying fees and document storage), operation of a call centre, responding to enquiries and complaints, admitting new advisers and operating various adviser services, paying advisers and deducting fees from member accounts, operating bank accounts, maintaining accounting records, preparing accounts and making available the online portal with a unique adviser portal and capacity for online account creation for new customers that integrated, and various IT functions.

288 The recitals to the Promoter Agreement likewise paint the picture of a bilateral relationship. Diversa created the sub-plans (which included YourChoice Super) at the request of the Promoter, and, in turn, appointed Wealth as promoter of the sub-plans. The "Promoter Services" included: general marketing and distribution/sales functions in relation to YourChoice Super; the appointment, training and control of Wealth's officers, employees and agents as required under Wealth's AFSL and the "Relevant Requirements" (defined to include a host of sources of regulatory obligations); and publishing on the relevant sub-plan website the PDS and other necessary disclosure documents as well as other notices or communications required by the Relevant Requirements.

289 Under the Administration Agreement, Super was to provide Diversa "Administration Services" (including admission of members and establishment of records, maintaining member files, liaison with the trustee and others, calculation and processing of benefits, co-ordination of claims on hardship grounds, calculation of benefit entitlements, preparation and lodgement of documents with the ATO and regulators, providing reports to the trustee, collecting and retaining information about members for anti-money laundering purposes, maintaining records regarding contribution limits, providing various information and reports to Diversa, and like matters), "Accounting Services", "Insurance Services", "Investment Services", "Communication Services" (principally internal reporting, but also including the distribution of PDSs, notices and other documents as required by the "Relevant Law" or the trustee, distribution of statements and information to members, answering queries from various sources, including members (including by referral to the Promoter)), "Online Information Services" (mostly back office functions) and "Banking Services".

290 The apparent overlap between the services to be provided by Wealth under the Promoter Services Agreement and by Super under the Administration Agreement was not addressed by either party, but is not presently of significance given that the OneVue Entities were treated together for most purposes in the trial.

291 As is apparent, the services to be provided by both Super and Wealth were mixed: some *might* be capable of being characterised as services performed as agents of Diversa, but others clearly could not be so characterised, as they were services provided by Super and Wealth *to* Diversa.

292 This brings me to three related deficiencies with the way in which ASIC put its case. First, ASIC made no attempt to delineate between the tasks undertaken by the OneVue Entities as agent (as it was contended by ASIC), and "non-agency" tasks. Secondly, ASIC did not attempt

to link the trove of emails it relied on as establishing the knowledge of the OneVue Entities to the undertaking of tasks that may be characterised as having been undertaken as agents of Diversa. Thirdly, ASIC has not discharged its burden of establishing that the OneVue Entities were agents of Diversa.

293 As to the first two of these points, it is not the task of this Court to construct a case for ASIC and then assess the case of the Court's own devising.

294 I will elaborate on the third issue in the next section of these reasons.

Whether the OneVue Entities were agents and, if so, the scope of the agency

295 ASIC's written submissions on the existence of an agency relationship were as follows (internal footnotes omitted):

> Diversa delegated tasks to OneVue Super and OneVue Wealth, such that knowledge gained, or conduct engaged in, by them in the performance of such tasks was imputed to Diversa. Diversa appointed OneVue Super and OneVue Wealth inter alia to administer YourChoice Super, promote YourChoice Super to the public, to operate the online portal through which customers could be signed-up to YourChoice Super, to operate the SuperMatch online portal on behalf of Diversa in order to enable "lost" super of a customer to be located and consolidated into a YourChoice account, to communicate with prospective and existing members of YourChoice Super (including receiving customer complaints, and managing customer queries), and to process the payment of commissions to financial advisers.
>
> Diversa relied wholly on OneVue Wealth and OneVue Super to perform those tasks; it did not undertake those tasks itself. For example, Diversa was not personally involved in the interactions with customers for sign-up; rather, it issued the interest in the superannuation fund, but also processed withdrawals, and received and handled customer complaints.
>
> It does not matter whether OneVue Wealth and OneVue Super formed binding contracts on behalf of Diversa. It is sufficient that they had authority to receive and communicate information on Diversa's behalf, and in so doing had the capacity to alter Diversa's legal position; and acted in a capacity which involved the repose of trust and confidence, being the agents of a superannuation trustee, attracting the fiduciary duties of agents towards Diversa.
>
> Nor is it determinative that each of the Administration Agreement and the Platform and Custody Services Agreement contained a "no agency" clause (cl 11 and cl 24.12 respectively). (The Promoter Agreement featured no such clause). The true character of the parties' relationship is to be gathered not from a label, but from an examination of all the surrounding circumstances, including, in particular, the provisions of the relevant agreements. Diversa's status as an "in-house" entity within the OneVue group until 30 September 2019 blurred the lines between the various corporate entities.

296 In oral submissions, ASIC advanced the following contentions, and raised the following facts, in support of its argument that the OneVue Entities were the agents of Diversa:

(a) First: the OneVue Entities did have the capacity to alter Diversa's legal position by making statements on its behalf when promoting the products. They "interacted with, and were authorised to interact with, customers about signing up to YourChoice".

(b) Secondly (and connected with the first point): ASIC relied on Super being responsible under the Administration Agreement for:

(i) the admission of new members;

(ii) liaising with members;

(iii) distributing documents in respect of the Fund; and

(iv) answering queries from members.

ASIC further pointed to the service levels (said to be inferred based on a different administration agreement), by which OneVue was responsible for receiving information from new members, issuing welcome letters and receiving money and information from members about contributions, rollovers and benefit requests.

(c) Thirdly, ASIC relied on the appointment of Wealth to promote YourChoice Super, pursuant to the Promoter Agreement. Under that agreement, Wealth was responsible for general marketing, distribution and sales functions for YourChoice Super.

297 For its part, Diversa submitted that the OneVue Entities were not Diversa's agents; they had no authority or capacity to affect legal relations between Diversa and third parties. While Diversa accepted that the "no agency" clauses were not determinative, it submitted that they were to be given proper weight, along with the nature of the services and the relationship between the entities. Here Diversa referred to the "two-way commercial relationship" between Diversa and the OneVue Entities. It submitted that none of the services to be provided involved the OneVue Entities acting on behalf of Diversa when providing financial product advice (but, rather, that they acted pursuant to their own AFSLs to the extent they provided any advice). Diversa further submitted as follows:

(a) Whether a person is another's agent will depend on the purpose for which the question is being asked (*Tonto* at [173] (Allsop P, with whom Bathurst CJ and Campbell JA agreed)).

(b) Agency is to be determined by analysis of the consensual legal relations between the parties, and is not a conclusion drawn from the performance by one person of a function, even if that function is necessary to the operation of the business of the putative

principal: *Tonto* at [194]. Here, the OneVue Entities had their own businesses and were providing financial services under their own AFSLs.

(c) Neither of the OneVue Entities had the capacity to alter Diversa's legal position by receiving and communicating information. To the extent Super was engaged to liaise with members, this was only for the purposes of carrying out administrative functions, and Wealth's communication and member services were similarly limited to basic email and phone services, including responding to enquiries and complaints addressed to the trustee.

(d) Merely having authority to receive and communicate information does not constitute a person an agent: *Tonto* at [178].

(e) ASIC is wrong to contend that the OneVue Entities acted in a capacity which involved the repose of trust and confidence on the basis that agents have fiduciary duties. It does not follow that a person engaged by a trustee to provide services necessarily owes fiduciary obligations to the trustee and is, on that basis, the trustee's agent.

298 In *Tonto*, Allsop P (with whom Bathurst CJ and Campbell JA agreed) observed (at [170]) that "[t]he word agency is one apt to cause difficulty, in significant part, because of its broad usage in business". Just as using the term "agent" to describe a person does not render that person an agent, so too a stated disavowal of an agency relationship by the parties does not preclude the substance of the relationship being one of principal and agent. That said, an express stipulation that the parties are not in an agency relationship is a "weighty consideration" (as explained in GE Dal Pont, *Law of Agency* (LexisNexis Australia, 4th ed, 2020) at [1.6], referring to the judgment of Finn J in *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611; [2000] FCA 1541 at [161]). The weight given to such express stipulations reflects that agencies of the kind at issue here are consensual agencies; they are created by agreement between the parties.

299 The hesitance associated with characterising the relationship of parties as one of principal and agent against their expressly stipulated wishes also reflects the fact that agents are fixed with fiduciary duties.

300 Here, the parties did expressly stipulate in two contracts that their relationship was not one in which Wealth and Super were Diversa's agents. The Platform and Custody Services Agreement (cl 24.12), and Administration Agreement (cl 11) contained "no agency" clauses. The relevant clause in the Administration Agreement in fact provided expressly that nothing gave Super the

authority to bind Diversa, precluded it purporting to act as agent, and prohibited it from representing or acting in a way that would cause a person to believe it was an agent of Diversa: cl 11. In respect of Super, there is nothing in the evidence that suggests that Super strayed outside the bounds of the terms of the Administration Agreement and conducted itself in a way that would support a characterisation of Super as the agent of Diversa in its dealings with members.

301 The parties' contractual disavowal of an agency relationship carries significant weight, although it is not determinative. I also note that there was no equivalent express disavowal of agency in the Sponsor Agreement or the Promoter Agreement.

302 The relationship between Diversa and Wealth — in particular Wealth's apparent occupation of the "driver's seat" (as detailed above) — is at odds with the characterisation of Wealth as Diversa's agent. It is difficult to reconcile the apparent relationship between Wealth and Diversa in particular with an agency paradigm in which Wealth owed fiduciary duties to Diversa and was obliged to act in its interests.

303 The concept of agency is not confined to circumstances where the agent can bind the principal: *Tonto* at [174] and [176]. Accordingly, even if the OneVue Entities lacked the capacity formally to bind Diversa, that would not preclude the existence of an agency relationship. However, an agency relationship not being precluded on that basis obviously enough does not establish the existence of the agency for which ASIC contended.

304 In *Tonto*, Allsop P said (at [177]) that the "conception of identity or representation of the principal" is central to the existence of agency. Here, however, ASIC did not adduce evidence of telephone scripts or actual telephone interactions involving OneVue personnel interacting with YourChoice Super members so that the nature of those interactions, and the basis on which OneVue personnel presented themselves, might be examined. There was also no evidence that Wealth in fact did itself engage in the promotion of YourChoice Super. So far as there was evidence of email interactions between OneVue personnel and YourChoice Super members, it appears that members mostly communicated with an "@onevue.com.au" domain email address and responses did not present themselves as being given on behalf of the trustee. Moreover, a sizeable portion of the correspondence in evidence comprising communications with members involved OneVue personnel identifying that the member's grievance was really with ASF and referring the member to ASF.

305 Nor does the fact that the tasks (or at least some of the tasks) performed by Wealth and Super were important to the functioning of Diversa's business supply the want. As Allsop P said in *Tonto* (at [194]):

> Agency is to be determined by an analysis of the consensual legal relations between the parties, it is not merely a conclusion drawn from the performance by A of a function important, even necessary, to the operation or functioning of the business enterprise of P in question.

306 I am not persuaded by the submissions of ASIC that either Super or Wealth was Diversa's agent. The submissions were advanced at too high a level of generality, and without regard to the need to interrogate the functions relied on more closely in order to assess whether the particular functions were performed as agent of Diversa. In order to discharge the burden of establishing agency, it is not sufficient, in my view, to point to a number of tasks that are of a kind that *may* be performed on an agency basis and then invite the Court, without more, to conclude that those tasks *were* performed as agent. In this case, there was no evidence of the actual workings of the relationships between Diversa, Super and Wealth. Nor was there sufficient evidence of just what it was that Super and Wealth in fact did, so as to assess whether or not either of them performed those tasks as Diversa's agents. Those deficiencies are fatal to ASIC's case on agency. Further, and as noted above, ASIC did not tie the knowledge it said the OneVue Entities had to the activities that it contended were undertaken as agent.

307 Before leaving the topic of agency, I note that, although Diversa addressed the distinct, but related, question of whether the OneVue Entities acted "on behalf of" Diversa as part of its written submissions on agency, ASIC's "on behalf of" contention was advanced as part of its case on contravention of s 912A(1)(ca) (not the contravention of s 912A(1)(a)).

The documents said to establish the OneVue Entities' knowledge

308 Although the additional documents that ASIC relied on as establishing the knowledge of the OneVue Entities are not strictly relevant, given my conclusion that ASIC's attribution case fails, I will address them briefly. By "additional documents", I am referring to the documents referred to in ASIC's aide memoire that were said to show the knowledge of the OneVue Entities (but not also knowledge of Diversa directly), the knowledge of Mr Blood after the divestment of Diversa, and the knowledge of Ms Caldwell-Smith outside the period of her secondment. As with my analysis of the direct knowledge of Diversa above, I do not consider documents that post-date 17 March 2020, when Diversa did that which ASIC contended it

needed to do in order to comply with its duties under s 912A(1)(a), namely cut off the Bhandari Entities.

309 The first point to make is that the body of additional documents does not raise any new or different topics from the body of documents addressed above in relation to Diversa: levels of hardship claims, complaints, the use of the dummy email addresses, re-use of signatures and the features of the Bhandari Entities' business model.

310 The second point to make is that, for the most part, these additional documents do not reveal any qualitatively different information than was revealed by the documents involving the Diversa personnel (Mr Blood before the divestment of Diversa, Ms Caldwell-Smith during the period of her secondment, Mr Loveridge and Mr Strachan), although, in respect of some topics, the additional documents revealed more detail about matters being considered, and steps being undertaken within OneVue.

311 In relation to hardship claims, the emails reveal further internal consideration of the level of hardship claims in the context of addressing the administrative burden associated with dealing with those claims. As already explained, I do not consider that a realisation that high numbers of hardship claims related to members who came to YourChoice Super from the Bhandari Entities revealed the "vices" in the Bhandari Entities' conduct. In addition, the suspicion harboured by Mr Mills of OneVue, at least in early 2018, was that it was those in the Philippines call centre of the Bhandari Entities that were planting the seed of the idea of making a hardship withdrawal claim with customers. Whether or not that was so, it tells against the OneVue Entities having knowledge of *actual* vulnerability by reason of the number of hardship claims being made.

312 In relation to the Bhandari Entities' business model, I have referred above to the advice given by The Fold. That package of information came to Diversa some time after the advice had been obtained and was available to some OneVue personnel. The documents specific to the OneVue Entities show interactions between Mr Mills and Mr Bhandari in February 2018 where Mr Mills suggested things that Mr Bhandari should raise with The Fold in obtaining advice from them. However, as the advice referred to above shows, the Bhandari Entities did proceed to obtain comprehensive advice from The Fold, which covered (amongst other things) the risk of personal advice being given and recommendations that it appears were accepted and implemented by the Bhandari Entities. In an email of 5 June 2018, Mr Mills acknowledged that Mr Bhandari had been responsive to concerns raised by OneVue, and The Fold had "completed

a full due diligence on his business". Nevertheless, Mr Mills said his concerns about Mr Bhandari's "business model are still a live issue". However, (other than a reference later in his email to unspecified "commercial implications" and "any ethical and/or market perception" matters) Mr Mills did not detail the nature of his concerns, or why he continued to have concerns notwithstanding the content of The Fold's advice and its sign-off. In addition, Mr Mills' email was in relation to the proposal that Mr Bhandari have his own "white label" fund. It is not apparent what, if any, connection a "white label" arrangement would have with Diversa or tasks Wealth or Super were undertaking pursuant to their contracts with Diversa.

313 In mid–late August 2019, Mr Mills' concerns about the business model of the Bhandari Entities appear to have become more acute. In an email of 13 August 2019, Mr Mills raised in particular the charging of high fees by ASF in connection with low balance accounts. In response to Mr Blood urging Mr Mills to log concerns through the proper channels under OneVue's Incident and Breach Management Policy, Mr Mills felt he was being "gagged". Mr Blood's email said the concern Mr Mills raised was being investigated in accordance with that policy. An email from Melissa Gomes, Chief Operating Officer, Super Services, to Mr Mills of 27 August 2019 bears out that an investigation was being undertaken. The evidence adduced by ASIC did not trace through the course of the investigation, so the vehemence with which Mr Mills expressed his concerns cannot of itself go far in supporting ASIC's case, particularly where it did not advance a case that took issue with a failure properly to escalate and deal with Mr Mills' concerns.

314 In relation to the topic of complaints, the documents specific to the knowledge of the OneVue Entities include a number of additional complaints. Some of the emails characterised by ASIC in its aide memoire as complaints were not complaints about the conduct of the Bhandari Entities at all. For example, an email of 4 December 2018 said to record a complaint by a customer indicating the customer had been unaware she would be rolled into a YourChoice Super account does not record anything about the initial conversation with the customer and only includes a statement by the customer in which she referred to having had a conversation with ASF in which she was informed the YourChoice Super account was set up as a temporary account and a comment "I don't think that is a good way to do business with your company". Another example of ASIC mischaracterising the documents arises from emails of 12 December 2018 said to constitute a customer complaint that the customer had not been told he would be charged any fees. The emails in question show some delay in funds being received by the customer (which appeared to relate to incorrect bank account details having been supplied) and

also a disembodied one-line statement from the customer: "You should not be charging all the fees I did not authorise for you to take the money of Australian super finder I will report you to the ACC[sic]".

315 In any event, while representing some additional complaints (involving approximately 10 individuals), those complaints are again to be considered in the context of the Bhandari Entities having over 30,000 clients with YourChoice Super accounts. Moreover, the emails relied on by ASIC provide only a snapshot in time regarding a complaint and do not address whether the complaint had any substance. As I have noted above, ASIC did not advance any criticisms about how the complaints were handled.

316 In relation to the topic of the dummy email addresses, the emails specific to the OneVue Entities included additional detail about the processes being pursued to address the issue. Those emails show that attention was being paid to addressing what might be described as system configuration issues concerning how different parts of the digital systems of the OneVue Entities operated and could be changed. For example, an email of 6 November 2018 identified that there was a situation where accounts had to be approved even if they had a dummy email to avoid automated duplicate accounts being set up overnight if not approved. An email of 9 November 2018 identified the need for changes to the platform online application processes. In short, these and other emails provide further detail about, but do not materially add to, the narrative already set out whereby the dummy email issue was spotted, investigated and dealt with. A list of completed rectification actions that had been performed was reported internally within OneVue by email on 26 November 2018, together with a list of matters that OneVue's risk and compliance officer was still pursuing.

317 In relation to the re-use of signatures issue, the additional emails specific to the OneVue Entities show the genesis of the issue being brought to the attention of OneVue (via a call with a customer detailed in an email of 22 May 2019) and provide more detail about the processes by which the issue was being investigated. That process included Mr Blood saying in an email of 25 October 2019 that the documents using re-used signatures should be rejected and original signatures should be required. The emails also included an email from Mr Blood directly to Mr Bhandari of 19 December 2019 raising the copied signature issue and querying whether Mr Bhandari had really personally sighted the original documents of the customers, such as their drivers' licenses. Mr Blood reported internally within OneVue that the issue would be treated as an "incident" if there was no satisfactory response from Mr Bhandari. Further

interactions revealed that ASF was using a "digital Green ID service", which Mr Blood identified was an accepted identity verification system. In all, the narrative on this issue, so far as it was supplemented by the documents specific to the OneVue Entities, shows that a serious issue was noticed and addressed.

Conclusions on whether Diversa failed to adhere to its s 912A(1)(a) duty

The knowledge case

318 In my view, ASIC has not made out its case that Diversa failed to adhere to obligations under s 912A(1)(a) on the basis that, by virtue of what it knew or ought to have known about the operations of the Bhandari Entities, Diversa should have cut them off by the start of the Relevant Period (13 March 2019) or, if not, at some time before it ultimately did so on 17 March 2020. I have already explained why I consider the case beyond 17 March 2020, when Diversa did give instructions to cut off the Bhandari Entities, to lack any conceivable foundation. What follows is confined to the period between 13 March 2019 and 17 March 2020.

319 I accept that Diversa knew or ought to have known that the Bhandari Entities' business model involved consolidation of superannuation accounts principally by assisting customers to find their lost super and then establishing a YourChoice Super account into which the lost superannuation accounts would be consolidated. Although much of the evidence concerning levels of hardship claims coming through pre-dated the start of the Relevant Period, and, so far as it involved Mr Blood, also pre-dated the commencement of his role with Diversa in March 2018, the topic of hardship claims was a sufficiently widespread and recurring topic that Diversa knew or ought to have known that the level of hardship claims being made was regarded as relatively high and productive of additional work in handling those claims.

320 However, for the reasons already set out, I am not persuaded that the level of hardship claims was disproportionate when held up against the proportion of YourChoice Super members overall who were customers of the Bhandari Entities. Nor, for reasons already set out, do I accept that the mere making of hardship claims necessarily revealed vulnerability of the clients of the Bhandari Entities as a group, or anything about the operations of the Bhandari Entities that should have been of such concern to Diversa that it should have stepped in and cut off the Bhandari Entities.

321 Of course, the hardship claims were not the only issue on which ASIC relied. Its case was broad enough that the accumulation of issues must also be considered. I have already referred to the fees charges and Diversa's knowledge of the Bhandari Entities' fees.

322 There were also a number of complaints, which included complaints that the customer had not in fact authorised ASF to proceed, or fees had not been properly notified and understood. In any business setting, there will be complaints. Here, complaints of that kind are, of course, concerning, but they went to the commercial and contractual relationship between the Bhandari Entities and their clients, and fundamentally to the content of the interactions between them (whether steps had been duly authorised, whether certain information had been provided to the client). Although ASIC relied on transcripts of various calls between the Bhandari Entities and their customers, its case was not premised on any suggestion that Diversa had, or should have been, privy to or monitoring those interactions. Nor were the complaints accompanied by any evidence of the actual interactions between the Bhandari Entities and their customers, or the outcome of investigation into those complaints. In those circumstances, I do not consider that the existence, number or quality of the complaints really ought to have told Diversa that there were such serious problems in the operations of the Bhandari Entities that it should not accept members who were their clients.

323 The use of dummy email addresses and the issues concerning signatures also do not persuade me that Diversa failed to meet its duties under s 912A(1)(a) by continuing to issue interests in YourChoice Super to customers of the Bhandari Entities. Both issues were serious, but they were identified, investigated and acted upon. That demonstrates systems working, not failing. Moreover, the evidence did not reveal any suggestion that the Bhandari Entities were pushing back or resisting correcting issues identified by OneVue. On the contrary, taken as a whole, the evidence tends to suggest that Mr Bhandari was receptive to making corrections and alterations in response to matters brought to his attention. That was particularly the case in relation to the broader matters raised by ASIC concerning the Bhandari Entities' business model.

324 ASIC's underlying concern (or at least one distinct concern that emerged more clearly during the trial) was that consolidation into YourChoice Super was simply not in the best interests of the customers of the Bhandari Entities, or at least there was a risk that that was the case. ASIC put this concern a number of ways, including that YourChoice Super might not be an appropriate product for a particular customer. I do not accept that a risk that Diversa's product might not be the best product for some customers of an adviser means that Diversa should not

have issued interests to any customers of the Bhandari Entities. It is of the nature of a general advice model that the personal circumstances of an individual are not considered. I do not consider that being aware that members to whom Diversa was issuing interests in YourChoice Super had come to the product under a general advice model means that Diversa should not have been willing to issue interests to them. It should also be recalled that, as Beach J said in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57 at [522], s 912A(1)(a) is "not a back door into an 'act in the [best] interests of' obligation".

325 Mention was also made of insurance being lost, but that was not established on the evidence (at least one internal email suggested the Bhandari Entities were mindful of the risk of lost insurance and did not take steps resulting in the loss of insurance). To the extent that ASIC's contention that YourChoice Super may not have been an appropriate product for customers related to the fees (other than consolidation fees) involved, the fees associated with being a member of YourChoice Super (whether on a temporary or ongoing basis) were detailed in the PDSs provided to prospective members. It was not suggested that the PDS was inadequate in any way. It was also not suggested or established that the fees charged by YourChoice Super were higher than those charged on other superannuation accounts.

326 That remains my view even accepting that, where general advice is provided via direct interactions with a customer, there is a risk that personal advice will be given. That risk exists in a wide variety of circumstances, and is a function of the existence of a hard legislative borderline between general and personal advice, coupled with application of the borderline being a matter of qualitative assessment in many cases. Here, the Bhandari Entities had retained a law firm, The Fold, to advise them on this (and other) issues. Prior to the start of the Relevant Period, Mr Blood had received the package of advice and documents earlier obtained which showed that the risk of personal advice being given was on the radar and that legal advice had been obtained and acted upon by the Bhandari Entities. In those circumstances, I do not accept that Diversa knowing that there was a risk that personal advice was being given went beyond the usual risk that general advice will stray into personal advice such that Diversa should have cut the Bhandari Entities off and declined to issue interests in YourChoice Super to any customers of the Bhandari Entities.

327 ASIC relied on the *Westpac* general advice litigation that went to the High Court as confirming the risk of personal advice being given. During the trial, reference was made by counsel for

Diversa to the High Court's decision in *Westpac HC* having "to some extent destroyed the [general advice] model". Diversa also submitted that "it was certainly a legitimate model in the way in which it was operated prior to that time". The judgment of the primary judge was handed down on 21 December 2018 (*Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2018) 133 ASCR 1; [2018] FCA 2078) and determined that Westpac had not given personal advice. That conclusion was overturned by the Full Court in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 (***Westpac FC***), handed down on 28 October 2019. The Full Court's decision was upheld by the High Court in *Westpac HC*, handed down on 3 February 2021.

328 The Relevant Period in this case commenced when the primary judgment in the *Westpac* litigation had been given, and concluded after the Full Court's decision. Even so, I do not consider the chronology of the *Westpac* litigation to be of significance in this case. That is because perusal of the reasons of the Full Court, and the High Court, shows that the facts specific to the giving of advice in that case drove the conclusion that personal advice was given. Two features stand out. First, it was close consideration of the actual interactions with consumers that was required to determine that personal advice was in fact given. In this case, while ASIC relied on transcripts of phone calls with customers in seeking to establish the "vices" for which it contended, there was no suggestion by ASIC that Diversa should have monitored the calls. Nor did ASIC suggest personal advice *had* been given by the Bhandari Entities, just that there was a risk of personal advice being given.

329 Secondly, the fact that those receiving calls from Westpac were its existing customers was a significant factor in the High Court and the Full Court's conclusions that personal advice was given: see, eg, *Westpac FC* at [146] (Allsop CJ), [219] (Jagot J), [389] (O'Bryan J); *Westpac HC* at [9] (Kiefel CJ, Bell, Gageler and Keane JJ), [71] and [79] (Gordon J). By contrast, contact was made between the Bhandari Entities and a customer when the customer completed an online form to be contacted about lost super; there was no existing customer relationship.

330 Further, it should also be noted that there was no general finding in *Westpac FC* (or *Westpac HC*, decided after the end of the Relevant Period) that direct consumer interactions by telephone necessarily carry an unacceptable risk of personal advice being given. As I have already addressed, here, advice was obtained from The Fold addressing the specific circumstances of the operations of the Bhandari Entities. There was a risk, but, from Diversa's viewpoint, it was being managed.

331 I will address other matters that ASIC pleaded (FASOC [42]) that Diversa knew, or ought to have known, which have not already been addressed in the course of the foregoing.

332 ASIC alleged that, “prior to their relationship with the OneVue Entities, Bhandari, ADG and/or ASF had been asked to leave another financial services licensee, MLC, because of the way in which they conducted their superannuation aggregation business”: FASOC [42(f)]. An email of Mr Mills dated 30 April 2018, forwarded to Mr Blood on 26 November 2019, was relied on in support of that contention. The email in question referred to consolidation having resulted in “our adviser services, super admin and trustee” having been “hit with many financial hardship claims”, and noted that Mr Bhandari had been asked to leave his previous platform provider, MLC, for “precisely this reason”. The link drawn by the email was with the administrative burdens associated with processing hardship claims, to which I have already referred. There is nothing in the email that referred to MLC having cut ties due to “the way in which they [the Bhandari Entities] conducted their superannuation aggregation business”.

333 Another matter raised by ASIC was the fact that “Bhandari, ASF and ADG were being asked questions by ASIC about their superannuation consolidation business”: FASOC [42(h)]. A communication from Mr Mills to Mr Blood on 12 February 2019 concerning ASIC’s investigation was relied upon in support of that contention. The email set out a list of the categories of documents that ASIC had requested. It said nothing about what concerns ASIC may have had about the operations of the Bhandari Entities. I do not see that being aware that ASIC was engaging in some sort of unspecified review of the operations of an adviser and had requested various, quite general, categories of documents advances ASIC’s case.

334 I also do not accept ASIC’s contention (pleaded in FASOC [42(i)]) that Diversa was, or ought to have been, aware that there was a material risk that the Bhandari Entities were engaging in misleading or deceptive conduct, or unconscionable conduct, or that ADG was itself in breach of its own obligations under s 912A(1)(a) or s 912A(1)(ca).

335 Taken as a whole, I am not satisfied that the matters known to Diversa are of such a character that it breached its obligations under s 912A(1)(a) by issuing interests in YourChoice Super to those who came to it via the Bhandari Entities.

336 I should also note that ASIC pleaded that Diversa knew or ought to have known, from at least 17 March 2020, that the use of SuperMatch by the Bhandari Entities resulted in the ATO’s revocation of the OneVue Platform’s access to that service. The exchanges between OneVue

and the ATO show that there were a range of general matters of concern to the ATO that were not specific to the Bhandari Entities. The exchanges also revealed that the ATO adopted a policy of cutting off access to SuperMatch in order to conduct its enquiries (cf a decision to cut off access reflecting a concluded view by the ATO as to wrongdoing or misuse). It appears that specific discussion with the ATO concerning ASF arose due to that entity accessing SuperMatch via a different process which did not involve a "direct technology link" to conduct SuperMatch searches, and which involved the public providing details via ASF's website.

337 For these reasons, interactions with the ATO concerning SuperMatch do not assist ASIC's case. For completeness, I note that I do not accept that the Bhandari Entities' use of SuperMatch constituted misuse of the service, per se (as parts of ASIC's oral submissions appeared to suggest). Access to SuperMatch was an integral part of the Bhandari Entities' consolidation business model, but ASIC did not plead or establish any misuse of that service by the Bhandari Entities beyond its general case as to the vices of the Bhandari Entities' business model. As such, contentions that Diversa was somehow responsible for the Bhandari Entities' use of the SuperMatch service based on the terms and conditions on which the ATO made that service available to trustees and administrators, do not assist ASIC (as well as not having been pleaded). In addition, and as already noted, the evidence did not establish whether the Bhandari Entities were using SuperMatch pursuant to an authorisation from Diversa, as trustee, or Super, as administrator.

Other matters relied on regarding the contravention of s 912A(1)(a)

338 ASIC's pleaded case concerning the first alleged contravention of s 912A(1)(a) relied on the knowledge ASIC alleged Diversa had or ought to have had (including the imputed knowledge of the OneVue Entities), but also referred to Diversa's "outsourcing arrangements" (as pleaded at FASOC [16]–[28]) and Diversa's "conduct and omissions" (as pleaded at FASOC [48]–[67]): FASOC [68]. The "conduct and omissions" (but not the "outsourcing arrangements") were also pleaded as part of the case on the second alleged s 912A(1)(a) contravention (FASOC [69]) and the alleged contravention of s 912A(1)(ca) (FASOC [70A]), [71]).

339 The pleas concerning the "outsourcing arrangements" simply set out the agreements on which ASIC relied, the roles of Super and Wealth pursuant to those agreements, the existence of the Platform, and the contentions that Super and Wealth performed services as agents of Diversa, or "on behalf of" Diversa.

340 These matters have already been addressed above (although I note that ASIC's submissions on the first s 912A(1)(a) contravention did not rely on its "on behalf of" pleas, but relied on its agency contentions). However, I should say something further about the "conduct and omission" pleas. The relevant paragraphs of the FASOC referred to Diversa's internal policies on outsourcing arrangements, alleged that Diversa did not receive "adequate" quarterly written confirmations of compliance from Super (as administrator) and Wealth (as promoter), did not engage in "sufficient" service provider review discussions and meetings, and did not ensure that there were "adequate" internal audit reviews and reports submitted to the Board or the Audit, Compliance and Risk Committee on compliance with the outsourcing policy: FASOC [50]. No particulars of these allegations were given.

341 Similar allegations were made, again without particulars, to the effect that: Diversa failed to "sufficiently" review or evaluate marketing and advertising of YourChoice Super; Diversa did not "sufficiently" review and approve marketing materials or statements used to promote YourChoice Super or any call scripts used by ASF; Diversa did not establish and enforce a policy for overseeing the training and supervision of representatives; Diversa did not "adequately" monitor and "appropriately oversee" the monitoring of activities in relation to YourChoice Super; Diversa did not establish procedures for monitoring performance under outsourcing agreements, ensure that outsourcing agreements addressed reporting requirements or have sufficient resources to manage and monitor the outsourcing relationship between the OneVue Entities and the Bhandari Entities; Diversa did not establish and maintain compliance measures of a certain kind; Diversa did not "adequately" retain control over, or supervise or monitor the day-to-day operations of YourChoice Super "in that Diversa did not take any, or any sufficient, action in response to issues in relation to [the Bhandari Entities] about which Diversa knew or should have known"; and Diversa did not "take steps to reduce the risks" of the Bhandari Entities providing personal financial advice. This last plea made in this part of the pleading alleged that, "[d]uring the Relevant Period, Diversa permitted the Bhandari Entities to continue, and did not prevent them from continuing, to operate the business using YourChoice Super, until 18 December 2020, when the business was sold": FASOC [67].

342 Despite having been pleaded at length, the vast majority of these pleas were not pursued by ASIC at trial. ASIC's case at trial was that Diversa had or ought to have had certain knowledge, and with that actual and constructive knowledge, Diversa should not have allowed the Bhandari Entities to continue to put clients into YourChoice Super, but should have cut the Bhandari Entities off. Those two planks of ASIC's case fall within this group of "conduct and omission"

pleas. However, in other respects, that group of pleas was not pursued at trial as forming a basis upon which ASIC contended Diversa contravened s 912A(1)(a).

343 ASIC's written submissions referred, in fairly brief terms, to APRA's Outsourcing Standard, Diversa's outsourcing policy, Diversa's obligations under its AFSL, Diversa's monitoring role under the Promoter Agreement and certification to the ATO regarding risk processes being in place to monitor access to SuperMatch for fraudulent or inappropriate usage. These matters were then said to establish that Diversa "could not turn a blind eye" to how its YourChoice Super product was to be promoted. ASIC's written submissions only took issue with the quarterly reports provided to Diversa and compliance attestations received by Diversa on the basis that they "did not address the vices in the way in which YourChoice Super was promoted, customers were signed-up and funds then withdrawn". ASIC submitted that such controls that were in place did not *prevent* the Bhandari Entities' conduct in relation to YourChoice Super, which only stopped when the business was sold in December 2020 (or the other, earlier dates identified by ASIC in the alternative).

344 Importantly, ASIC's submissions on how it was that Diversa engaged in the first alleged contravention of s 912A(1)(a) did not pursue the pleaded case concerning Diversa's "conduct and omissions", as pleaded and referred to above, beyond submitting that monitoring obligations were imposed on Diversa by outsourcing agreements and that that supported its case that Diversa ought to have known of the alleged "vices". The position is the same in respect of the second alleged contravention of s 912A(1)(a), and the alleged contravention of s 912A(1)(ca). While ASIC's submissions pointed out that Diversa's suite of controls did not *prevent* the Bhandari Entities' conduct, a contravention of s 912A(1)(a) is not — at least in this case — made out on any *res ipsa loquitur* type of reasoning.

345 The only other point at which ASIC referred back to a subset of its "conduct and omissions" pleas (FASOC [59], [60(c)], [62] and [64]) was in its post-trial note addressing complaints raised by Diversa concerning (relevantly to this point) ASIC having expanded its case by its oral reply submissions. I have, however, already addressed the point made by ASIC in its reply submissions and set out why it is that the submissions made related to issues concerning aggregation of knowledge. ASIC did not run at trial a case that contended that a contravention of s 912A(1)(a) arose due to a failure to escalate concerns.

THE SECOND ALLEGED S 912A(1)(A) CONTRAVENTION: PROVISION OF ADVICE

346 ASIC's case on the second alleged contravention was that Diversa breached s 912A(1)(a) because it failed to do all things necessary to ensure that the general advice in respect of YourChoice Super was provided *by the OneVue Entities* efficiently, honestly and fairly.

347 ASIC contended that the alleged failure of the OneVue Entities to provide general advice efficiently, honestly and fairly resulted in Diversa breaching its obligations on the basis that the financial service of providing general advice in respect of YourChoice Super was a service that was "covered" by Diversa's AFSL, even though Diversa did not itself provide general advice. Diversa's AFSL authorised it to provide general financial advice about superannuation products. On ASIC's case, "it does not matter whether the service was provided by the licensee itself, or by another licensee". ASIC contended that, where the services in question are provided by another Licensee, the responsibility under s 912A(1)(a) is "carried and shared by both licensees".

348 Section 912A(1)(a) refers to "services provided". ASIC submitted that the use of the passive voice, and the fact that the section does not specify who is to provide the services, supported its construction. ASIC also pointed to the absence of express words limiting the obligation to the Licensee providing the service as indicative of an intention that the provision operate more widely. In its written submissions, ASIC suggested that as long as "a service is covered by the licensee's AFSL, the licensee is obliged to do all things necessary to ensure that the service is provided efficiently, honestly and fairly" regardless of whether the Licensee is themselves providing the service. In those circumstances, ASIC contended that Diversa was required to ensure that the OneVue Entities provided general advice in respect of YourChoice Super efficiently, honestly and fairly.

349 Perhaps mindful of the absurdity of any suggestion that one Licensee could be liable for a contravention of s 912A(1)(a) based on the conduct of another, independent Licensee with which the first Licensee had no relationship, ASIC fixed on "delegation" as the necessary and sufficient nexus between the activities of the two Licensees. ASIC submitted that s 911B(3) (emphasis added):

> does not exempt Diversa from the obligation to do all things necessary to ensure that **the service is provided by the delegate** efficiently, honestly and fairly.

350 ASIC expanded on the submission and the foundation for the alleged delegation as follows (emphasis added):

> Diversa **delegated the provision of general advice** to OneVue Super and OneVue Wealth (Diversa's agents), under the Administration Agreement, the Platform and Custody Services Agreement and the Promoter Agreement. Under those agreements, OneVue Super and OneVue Wealth were responsible for interactions with prospective customers about matters such as signing-up to YourChoice Super, and with existing customers about matters such as whether to withdraw from YourChoice Super.

351 Diversa contended that the proper construction of s 912A(1)(a) does not extend to "services provided on behalf of a licensee by a person who has their own license … as those services are covered by the license of the person who is actually providing the service" (emphasis in original).

352 In my view, ASIC's case fails for two independent reasons.

353 First, the only sensible construction of s 912A(1)(a) is that it operates in relation to financial services *provided by* the Licensee.

354 Where the service is provided by another Licensee who has its own AFSL, s 911B(3) provides that "for the purposes of the other provisions of this Chapter, the service is taken to be provided by the provider (and not by the principal) unless regulations made for the purposes of this subsection provide otherwise". The effect of that provision on the facts of this case is that if (and assuming for present purposes that) the OneVue Entities provided general financial advice, and that they did so "on behalf of" Diversa, those services were provided by the OneVue Entities, and not by Diversa.

355 One Licensee may provide services on behalf of another Licensee if the first Licensee has an AFSL "covering the provision of the service": s 911B(1)(d). Contrast the circumstance where the person providing financial services on behalf of a Licensee does not have its own AFSL. Pursuant to ss 911B(1)(a)–(c), one of the criteria is that the principal holds an AFSL "covering the provision of the service". That requirement is absent from s 911B(1)(d), which applies where the provider has its own AFSL. In that circumstance, the service is provided by the first Licensee pursuant to its AFSL.

356 Section 911B(3) is a significant provision. It identifies clearly, and for the operation of all other provisions of the chapter, just who it is who is providing the financial service. That provision works with other provisions so that the provision of those services by that Licensee is subject to the array of provisions that make up the AFSL regime. As I have set out above in describing

the statutory scheme, the provisions knit together and function based on whose AFSL is being used to authorise the provision of the services in question.

357 Where the person performing the financial service has its own AFSL, its AFSL is "in play". If that person is performing services as "representative" of another Licensee, the second Licensee will still be subject to the "reasonable steps" obligations imposed by s 912A(1)(ca). But the second Licensee will not, in that situation, be liable under s 912A(1)(a) for any failure of the Licensee who actually performs the service to adhere to its own obligations under s 912A(1)(a).

358 Against these considerations — which, in my view, compel a conclusion to the contrary of ASIC's construction — I do not consider that the use of the passive voice, and the failure of s 912A(1)(a) to expressly refer to who is providing the service, suggest that the construction for which ASIC contends is correct. Read in its context, and having regard to the scheme of provisions within which s 912A(1)(a) sits, it is clear that the preferable construction is one which imposes the obligation on the Licensee actually providing the service.

359 ASIC did not contend that Diversa itself engaged in the financial service of providing general financial advice. ASIC accepted that, but for Diversa happening to have an AFSL which would have authorised it to provide general financial advice, there would be no contravention of the kind alleged. Viewed in this way, ASIC's case involved applying s 912A(1)(a) to a Licensee in respect of services it did not even provide, simply because its AFSL would have authorised it to provide such services, had it chosen to do so. On ASIC's case, even if the activities of, and arrangements between, Diversa and the OneVue Entities were precisely the same as they were in this case, but it just so happened that Diversa's AFSL did not authorise it to provide financial advice, no contravention would arise. I do not accept that a contravention of a civil penalty provision can be founded on such happenstance.

360 Secondly, ASIC has not established that the OneVue Entities provided general financial advice.

361 As noted above, ASIC contended that Diversa "delegated" the provision of general advice to Super and Wealth under three agreements. ASIC submitted that, under those agreements, Super and Wealth were "responsible for interactions with prospective customers about matters such as signing-up to YourChoice Super, and with existing customers about matters such as whether to withdraw from YourChoice Super".

362 Counsel for ASIC accepted that it was not "in terms" part of any of the agreements with the OneVue Entities for them to provide general advice, but supported its submission that Diversa

delegated the provision of general advice to the OneVue Entities by pointing to the Promoter Agreement — which provided for Wealth to market and distribute, inter alia, YourChoice Super — and to the fact that the OneVue Entities were responsible for distributing PDSs. In addition, ASIC referred to "consumer interactions" being referred to in the (inferred) service levels annexure to the Administration Agreement.

363 The tasks to be performed by the OneVue Entities under the Administration Agreement, the Promoter Agreement and the Platform and Custody Services Agreement involved, as ASIC submitted, "interactions" with members. However, in the absence of any evidence detailing what those interactions actually entailed, I am not satisfied that the OneVue Entities in fact provided financial product advice.

364 As defined by s 766B(1) of the Corporations Act, financial product advice means a recommendation or a statement of opinion, or a report of either of those things, that "is intended to influence a person or persons in making a decision in relation to a particular financial product or …. could reasonably be regarded as being intended to have such an influence". ASIC did not establish that interactions of the kind that those agreements anticipated involved the OneVue Entities making any "recommendations" or "statements of opinion" at all, let alone recommendations or statements of opinion that would have the characteristics necessary to render the interaction one involving the giving of financial product advice.

365 While each of these two bases results in ASIC's case on this ground failing, there is another issue. ASIC did not contend that there was anything wrong with the way in which the OneVue Entities provided general financial advice (assuming they did so, which ASIC did not establish). The only deficiencies, again, were said by ASIC to arise from the conduct of the Bhandari Entities. In substance, ASIC's case on this contravention involved a contention that Licensee A breached its s 912A(1)(a) obligations because Licensee B also breached its s 912A(1)(a) obligations when Licensee B provided general product advice, but the only vices identified were those associated with how Licensee C performed its services. The case was muddled and, in my view, contrived.

366 During the hearing, I explored with counsel for ASIC how it brought home issues with the performance of services by the Bhandari Entities to the OneVue Entities in its alleged provision of general advice. I understood ASIC to rely on two matters. The first was that the Bhandari Entities were considered by the OneVue Entities to be "promoters", despite the absence of any instrument of appointment. In that regard, I note that ASIC relied on an email from December

2018 that attached a template “POI Appointment of Promoter”. That template was circulated by Andrew Loveridge (of Diversa), following a request from Brett Marsh at OneVue, which said:

> Andrew
>
> Do you have requirements for promoter due diligence? If so, can you forward.
>
> We are looking at Nizi and his request to access margin which would require some promotion activities.
>
> We are looking at a range of options but want to be sure of a position before we go back with something.

367 There is no evidence this appointment was progressed. The only document in evidence that relevantly provides a contractual link between the OneVue Entities and the Bhandari Entities is the “OneVue Platform Dealer Group Registration” form.

368 While ASIC relied on the email just referred to on the basis that it showed that OneVue was referring internally to the Bhandari Entities as promoters, all that document records is that Mr Bhandari had requested to “access margin”. Whatever that meant, it appears that “accessing margin” would require some “promotion activities”. The document does not even show Mr Bhandari or the Bhandari Entities being referred to internally within the OneVue Entities as promoters.

369 The second matter that ASIC relied on was that Diversa had certain actual and constructive knowledge about how the Bhandari Entities were giving general advice (notwithstanding the absence of formal agreements tying the Bhandari Entities back to the OneVue Entities). ASIC submitted that the analysis could not be limited to formal agreements, but needed to look at the fact that it was the Bhandari Entities who were giving advice. ASIC relied on the fact that “what Diversa knew or ought to have known was that the people on the ground actually doing the giving of advice were the Bhandari [E]ntities”. This drew an objection from counsel for Diversa that a case to the effect that advice was given by the Bhandari Entities had been abandoned. I have referred above to the relevant plea that was abandoned by ASIC. Diversa was correct to submit that ASIC abandoned a case which was based on advice having been given by the Bhandari Entities (cf by the OneVue Entities).

THE ALLEGED CONTRAVENTION OF S 912A(1)(CA): DIVERSA'S ALLEGED REPRESENTATIVES

370 ASIC's case regarding this alleged contravention was that Super and Wealth were Diversa's "representatives" and Diversa did not take reasonable steps to ensure that its representatives complied with their own obligations to comply with s 912A(1)(a). The OneVue Entities were said to be Diversa's "representatives" under s 910A because they "'acted on behalf of' Diversa in the administration and promotion of YourChoice Super, and were responsible for interactions with prospective and existing members of the fund". ASIC submitted that, while "on behalf of" (which includes acting "on the instructions of", pursuant to the definition of "on behalf of" in s 9), is a wider concept than that of agency, Super and Wealth nevertheless acted as Diversa's agents.

371 The argument, then, was that Diversa failed to meet the requisite minimum standard because it knew, or ought to have known, that there was at least a risk that Super and Wealth were themselves not complying with their s 912A(1)(a) obligations by reason of the activities and approach of the Bhandari Entities.

372 I accept that, as submitted by ASIC, a breach of s 912A(1)(ca) is not predicated on establishing an *actual* breach by the representative of its own obligations under the financial services laws: see, eg, *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* (2020) 377 ALR 55; [2020] FCA 69 (***AMP***) at [106] (Lee J); see also *Australian Securities and Investments Commission v Financial Circle Pty Ltd* (2018) 131 ACSR 484; [2018] FCA 1644 at [123] (O'Callaghan J). Rather, the obligation imposed on a Licensee is to take "reasonable steps" to ensure that its representatives comply with the financial services laws. As Lee J observed in *AMP*, a "reasonable steps" obligation imposed on a Licensee (there, s 961L) focuses on the conduct of the Licensee, "not the provision of advice by representatives (being the conduct to which the best interests provisions are directed)": *AMP* at [123] (see also at [106]). In the context of s 912A(1)(ca), the relevant point is that the ultimate focus must be on what the Licensee (here) did or did not do, and whether it complied with its "reasonable steps" obligations. Any examination of the conduct at the level of the putative representative must be directed to that ultimate enquiry.

373 Like the obligation imposed by s 912A(1)(a), the obligation imposed by s 912A(1)(ca) is primarily forward-looking, and concerned with systems and processes: *AMP* at [105] (Lee J);

RI Advice at [393] (Moshinsky J). As Moshinsky J emphasised in *RI Advice,* a reasonable steps obligation does not require a Licensee to "find and to take the optimal steps": at [392].

374 Nevertheless, an immediate, and fatal, flaw in ASIC's case is that it has not established what financial services the OneVue Entities were in fact providing, in respect of which a risk of non-compliance with s 912A(1)(a) may have existed. While ASIC's pleaded case (FASOC [70]–[71]) referred to financial services that were "covered" by the AFSLs held by the OneVue Entities, for reasons already canvassed, I do not accept that s 912A(1)(a) is concerned with services that *may* be offered (as distinct from services that *are* offered) by a Licensee. As I have set out above in relation to ASIC's second alleged s 912A(1)(a) contravention, ASIC has not established that the OneVue Entities gave general financial product advice. While the particulars to ASIC's case also referred to the AFSLs of the OneVue Entities authorising dealing in interests in YourChoice Super (including by applying for, acquiring, varying or disposing of a financial product on behalf of another person), ASIC did not establish that the OneVue Entities did engage in such dealing. ASIC accepted that the OneVue Entities did not issue interests in YourChoice Super, but simply said, without elaboration, "there are other forms of dealing".

375 The second issue in ASIC's case (assuming for present purposes that the OneVue Entities were Diversa's representatives and performed financial services), is that it overlooks the systems and processes that Diversa had in place. Section 912A(1)(ca) requires that a Licensee take "reasonable steps". Whether or not Diversa failed in that duty is a conclusion that can only be reached on a wholistic analysis that takes into account the full framework of Diversa's contracts, policies and procedures.

376 As detailed in Diversa's submissions, the relevant features of the relationship between Diversa and the OneVue Entities included that: the OneVue Entities each had their own AFSLs; the contracts under which they were to provide services included obligations to ensure that the services they were providing were provided properly and in accordance with applicable regulatory requirements; and the OneVue Entities did have a compliance function and were actively monitoring the Bhandari Entities.

377 In addition, the Administration Agreement and the Promoter Agreement required Super and Wealth to provide regular compliance reports, which were received by Diversa. The reports to be provided to Diversa under the Administration Agreement included reports on the incidents logged and how they had been resolved. Each report was to be accompanied by a compliance

declaration attesting to compliance with relevant requirements in respect of each of the services provided under the Administration Agreement. Wealth provided similar compliance declarations in respect of the services it provided. These reports and attestations then fed up to the Board of Diversa by quarterly Compliance and Risk Management Reports. Diversa's Outsourcing Policy included a range of provisions including provisions requiring that APRA be notified of outsourcing arrangements, the key risks involved in such arrangements, and the risk mitigation strategies put in place.

378 ASIC did not detail, as part of the presentation of its case, why these procedures did not constitute the taking of "reasonable steps". Rather, ASIC's argument was that:

> Diversa failed to meet the requisite minimum standard because during the Relevant Period, it knew or ought to have known that there was at least a risk that OneVue Super and OneVue Wealth — who as licensees were themselves bound by the obligation in s 912A(1)(a) — were not doing all things necessary to ensure that the financial services covered by their licence were provided efficiently, honestly and fairly …

379 At that point of its written submissions, ASIC referred to various features of the Bhandari Entities' conduct and its impact on customers, before concluding as follows:

> Diversa unreasonably allowed those entities [Super and Wealth] to continue to outsource to the Bhandari Entities dealings with prospective and existing customers in relation to Diversa's financial product, YourChoice Super, in circumstances where Diversa knew or should have known about the vices in [the] Bhandari Entities' conduct.

380 There are a few reasons why this submission fails. One is that ASIC did not, in my view, establish that the OneVue Entities (or Wealth more specifically) "outsourced" dealings with prospective or existing customers to the Bhandari Entities. The Bhandari Entities had access, as did others, to the OneVue Platform, and could, through that platform, sign up their clients to be issued interests in YourChoice Super. But providing a platform of that kind does not necessarily involve "outsourcing" a function. In addition, the submission as set out above depended on the knowledge of Diversa, but if the vice lay in *Diversa* having knowledge and not stopping the OneVue Entities "outsourcing" to the Bhandari Entities, that does not establish a potential contravention of s 912A(1)(a) by the OneVue Entities. Rather, the case is simply a restatement of ASIC's first case on contravention by Diversa of s 912A(1)(a).

381 The case was put on a different basis orally. In oral submissions ASIC directed attention not to *Diversa's* knowledge of the problems associated with the conduct of the Bhandari Entities, but to the knowledge of the OneVue Entities. ASIC said it relied on its consolidated aide memoire "to say that the OneVue Entities knew or ought to have known of the vices in the Bhandari

Entities' conduct sufficient to give rise to a breach of the 912A(1)(a) obligation". Put on this basis, the case involves some mental gymnastics as Diversa can only have contravened s 912A(1)(ca) due to the OneVue Entities continuing to deal with the Bhandari Entities notwithstanding what they (the OneVue Entities) knew, if Diversa itself knew that the OneVue Entities knew those matters. That takes the analysis back to ASIC's case on the attribution of knowledge of the OneVue Entities to Diversa, which I have found was not made out.

382 To this point, I have set out independent bases on which, in my view, ASIC's s 912A(1)(ca) case ought to fail even if the OneVue Entities were Diversa's representatives. I should, however, and for completeness, deal with the allegation that the OneVue Entities were Diversa's representatives, as defined by s 910A.

383 I have already addressed ASIC's "agency" contention above. Based on those conclusions, the OneVue Entities were not Diversa's representatives by virtue of being its agents. That leaves for consideration whether, if the agency contention fails, ASIC established that the OneVue Entities were Diversa's representatives because they "acted on behalf of" Diversa by acting on the instructions of Diversa (s 910A definition of "representative", as extended by the s 9 definition of "on behalf of").

384 As stated above, ASIC's written submissions contended that the OneVue Entities acted on behalf of Diversa "in the administration and promotion of YourChoice Super, and were responsible for interactions with prospective and existing members of the fund". ASIC further submitted, in reference to the extended definition of acting "on behalf of" (which includes acting on the instructions of a person), that:

> We say that there was more than simply just instructing, more than acted on instruction of Diversa. Diversa here outsourced the entire operation of the fund to the OneVue entities.

385 I accept that the phrase "on behalf of" has no strict legal meaning and can embrace a wide range of relationships (*Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 (***Walplan***) at 37 (Lockhart J)). In *Lisciandro v Official Trustee in Bankruptcy* (1995) ATPR 41-436; [1995] FCA 716, Kiefel J (as her Honour then was) referred to Lockhart J's observation in *Walplan* but cautioned that "there is a limit to how loose the connection can be", finding that the expression "still conveys that something is done 'for' the company … or something similar to 'in the course of the body corporate's affairs or activities'": at 40,903–4. I also accept that "on behalf of" may encompass circumstances that may not qualify as "agency" relationships.

386 However, in my view, the submission as it was put by ASIC was altogether too superficial to be accepted. It overlooked the detailed web of mutual obligations on which Diversa's arrangements with Wealth and Super were based. It also overlooked the many respects in which Wealth in particular, was in the "driver's seat", and Diversa was taking instructions from it.

CONCLUSION

387 ASIC's originating process will be dismissed with costs.

388 Had ASIC's case succeeded, it would have been necessary to grapple with the injunctions sought by ASIC, and the orders sought under s 1101B(1). The relief sought was cast in terms that were, in many respects, impossibly vague (eg an outright ban on outsourcing absent "appropriate systems, policies and procedures …" and a direction that Diversa implement and maintain "appropriate systems, policies and procedures …"). However, given my conclusions on the substantive issues, it is not necessary to say anything more about the relief sought.

I certify that the preceding three hundred and eighty-eight (388) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Button.

Associate:

Dated: 24 October 2023