

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Daly (Penalty Hearing) [2024] FCA 3

File number: QUD 269 of 2020

Judgment of: **CHEESEMAN J**

Date of judgment: 10 January 2024

Catchwords: **CORPORATIONS** — civil penalty proceedings — penalty phase — duties of officers of responsible entity of a registered managed investment scheme — where respondents found to have breached duties owed pursuant to s 601FD(1) and thereby breached s 601FD(3), a civil penalty provision, of the *Corporations Act 2001* (Cth) — where three of four respondents (**Submitting Respondents**) did not contest liability and agreed relief with the regulator and one respondent did not — consideration of appropriate relief — consideration of application of parity principle as between Submitting Respondents on the first part and the respondent who contested liability on the other part — Held: relief granted.

Legislation: *Corporations Act 2001* (Cth) ss 206C, 601FD(1)(b),(c),(e),(f), 601FD(3), 920A, 1317E(1),(2),(3), 1317G, 1317QF
Federal Court of Australia Act 1976 (Cth) ss 21, 23
Treasury Laws Amendment (Strengthening Corporation Financial Sector Penalties) Act 2019 (Cth)
Federal Court Rules 2011 (Cth) r 39.05

Cases cited: *ASIC v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310; 41 ACSR 561
Australian Building and Construction Commission v Construction, Forestry, Maritime, Mining and Energy Union [2020] FCA 1662
Australian Building and Construction Commissioner v Pattinson [2022] HCA 13; 274 CLR 450
Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2015] FCA 330; 327 ALR 540
Australian Competition and Consumer Commission v MSY Technology Pty Ltd [2012] FCAFC 56; 201 FCR 378
Australian Securities and Investments Commission v MLC

Nominees [2020] FCA 1306; 147 ACSR 266
Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd [2014] FCA 1387; 103 ACSR 453
Australian Securities and Investments Commission v Stone Assets Management Pty Ltd [2012] FCA 630; 205 FCR 120
Commissioner of Taxation v Bogiatto (No 2) [2021] FCA 98
Commonwealth v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; 258 CLR 482
Flight Centre Limited v Australian Competition and Consumer Commission (No 2) [2018] FCAFC 53; 260 FCR 68
Green v The Queen [2011] HCA 49; 244 CLR 462
Trilogy Funds Management Pty Ltd v Sullivan (No 2) [2015] FCA 1452; 331 ALR 185

Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	140
Date of hearing:	14 June 2023
Date of last submissions:	21 June 2023
Counsel for the Applicant:	Mr M Brady KC, Mr L Clark and Mr E Robinson
Solicitor for the Applicant	Gadens
Counsel for the First Respondent:	Mr G Coveney and Mr D Freeman
Solicitor for the First Respondent:	Assembly Law
Counsel for the Second Respondent:	Mr M A Windsor
Solicitor for the Second Respondent:	McCullough Robertson

Counsel for the Third
Respondent:

Mr C A Johnstone

Solicitor for the Third
Respondent:

Cowen Schwarz Marschke

Solicitor for the Fourth
Respondent:

Mr B Cohen of Bartley Cohen

ORDERS

QUD 269 of 2020

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

AND: **PETER DALY**
First Respondent

PAUL NIELSEN
Second Respondent

PAUL ANTHONY RAFTERY (and another named in the
Schedule)
Third Respondent

ORDER MADE BY: **CHEESEMAN J**

DATE OF ORDER: **10 JANUARY 2024**

FOR THE PURPOSE OF THESE ORDERS:

2015 Adviser Loans means the loans made by Linchpin in its capacity as trustee of the Unregistered Scheme to authorised representatives of Financiallink in the period 1 July 2015 to 1 October 2015 as detailed in Schedule C of the Liability Judgment.

2015 to 2016 Adviser Loans means the loans made by Linchpin in its capacity as trustee of the Unregistered Scheme to authorised representatives of Financiallink and RIAA in the period 1 October 2015 to 24 June 2016 as detailed in Schedule C of the Liability Judgment.

2016 to 2018 Adviser Loans means the loans made by Linchpin in its capacity as trustee of the Unregistered Scheme to authorised representatives of Financiallink and RIAA in the period 25 June 2016 to 7 August 2018 as detailed in Schedule C of the Liability Judgment.

2017 Adviser Loans means the loans made in the period January 2017 to 1 November 2017 to authorised representatives of Financiallink and RIAA as detailed in Schedule C of the Liability Judgment.

ASIC means the Australian Securities and Investments Commission, the applicant.

Commonwealth means the Commonwealth of Australia.

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

Compliance Plan means the compliance plan lodged by Endeavour Securities (Australia) Ltd (in liquidation) with the Applicant on 5 October 2006 pursuant to Part 5C.4 of the Corporations Act, in respect of the Registered Scheme.

Endeavour means Endeavour Securities (Australia) Ltd (in liquidation) (ACN 079 988 819).

Liability Judgment means *Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 290.

Linchpin means Linchpin Capital Group Ltd (in liquidation) (ACN 079 988 819).

Rafferty Loan Deed Variation means the variation to the Rafferty Loan Deed on 1 December 2016.

Registered Scheme means the registered managed investment scheme called the “Investport Income Opportunity Fund”, for which Endeavour was the responsible entity.

Schedule C means Schedule C to the Liability Judgment.

Unregistered Scheme means the unregistered managed investment scheme called the “Investport Income Opportunity Fund”, for which Linchpin was responsible.

Defined terms otherwise have the same meaning as in the Liability Judgment and are not repeated here.

THE COURT DECLARES THAT:

Contravention of s 601FD(1)(b) of the Corporations Act

1. The first respondent, Peter Eugene Daly, contravened s 601FD(1)(b) of the Corporations Act which requires an officer of the responsible entity of a registered scheme to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer’s position by:

(a) in the period 1 July 2015 to 1 October 2015:

(i) approving:

A. the variation to the loan agreement between Linchpin in its capacity as trustee of the Unregistered Scheme and Linchpin in

its own capacity dated 1 July 2015 (**Linchpin Loan Deed Variation**);

B. the loans made by Linchpin in its capacity as trustee of the Unregistered Scheme to authorised representatives of The Financiallink Group Pty Ltd (**Financiallink**) in this period, as detailed in Schedule C (**2015 Adviser Loans**);

when a reasonable person in his position would not have approved these loans;

(ii) entering into the loan agreement with Linchpin in its capacity as trustee of the Unregistered Scheme dated 14 September 2015 (**Daly Loan Deed**) when a reasonable person in his position would not have entered into it;

(b) in the period 1 October 2015 to 24 June 2016:

(i) approving:

A. the first variation to the loan agreement between Linchpin in its capacity as trustee of the Unregistered Scheme and Beacon Financial Group Pty Ltd (**Beacon**) dated 20 April 2016 (**Beacon Loan Deed Variation**);

B. the loans made by Linchpin in its capacity as trustee of the Unregistered Scheme to authorised representatives of Financiallink and Risk and Investment Advisers Australia Pty Ltd (**RIAA**) in this period as detailed in Schedule C (**2015 to 2016 Adviser Loans**);

C. the loan agreement between Linchpin in its capacity as trustee of the Unregistered Scheme and Paul Raftery, the third respondent, dated 1 April 2016 (**Raftery Loan Deed**);

when a reasonable person in his position would not have approved these loans;

(ii) entering into the variation to the loan agreement that he entered into with Linchpin in its capacity as trustee of the Unregistered Scheme dated 11 November 2015 (**Daly Loan Deed Variation**) when a reasonable person in his position would not have entered it;

- (c) in the period 24 June 2016 to 7 August 2018:
- (i) approving:
 - A. the second variation to the loan agreement between Linchpin in its capacity as trustee of the Unregistered Scheme and Beacon dated 30 September 2016 (**Beacon Second Loan Deed Variation**);
 - B. the loan agreement between Linchpin in its capacity as trustee of the Unregistered Scheme and CPG Research & Advisory Group Pty Ltd (**CPG**) dated 21 November 2016 (**CPG Loan Deed**);
 - C. a variation to the Raftery Loan Deed on 1 December 2016 (**Raftery Loan Deed Variation**);
 - (ii) approving and/or executing (as detailed in Schedule C) the loans made by Linchpin in its capacity as trustee of the Unregistered Scheme to authorised representatives of Financiallink and RIAA in this period as detailed in Schedule C (**2016 to 2018 Adviser Loans**);
 - (iii) entering into a further loan agreement with Linchpin in its capacity as trustee of the Unregistered Scheme (**Further Daly Loan Deed**) as varied on or around 25 July 2017 (**Further Daly Loan Deed Variation**);

when a reasonable person in his position would not have done so;

- (d) not taking proactive steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purposes of the loans referred to in paragraphs 1(a)(i), 1(b)(i) and 1(c)(i) and (ii) above when a reasonable person in his position would have taken such proactive steps.

2. The second respondent, Paul Nielsen, contravened s 601FD(1)(b) of the Corporations Act which requires an officer of the responsible entity of a registered scheme to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position by:

- (a) in the period 1 July 2015 to 1 October 2015 approving and executing:
 - (i) the Linchpin Loan Deed Variation;
 - (ii) the 2015 Adviser Loans; and
 - (iii) the Daly Loan Deed;

when a reasonable person in his position would not have approved or executed these loans;

- (b) in the period 1 October 2015 to 24 June 2016:
 - (i) approving and executing:
 - A. the Beacon Loan Deed Variation; and
 - B. the Raftery Loan Deed;
 - (ii) approving and/or executing (as detailed in Schedule C) the 2015 to 2016 Adviser Loans;
 - (iii) approving and executing the Daly Loan Deed Variation;

when a reasonable person in his position would not have done so;

- (c) in the period 24 June 2016 to 7 August 2018:
 - (i) approving and executing:
 - A. the Beacon Second Loan Deed Variation; and
 - B. the CPG Loan Deed;
 - (ii) approving and/or executing (as detailed in Schedule C) the 2016 to 2018 Adviser Loans;
 - (iii) approving the Raftery Loan Deed Variation;

when a reasonable person in his position would not have done so; and

- (iv) executing:
 - A. the Further Daly Loan Deed Variation;
 - B. a variation to a loan agreement between Linchpin as trustee for the Unregistered Scheme dated 1 July 2016 and RIAA (**RIAA Loan Deed Variation**); and
 - C. a loan agreement between Linchpin as trustee of the Unregistered Scheme and ISARF Pty Ltd dated 30 June 2017 (**ISARF Loan Deed**);

when a reasonable person in his position would not have done so;

- (d) not taking proactive steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purposes of the loans

referred to in paragraphs 2(a)(i) and (ii), 2(b)(i) and (ii), and 2(c)(i) to (iii) above when a reasonable person in his position would have taken such proactive steps.

3. The third respondent, Paul Raftery, contravened s 601FD(1)(b) of the Corporations Act which requires an officer of the responsible entity of a registered scheme to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position by:
 - (a) failing to take all steps that a reasonable person in his position would have taken by executing the Raftery Loan Deed and by failing to take any steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purpose of the Raftery Loan Deed;
 - (b) in the period January 2017 to 1 November 2017 approving loans to authorised representatives of Financiallylink and RIAA as detailed in Schedule C (**2017 Adviser Loans**) when a reasonable person in his position would not have done so.

4. The fourth respondent, Ian Comrie Williams, contravened s 601FD(1)(b) of the Corporations Act which requires an officer of the responsible entity of a registered scheme to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position by:
 - (a) in the period 1 July 2015 to 1 October 2015 approving and executing:
 - (i) the Linchpin Loan Deed Variation;
 - (ii) the 2015 Adviser Loans; and
 - (iii) the Daly Loan Deedwhen a reasonable person in his position would not have done so;
 - (b) in the period 1 October 2015 to 24 June 2016:
 - (i) approving and executing:
 - A. the Beacon Loan Deed Variation; and
 - B. the Raftery Loan Deed;
 - (ii) approving and/or executing (as detailed in Schedule C) the 2015 to 2016 Adviser Loans;
 - (iii) approving and executing the Daly Loan Deed Variation;when a reasonable person in his position would not have done so;

- (c) in the period 24 June 2016 to 7 August 2018:
 - (i) approving and executing:
 - A. the Beacon Second Loan Deed Variation; and
 - B. the CPG Loan Deed;
 - (ii) approving and/or executing (as detailed in Schedule C) the 2016 to 2018 Adviser Loans;
 - (iii) approving the Raftery Loan Deed Variation;
 - (iv) approving and executing the Further Daly Loan Deed Variation;
 - (v) executing:
 - A. the RIAA Loan Deed Variation; and
 - B. the ISARF Loan Deed;
- when a reasonable person in his position would not have done so;
- (d) not taking proactive steps to prevent Endeavour from transferring funds from the Registered Scheme to the Unregistered Scheme for the purposes of the loans referred to in paragraphs 4(a)(i) and (ii), 4(b)(i) and (ii), 4(c)(i) to (iii) above when a reasonable person in his position would have taken such proactive steps.

Contravention of s 601FD(1)(c) of the Corporations Act

5. Mr Daly, by reason of his conduct at paragraphs 1(a) to 1(c) above, in the period 1 July 2015 to 7 August 2018, gave priority to the interests of Linchpin and the Unregistered Scheme borrowers over those of members/ unit holders in the Registered Scheme and thereby contravened s 601FD(1)(c) of the Corporations Act which requires that an officer of a responsible entity for a registered scheme must act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests.
6. Mr Nielsen, by reason of his conduct at paragraphs 2(a) to 2(c) above, in the period 1 July 2015 to 7 August 2018, gave priority to the interests of Linchpin and the Unregistered Scheme borrowers over those of members/ unit holders in the Registered Scheme and thereby contravened s 601FD(1)(c) of the Corporations Act which requires that an officer of a responsible entity for a registered scheme must act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests.

7. Mr Raftery, by reason of his conduct at paragraphs 3(a) to 3(b) above, gave priority to the interests of Linchpin and the Unregistered Scheme borrowers over those of members/ unit holders in the Registered Scheme and thereby contravened s 601FD(1)(c) of the Corporations Act which requires that an officer of a responsible entity for a registered scheme must act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests.
8. Mr Williams, by reason of his conduct at paragraphs 4(a) to 4(c) above, in the period 1 July 2015 to 7 August 2018, gave priority to the interests of Linchpin and the Unregistered Scheme borrowers over those of members/ unit holders in the Registered Scheme and thereby contravened s 601FD(1)(c) of the Corporations Act which requires that an officer of a responsible entity for a registered scheme must act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests.

Contravention of s 601FD(1)(e) of the Corporations Act

9. In the period 14 September 2015 to 7 August 2018, Mr Daly contravened s 601FD(1)(e) of the Corporations Act by improperly using his position as an officer of Endeavour to cause an advantage for himself and a detriment to members of the Registered Scheme by applying for, and obtaining, the loans made pursuant to the Daly Loan Deed, the Daly Loan Deed Variation, the Further Daly Loan Deed and the Further Daly Loan Deed Variation, using funds sourced from the Registered Scheme.
10. Mr Raftery contravened s 601FD(1)(e) of the Corporations Act by improperly using his position as an officer of Endeavour to cause an advantage for himself and a detriment to members of the Registered Scheme by applying for, and obtaining in about April 2016, the loan made pursuant to the Raftery Loan Deed and a further advance of funds from Linchpin in about December 2016.

Contravention of s 601FD(1)(f) of the Corporations Act

11. Mr Daly contravened s 601FD(1)(f) of the Corporations Act which requires that an officer of a responsible entity for a registered scheme must take all steps that a reasonable person would take if they were in the officer's position to ensure that the responsible entity complies with the Corporations Act, the conditions imposed on the entity's Australian financial services licence and the scheme's constitution and compliance plan by:

- (a) in the period 1 July 2015 to 1 October 2015:
 - (i) approving the Linchpin Loan Deed Variation and the 2015 Adviser Loans;
 - (ii) executing the Daly Loan Deed;when a reasonable person in his position:
 - (iii) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
 - (iv) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act;
- (b) in the period 1 October 2015 to 24 June 2016:
 - (i) approving the Beacon Loan Deed Variation, the 2015 to 2016 Adviser Loans and the Raftery Loan Deed; and
 - (ii) executing the Daly Loan Deed Variation,when a reasonable person in his position:
 - (iii) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
 - (iv) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act;
- (c) in the period 24 June 2016 to 7 August 2018:
 - (i) approving the Beacon Second Loan Deed Variation, the CPG Loan Deed, the 2016 to 2018 Adviser Loans, the Raftery Loan Deed Variation, the RIAA Loan Deed Variation and the ISARF Loan Deed;
 - (ii) executing the Further Daly Loan Deed Variation;when a reasonable person in his position:
 - (iii) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
 - (iv) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act.

12. Mr Nielsen contravened s 601FD(1)(f) of the Corporations Act which requires that an officer of a responsible entity for a registered scheme must take all steps that a reasonable person would take if they were in the officer's position to ensure that the responsible entity complies with the Corporations Act, the conditions imposed on the entity's Australian financial services licence and the scheme's constitution and compliance plan by:
- (a) in the period 1 July 2015 to 1 October 2015:
 - (i) approving and executing the Linchpin Loan Deed Variation and the 2015 Adviser Loans; and
 - (ii) executing the Daly Loan Deed;when a reasonable person in his position:
 - (iii) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
 - (iv) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act;
 - (b) in the period 1 October 2015 to 24 June 2016:
 - (i) approving and executing the Beacon Loan Deed Variation, the Daly Loan Deed Variation and the Raftery Loan Deed; and
 - (ii) approving and/or executing the 2015 to 2016 Adviser Loans (as detailed in Schedule C);when a reasonable person in his position:
 - (iii) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
 - (iv) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act;
 - (c) in the period 24 June 2016 to 7 August 2018:
 - (i) approving and executing the Beacon Second Loan Deed Variation, the CPG Loan Deed and the RIAA Loan Deed Variation;

- (ii) approving and/or executing the 2016 to 2018 Adviser Loans (as detailed in Schedule C);
- (iii) approving the Raftery Loan Deed Variation;
- (iv) executing the ISARF Loan Deed, the Further Daly Loan Deed and the Further Daly Loan Deed Variation;

when a reasonable person in his position:

- (v) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
 - (vi) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act.
- (d) causing Endeavour to issue a product disclosure statement on 27 April 2015 (the **First PDS**), in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f) and 1013E of the Corporations Act;
 - (e) causing Endeavour to issue a product disclosure statement on 1 October 2015 (the **Second PDS**), in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Corporations Act;
 - (f) causing Endeavour to issue a product disclosure statement on 24 June 2016 (the **Third PDS**) in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Corporations Act.

13. Mr Raftery contravened s 601FD(1)(f) of the Corporations Act which requires that an officer of a responsible entity for a registered scheme must take all steps that a reasonable person would take if they were in the officer's position to ensure that the responsible entity complies with the Corporations Act, the conditions imposed on the entity's Australian financial services licence and the scheme's constitution and compliance plan by:

- (a) executing the Raftery Loan Deed and approving the 2017 Adviser Loans when a reasonable person in his position:
 - (i) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and

- (ii) would have ensured that requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act;
 - (b) causing Endeavour to issue the First PDS in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f) and 1013E of the Corporations Act;
 - (c) causing Endeavour to issue the Second PDS in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Corporations Act;
 - (d) causing Endeavour to issue the Third PDS in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Corporations Act.
14. Mr Williams contravened s 601FD(1)(f) of the Corporations Act which requires that an officer of a responsible entity for a registered scheme must take all steps that a reasonable person would take if they were in the officer's position to ensure that the responsible entity complies with the Corporations Act, the conditions imposed on the entity's Australian financial services licence and the scheme's constitution and compliance plan by:
- (a) in the period 1 July 2015 to 1 October 2015:
 - (i) approving and executing the Linchpin Loan Deed Variation, the Daly Loan Deed;
 - (ii) approving and/or executing (as detailed in Schedule C) the 2015 Adviser Loans;when a reasonable person in his position:
 - (iii) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
 - (iv) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act;
 - (b) in the period 1 October 2015 to 24 June 2016:
 - (i) approving and executing the Beacon Loan Deed Variation, the Daly Loan Deed Variation and the Raftery Loan Deed;

- (ii) approving and/or executing (as detailed in Schedule C) the 2015 to 2016 Adviser Loans;

when a reasonable person in his position:

- (iii) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
- (iv) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act;

(c) in the period 24 June 2016 to 7 August 2018:

- (i) approving and executing the Beacon Second Loan Deed Variation, the CPG Loan Deed, the RIAA Loan Deed Variation, the Further Daly Loan Deed and the Further Daly Loan Deed Variation;
- (ii) approving and/or executing (as detailed in Schedule C) the 2016 to 2018 Adviser Loans;
- (iii) approving the Raftery Loan Deed Variation; and
- (iv) executing the ISARF Loan Deed;

when a reasonable person in his position:

- (v) would not have approved or executed these transactions because they did not comply with section 16 of the Compliance Plan; and
- (vi) would have ensured that the requisite member approval was obtained in respect of these related party transactions in accordance with s 208 of the Corporations Act as modified by s 601LC of the Corporations Act.

(d) causing Endeavour to issue the First PDS in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f) and 1013E of the Corporations Act;

(e) causing Endeavour to issue the Second PDS in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Corporations Act;

(f) causing Endeavour to issue the Third PDS in circumstances where it did not comply with ss 1013D(1)(d), 1013D(1)(f), 1013E and 1017B of the Corporations Act.

Contravention of s 601FD(3) of the Corporations Act

15. In the period 1 July 2015 to 7 August 2018, Mr Daly contravened s 601FD(3) of the Corporations Act because he breached the obligations imposed on him as an officer of a registered scheme under s 601FD(1) of the Corporations Act.
16. In the period 1 July 2015 to 7 August 2018, Mr Nielsen contravened s 601FD(3) of the Corporations Act because he breached the obligations imposed on him as an officer of a registered scheme under s 601FD(1) of the Corporations Act.
17. In the period April 2016 to 1 November 2017, Mr Raftery contravened s 601FD(3) of the Corporations Act because he breached the obligations imposed on him as an officer of a registered scheme under s 601FD(1) of the Corporations Act.
18. In the period 1 July 2015 to 7 August 2018, Mr Williams contravened s 601FD(3) of the Corporations Act because he breached the obligations imposed on him as an officer of a registered scheme under s 601FD(1) of the Corporations Act.

THE COURT ORDERS THAT:

Mr Daly

19. Pursuant to s 206C of the Corporations Act, Mr Daly be disqualified from managing corporations for a period of five years.
20. Pursuant to s 1317G(1) of the Corporations Act, Mr Daly pay to the Commonwealth a pecuniary penalty in the sum of \$150,000.
21. Mr Daly pay ASIC's costs as follows:
 - (a) \$175,000, being 25% of ASIC's costs of the proceeding up to and including the first day of the liability trial (7 March 2022) (as agreed);
 - (b) ASIC's costs of the liability hearing from 8 March 2022 to 11 March 2022 as agreed, or failing agreement, as assessed (by a Registrar on a lump sum basis); and
 - (c) 25% of ASIC's costs of and incidental to the penalty hearing on 14 June 2023 as agreed, or failing agreement, as assessed (by a Registrar on a lump sum basis).

Mr Nielsen

22. Pursuant to s 206C of the Corporations Act, Mr Nielsen be disqualified from managing corporations for a period of four years.

23. Pursuant to s 1317G(1) of the Corporations Act, Mr Nielsen pay to the Commonwealth a pecuniary penalty in the sum of \$100,000.
24. Mr Nielsen pay ASIC's costs in the agreed amount of \$175,000, being 25% of ASIC's costs of the proceeding up to and including the first day of the liability trial (7 March 2023).

Mr Raftery

25. Pursuant to s 206C of the Corporations Act, Mr Raftery be disqualified from managing corporations for a period of three years.
26. Pursuant to s 1317G(1) of the Corporations Act, Mr Raftery pay to the Commonwealth a pecuniary penalty in the sum of \$40,000.
27. Mr Raftery pay ASIC's costs in the agreed amount of \$175,000, being 25% of ASIC's costs of the proceeding up to and including the first day of the liability trial (7 March 2023).

Mr Williams

28. Pursuant to s 206C of the Corporations Act, Mr Williams be disqualified from managing corporations for a period of four years.
29. Pursuant to s 1317G(1) of the Corporations Act, Mr Williams pay to the Commonwealth a pecuniary penalty in the sum of \$100,000.
30. Mr Williams pay ASIC's costs in the agreed amount of \$175,000, being 25% of ASIC's costs of the proceeding up to and including the first day of the liability trial (7 March 2023).

Liability Judgment

31. Pursuant to r 39.05 of the *Federal Court Rules 2011* (Cth), paragraph 362 of the Liability Judgment be corrected so that it reads:
 - 362 Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because a reasonable person in their respective positions would not have approved (Mr Williams) and executed (Mr Nielsen and Mr Williams) the Further Daly Loan Deed Variation and would not have executed (Mr Nielsen and Mr Williams) the RIAA Loan Deed Variation and the ISARF Loan Deed.

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

REASONS FOR JUDGMENT

CHEESEMAN J:

INTRODUCTION

- 1 In *Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 290 (**Liability Judgment** or **LJ**) I found that Peter Daly, Paul Nielsen, Paul Raftery, and Ian Williams, the first to fourth respondents respectively, contravened various subsections of ss 601FD(1)(b),(c),(e),(f) and 601FD(3) of the *Corporations Act 2001* (Cth) in their capacity as officers of **Endeavour** Securities (Australia) Ltd, the responsible entity for the Investport Income Opportunity Fund (the **Registered Scheme**). These reasons assume familiarity with the Liability Judgment. Terms defined or used in the Liability Judgment are adopted in these reasons.
- 2 Mr Daly was not a director but was found to be an officer of Endeavour and, as such, subject to the obligations imposed by s 601FD(1)(b), (c), (e) and (f) of the Corporations Act. He contested liability. He denied that he was an officer of Endeavour and also contended that Australian Securities and Investments Commission's (**ASIC**'s) claims against him were not adequately pleaded and that there was no causative link between his conduct and the relevant contraventions of the Corporations Act: LJ[14]. Mr Daly's counsel cross-examined two of three witnesses called by ASIC. Mr Daly ultimately elected to exercise his privilege against exposure to a penalty and did not give evidence: LJ[14]. Mr Daly was unsuccessful in his defence: LJ[16].
- 3 Mr Nielsen, Mr Raftery and Mr Williams were relevantly the directors of Endeavour. Mr Nielsen, Mr Raftery and Mr Williams did not contest that ASIC was entitled to declaratory relief on the basis that the evidence led by ASIC established to the requisite standard of proof that they each had contravened s 601FD(1) of the Corporations Act as alleged: LJ[13]. I will refer to Mr Nielsen, Mr Raftery and Mr Williams collectively as the **Submitting Respondents** where it is convenient to do so.
- 4 By the time of the penalty hearing, the areas of agreement between ASIC and the respondents had significantly enlarged.

5 ASIC and each of the four respondents agreed to the form of declarations to give effect to the findings in the Liability Judgment and agreed that it was appropriate and utile to make declarations.

6 As between ASIC and the Submitting Respondents, agreement was reached in relation to the period for which each of the Submitting Respondents should be disqualified from managing corporations, the respective pecuniary penalties that should be imposed, and the appropriate costs orders that should be made against the Submitting Respondents.

7 The agreed position between ASIC and each of the Submitting Respondents may be summarised as follows:

<i>Submitting Respondent</i>	<i>Disqualification period</i>	<i>Pecuniary penalty</i>	<i>Costs</i>
Mr Nielsen	4 years	\$100,000	\$175,000 (one quarter of ASIC's pre-liability hearing costs including the first day of the liability hearing)
Mr Raftery	3 years	\$40,000	\$175,000 (one quarter of ASIC's pre-liability hearing costs including the first day of the liability hearing)
Mr Williams	4 years	\$100,000	\$175,000 (one quarter of ASIC's pre-liability hearing costs including the first day of the liability hearing)

8 ASIC and the Submitting Respondents submitted that the appropriate course was to order a single penalty, rather than separate penalties in relation to the different courses of conduct.

9 Joint written submissions were filed by ASIC and Mr Nielsen; ASIC and Mr Raftery; and ASIC and Mr Williams. Each of the Submitting Respondents deposed by affidavit to their personal circumstances, professional and educational background, financial position and remorse.

10 At the hearing on relief and penalty I was taken through the comprehensive joint written submissions of ASIC and each of the Submitting Respondents. Given the significant overlap in the relevant legislation and the contraventions found, each of the joint written submissions cover substantially the same territory in relation to the relevant legislative provisions and the applicable principles concerning: (1) the appropriateness of agreed penalties based on joint

submissions; (2) disqualification; and (3) pecuniary penalties (including with respect to the guidance afforded by way of comparison with other cases). Each of the joint submissions also includes a bespoke section setting out the relevant factors applicable to the individual respondent, including the nature and setting of the contravening conduct, the harm occasioned by the conduct, the respondent's personal circumstances and relevant history, and the level of cooperation and contrition.

11 The survey of the principles to be applied in the context of the relief and penalties sought against the Submitting Respondents is not controversial. The application of those principles to the facts of the present case does not raise any novel question. For present purposes, it suffices to emphasise that even though the relief claimed includes pecuniary penalties in specified amounts, it is highly desirable to give effect to the parties' agreement on appropriate civil remedies where the Court is sufficiently persuaded of the accuracy of the parties' agreement as to the relevant facts and their consequences, and that what is proposed, by way of relief, is *an* appropriate remedy: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [57] to [59]. The process for arriving at appropriate relief involves intuitive or instinctive synthesis of all relevant factors: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 at [6] (Allsop CJ). Accordingly, in these reasons, in relation to each of the Submitting Respondents, I will focus on the application of the established principles to the relevant circumstances of each individual in considering whether the agreed relief is *an* appropriate remedy.

12 ASIC and Mr Daly ultimately agreed on the form and content of the declaratory relief but they did not reach agreement on disqualification, penalty and costs. In relation to penalty they did agree that the appropriate course was to order a single penalty, rather than separate penalties in relation to each of the different courses of conduct.

13 They each filed extensive written submissions in advance of the penalty hearing. Mr Daly was represented by counsel at that hearing. He relied on an affidavit he had made and was cross-examined by counsel for ASIC at the penalty hearing.

14 Save for one issue, the dispute between ASIC and Mr Daly was not at the level of principle. Mr Daly expressly accepted that ASIC's submissions provided an accurate outline of the legislative provisions and applicable legal principles. During the course of the hearing, one issue of principle emerged which concerned the application of the parity principle as between

the agreed relief against the Submitting Respondents on the one hand, and the orders to be made against Mr Daly, on the other. It will be necessary to address that issue when considering the relief to be granted against Mr Daly. Apart from that issue, in these reasons, I will focus on the application of the established principles to the relevant circumstances of Mr Daly in determining what is *the* appropriate relief to be granted against him in the whole of the circumstances. In doing so, I am conscious that the appropriate remedy may sit on a continuum of appropriate remedies, there being no singular outcome which is definitively the only appropriate outcome: *Fair Work* at [57] to [58]. Again, the process is one of instinctive synthesis.

15 The competing positions of ASIC and Mr Daly may be summarised as follows:

<i>Party</i>	<i>Disqualification period</i>	<i>Pecuniary penalty</i>	<i>Costs</i>
ASIC	5 years	\$200,000	\$175,000 (one quarter of ASIC’s pre-liability hearing costs); plus the cost of the whole liability hearing from 8 March 2023 to 11 March 2023; plus one quarter of ASIC’s costs of and incidental to the penalty hearing
Mr Daly	2 years	\$40,000	\$175,000 (one quarter of ASIC’s pre-liability hearing costs); plus the cost of the liability hearing from 10 March 2023 to 11 March 2023; plus one quarter of ASIC’s costs of and incidental to the penalty hearing

16 Mr Daly accepts that he should pay one quarter of ASIC’s costs immediately prior to trial and one quarter of ASIC’s costs of the penalty hearing, but submits that he should only pay ASIC’s costs of the final two days of the five day liability hearing, being 10 and 11 March 2022. Mr Daly’s justification for this apportionment is somewhat opaque. Mr Daly submits that the transcript from the liability hearing shows that ASIC led evidence in chief against all respondents for the whole of 7 March 2022 and up until 11.22 am on 8 March 2022, the second day of the five day hearing. Mr Daly submits that this section of the hearing was necessary for ASIC to make out its case against the respondents. Even on Mr Daly’s analysis, and assuming that the Submitting Respondents ought pay a proportion of the costs for 7 March and 8 March 2022, Mr Daly does not explain why those respondents should also contribute to payment of ASIC’s costs of the third day of the hearing.

17 In light of Mr Daly’s reliance on the parity principle, I invited the parties to identify any cases which were relevant to the application of the parity principle as between the Submitting Rand Mr Daly and any cases that the parties considered to be appropriate comparators and to prepare an aide-mémoire which identifies the number of contraventions by each respective respondent. I have considered the post hearing submissions addressing these topics provided by ASIC and Mr Williams’ submissions addressing parity. No materials were received from Mr Daly, Mr Nielsen or Mr Raftery.

CONTRAVENTIONS ESTABLISHED AGAINST RESPONDENTS

18 In the Liability Judgment, I made detailed findings of the contraventions by each of the respondents in the relevant period: LJ[320], [329] to [363] (failure to exercise reasonable care and diligence: s 601FD(1)(b)); LJ[364] to [367] (failure to act in the best interests of members: s 601FD(1)(c)); LJ[368] to [377] (improper use of position: s 601FD(1)(e)); LJ[378] to [395] (failure to take reasonable steps to ensure compliance with the Corporations Act: s 601FD(1)(f)). As noted, familiarity with the Liability Judgment, including Schedules B to E of the Liability Judgment, is assumed. Each of the declarations that I will make record the respective respondent’s contraventions in detail. For present purposes, it is sufficient to note at this stage that each of the respondents have been found to have contravened s 601FD(3) and to have breached various of their obligations as officers of Endeavour and thereby contravened subsections of 601FD(1).

19 There is one slip in the Liability Judgment that the parties drew to my attention during the penalty hearing which I will correct under r 39.05 of the *Federal Court Rules 2011* (Cth). I extract LJ[362]:

362 Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because a reasonable person in their respective positions would not have approved and executed the Further Daly Loan Deed Variation and would not have executed the RIAA Loan Deed Variation and the ISARF Loan Deed.

20 That paragraph should not be expressed in a compound form in relation to Mr Nielsen and Mr Williams and should instead have distinguished between them in relation to the acts of approval and execution as follows:

362 Mr Nielsen and Mr Williams contravened s 601FD(1)(b) because a reasonable person in their respective positions would not have approved (Mr Williams) and executed (Mr Nielsen and Mr Williams) the Further Daly Loan Deed Variation and would not have executed (Mr Nielsen and Mr Williams) the RIAA Loan Deed Variation and the ISARF Loan Deed.

21 I will correct that slip. I am grateful to the parties for drawing it to my attention. The relevant declarations are expressed accordingly.

EVIDENCE

22 In support of its case on relief and penalty, ASIC relies on an affidavit of Scott Couper, sworn on 19 May 2023 and an affidavit of Jason Tracy affirmed on 19 May 2023.

23 Mr Couper is a solicitor of the firm with carriage of the proceeding for ASIC. His affidavit annexes ASIC personal name extracts for each of the respondents, copies of the banning orders imposed on each of the respondents on 19 November 2019 pursuant to s 920A of the Corporations Act, and material relevant to applications brought by Mr Williams, Mr Raftery and Mr Daly in the Administrative Appeals Tribunal (AAT) for a review of their banning orders. Mr Nielsen did not apply to the AAT for a review of the banning order imposed upon him.

24 Mr Tracy and David Orr are the liquidators of Linchpin, the trustee of the Unregistered Fund. Mr Tracy and Mr Orr are also the liquidators of Endeavour. Mr Tracy gives evidence as to the status of the recoveries and claims in the liquidations of Linchpin, Endeavour and the winding up of the Registered and Unregistered Funds. He also gives evidence as to the status of the repayment of the Daly Loans.

25 As mentioned, Mr Daly, Mr Williams, Mr Raftery and Mr Nielsen each rely on their own affidavits sworn between 18 May 2023 and 7 June 2023. Broadly, each of their affidavits cover their personal circumstances, professional and educational background, their financial position, including their current assets and liabilities, their most recent involvement in the management of corporations, their involvement in Linchpin and/or Endeavour including their involvement in the impugned conduct for which I have found them liable.

26 In their affidavits, Mr Williams, Mr Raftery and Mr Nielsen give evidence of their agreements with ASIC as to disqualification and penalty and include expressions of their acceptance of responsibility and remorse. They were not cross-examined. Mr Nielsen expressed his regret for the losses suffered by the investors. Mr Raftery stated that he is very sorry that investors have lost significant sums of money as a result of the absence of proper disclosure in the PDSs. Mr Williams states that he feels enormous shame, embarrassment and regret that investors have lost their money.

27 In his affidavit, Mr Daly gives evidence that he had a genuine belief that he was not an officer of Endeavour on the basis of the “silo” management structure of Linchpin “whereby each of the directors were responsible for the day-to-day management of their individual divisions and only met once a month in Sydney for board meetings”. Mr Daly’s evidence is that his designated “silo” was within the financial planning division of **Beacon** Financial Group Pty Limited, and that in general he “deferred to Mr Nielsen and Mr Williams in matters concerning Endeavour”. Also within his “silo” was RIAA. Mr Daly deposes that he now accepts that his “genuine belief [that he was not an officer of Endeavour] was mistaken and at odds with the findings of the Court”. Mr Daly’s affidavit contains a section addressed to his “contrition” which is the subject of some controversy. Mr Daly stated that he regretted any investors lost money through the operation of the Registered Scheme. Mr Daly was required for cross-examination on his affidavit. ASIC contends that Mr Daly’s evidence, taken as a whole, does not reflect a fulsome acceptance of responsibility and expression of remorse from which an inference of genuine insight may be drawn. I will return to Mr Daly’s evidence on this issue below.

RELEVANT LEGISLATIVE PROVISIONS

28 The relevant provisions are as follows.

Civil Penalty Provisions

29 The relevant contraventions are in respect of ss 601FD(1)(b), (c), (e), (f) and 601FD(3) of the Corporations Act. Sections 601FD(1)(b), (c), (e), (f) are not captured by the definition of “civil penalty provision” in s 1317E(1). However, s 601FD(3) relevantly provides that a person who contravenes s 601FD(1) contravenes s 601FD(3). Section 601FD(3) is a “civil penalty provision” categorised as a “corporation/scheme civil penalty provision”: s 1317DA (which was applicable during the relevant period but has subsequently been repealed and replaced by s 1317E(3) in 2019 pursuant to the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth)).

Declaratory relief

30 ASIC seeks declaratory relief in respect of the contraventions of ss 601FD(1)(b), (c), (e) and (f) and 601FD(3). In its originating process, ASIC relies on ss 21 and 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).

31 In its originating process, ASIC does not rely on s 1317E of the Corporations Act. However, in its amended statement of claim, ASIC relies on its standing under s 1317J(1) of the Corporations Act to seek, *inter alia*, declarations of contravention. The power to make declarations of contravention of civil penalty provisions is provided in s 1317E(1) of the Corporations Act. A declaration of contravention is a prerequisite to ASIC obtaining a disqualification order under s 206C and also for a pecuniary penalty order under s 1317G.

32 ASIC did not make any submissions in support of the declarations being made. It appears that ASIC relies on ss 21 and 23 of the FCA Act as the relevant power for the Court to make declarations in respect of the established contraventions of s 601FD(1)(b), (c), (e) and (f), which are not civil penalty provisions. The Court's power to make a declaration of contravention in respect of s 601FD(3), which is a civil penalty provision, is found in s 1317E(1). Subsection 1317E(1) provides that the Court must make a declaration of a contravention of a civil penalty provision if it is satisfied a person has contravened such a provision and subsection 1317E(2) provides elements which must be included in such declarations.

Disqualification orders

33 In the relevant period, s 206C of the Corporations Act provided as follows:

- (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
 - (a) a declaration is made under:
 - (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or
 - (ii) section 386-1 (civil penalty provision) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* that the person has contravened a civil penalty provision (within the meaning of that Act); and
 - (b) the Court is satisfied that the disqualification is justified.
- (2) In determining whether the disqualification is justified, the Court may have regard to:
 - (a) the person's conduct in relation to the management, business or property of any corporation; and
 - (b) any other matters that the Court considers appropriate.
- (3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

34 As mentioned above, s 601FD(3) is the relevant corporation/scheme civil penalty provision in respect of which a declaration of contravention will be made under s 1317E(1) and which satisfies the condition in s 206C(1)(a)(i).

Penalties

35 In the relevant period, s 1317G(1) of the Corporations Act provided:

- (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to \$200,000 if:
 - (a) a declaration of contravention by the person has been made under section 1317E; and
 - (aa) the contravention is of a corporation/scheme civil penalty provision; and
 - (b) the contravention:
 - (i) materially prejudices the interests of the corporation or scheme, or its members; or
 - (ii) materially prejudices the corporation's ability to pay its creditors; or
 - (iii) is serious.

36 The penalties for breach of civil penalty provisions were amended by the *Treasury Laws Amendment (Strengthening Corporation Financial Sector Penalties) Act 2019* (Cth), which commenced on 13 March 2019. Those amendments included *inter alia* the introduction of s 1317QF which *inter alia* requires the Court when making a pecuniary penalty order to consider the effect that making the order would have on the amount available to pay any associated compensation. However, the amended provisions (including the new s 1317QF) do not apply retrospectively. Those provisions apply only to conduct that occurs wholly on or after the commencement date (13 March 2019). In the present case none of the impugned conduct occurred after that date.

DECLARATORY RELIEF AGAINST ALL RESPONDENTS

Applicable principles

37 As mentioned above, the position in relation to declaratory relief is agreed between ASIC and all of the respondents, including Mr Daly. The parties did not address the principles applicable to the circumstances in which the Court will make a declaration where the parties agree to the declaration being made in a form that is agreed.

38 The applicable principles may be shortly stated insofar as the declaration is made under s 21 of the FCA Act, the Court may exercise its discretion under s 21 provided that:

- (1) the issue in respect of which the declaration is sought is not hypothetical or theoretical;
- (2) the applicant has a real interest in raising it; and
- (3) there is a proper contradictor, that is someone presently existing who has a true interest to oppose the declaration sought, noting that the fact that such a party has chosen not to oppose a grant of particular declaratory relief is not an impediment to such relief being granted by the Court: *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56; 201 FCR 378 at [14], [30] to [33] (Greenwood, Logan and Yates JJ).

39 Other factors relevant to the exercise of the discretion include:

- (1) whether the declaration will have any utility;
- (2) whether the proceeding involves a matter of public interest; and
- (3) whether the circumstances call for the marking of the Court's disapproval of the contravening conduct: *ASIC v Pegasus Leveraged Options Group Pty Ltd* [2002] NSWSC 310; 41 ACSR 561 at 571 (Davies AJ); *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd* [2014] FCA 1387; 103 ACSR 453 at [63] (Gordon J); *Australian Securities and Investments Commission v Stone Assets Management Pty Ltd* [2012] FCA 630; 205 FCR 120 at [42] (Besanko J).

40 Critically, where there is agreement between the parties in respect of proposed declarations, it remains for the Court to decide whether declaratory relief is appropriate: *Australian Securities and Investments Commission v MLC Nominees* [2020] FCA 1306; 147 ACSR 266 at [109] (Yates J).

41 Insofar as the declaration is a declaration of contravention required by s 1317E(1), it must be framed so as to comply with s 1317E(2).

42 The respondents having been found to have contravened s 601FD(3) will be the subject of declarations of contravention under s 1317E(1). I am satisfied that the declarations agreed by the parties in substance satisfy the requirements of s 1317E(2). I will make declarations substantially in the form agreed.

43 In relation to the declarations agreed between the parties in relation to the contraventions of s 601FD(1), I am satisfied as to the enumerated matters I have identified at paragraph [38] and am further satisfied that it is appropriate to exercise the discretion having regard to each of the considerations identified in [39]. Accordingly, I will make declarations substantially in the form agreed between the parties. In relation to the declarations directed to the Further Daly Loan Deed dated 5 January 2017, I note that notwithstanding that there was no executed version of the Further Daly Loan Deed in evidence (see the findings in relation to the timing of the execution of this document: LJ[186] to [186]), that each of Mr Daly, Mr Nielsen and Mr Williams have agreed to the making of a declaration in respect of the Further Daly Loan Deed that is based on an admission that the document was in fact executed by each of them and the relevant funds were advanced to Mr Daly. In addition, the execution of the Further Daly Loan Deed was admitted by each of them on the pleadings. In these circumstances, I am satisfied that it is appropriate to make declarations of contravention related to the Further Daly Loan Deed substantially in the form that has been agreed by the relevant parties.

REMAINING RELIEF SOUGHT AGAINST THE SUBMITTING RESPONDENTS

44 As noted at paragraph [6] above, ASIC and the Submitting Respondents have reached agreement in relation to the term of disqualification and the amount of the pecuniary penalty for each Submitting Respondent. My task is to determine whether the agreement reached represents an appropriate remedy against each of the Submitting Respondents in all of the circumstances.

Considerations common to all the Submitting Respondents

45 Before turning to the particular circumstances of each of the Submitting Respondents, I will address considerations that are of relevance to all of the Submitting Respondents.

46 *First*, Chapter 5C of the Corporations Act contains a comprehensive statutory regime for the regulation of managed investment schemes and the responsible entities and persons who operate them. The statutory regime is directed to the protection of members who invest in managed investment schemes and also for those that may potentially invest. The detailed and highly prescriptive requirements of the Corporations Act must be reflected in the contents of the constitution and compliance plan pursuant to which the scheme is operated and must be implemented under the purview of a compliance committee. Managed investment schemes involve the holding of assets on trust for the members of the scheme. Responsible entities effectively act as professional trustees in operating the scheme. The statutory regime relies on

officers of responsible entities complying with the duties provided for by s 601FD(1) of the Corporations Act. The seriousness of the obligations imposed by s 601FD(1) is reflected in the statutory regime by rendering any breach of those obligations a breach of s 601FD(3) of the Corporations Act, which is a civil penalty provision. The gravity of the contravening conduct in issue here is obvious.

47 *Secondly*, the penalties imposed must reflect the need for general and specific deterrence. The focus must be on the promotion of the public interest in compliance with the relevant statutory norms by specific and general deterrence. The “proportionality” which falls for consideration is the need to strike a reasonable balance between deterrence and oppressive severity.

48 *Thirdly*, each of the Submitting Respondents will be the subject of a relevant declaration of contraventions of a civil penalty section which is a condition that must be met before the Court may make a disqualification order or a pecuniary penalty order.

49 *Fourthly*, in considering whether the agreed relief is an appropriate remedy against each of the Submitting Respondents, I take into account that ASIC supports the agreed outcomes for each of the Submitting Respondents. Given ASIC’s specific function in regulating the financial services industry, I would expect that it is in a position to have assessed on an informed basis whether in its view the level of penalty is commensurate with that necessary to achieve compliance with the relevant statutory obligations: *Fair Work* at [60].

50 *Fifthly*, although each of the Submitting Respondents showed some contrition by not contesting liability, they did not do so until shortly before the final hearing of the proceeding. In these circumstances, taking into account their respective breaches of the obligation to exercise due care and the need to protect the public it is appropriate that they each be disqualified from managing corporations for a defined future period.

51 *Sixthly*, the Submitting Respondents’ belated agreement not to contest liability saved public resources in that ASIC was saved some expense of proceeding against them, the need to call witnesses was reduced and the Court’s time in hearing and determining liability was also reduced. The Submitting Respondents’ conduct in this regard reduces the level of the specific deterrence required.

52 *Seventhly*, and relatedly, the agreement reached between ASIC and each of the Submitting Respondents in relation to relief has also saved public resources and also reduces the level of specific deterrence required.

53 *Eighthly*, where, as here, there is agreement between the parties as to the relief, provided the Court is satisfied that the relief is an appropriate remedy, the Court will be slow to refuse to give effect to the terms of a settlement reached by consent.

54 *Ninthly*, the investors in the Registered Scheme have suffered significant harm. They are unlikely to recoup their investments in whole or in part. There are debts to the investors of about \$16 million and the total amount expected to be recovered is \$113,000.

55 *Finally*, I have considered the comparative cases to which I was referred by ASIC and the Submitting Respondents. I note the limitations of that exercise, as was acknowledged by ASIC. The authorities make plain that it is the consistent application of principle that is relevant to the assessment of penalty, rather than the range of penalties given in disparate circumstances that cannot be said to be analogous: *Flight Centre Limited v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; 260 FCR 68 (Allsop CJ, Davies and Wigney JJ) at [63]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [60] (Keane CJ, Finn and Gilmour JJ); *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285 at 295 (Burchett and Kiefel JJ, with whom Carr J agreed).

56 I now turn to consider the particular circumstances of each of the Submitting Respondents.

Mr Nielsen

57 Mr Nielsen was a director of Endeavour during the period 1 April 2015 to 7 August 2018. Along with Mr Williams, he acted as joint chief executive officer and managing director of Endeavour during the whole of that period. Mr Nielsen was a member of the Investment Committee from at least around 1 April 2015 until around December 2016. It is the conduct of the Investment Committee that was at the heart of the contravening conduct.

58 In the Liability Judgment at paragraphs [353], [355], [356], [358], [360] and [362], I found that Mr Nielsen contravened s 601FD(1)(b), (c), (f) and 601FD(3) of the Corporations Act on multiple occasions by his conduct, which may broadly be grouped as three courses of conduct:

- (1) the failure to ensure that loans to related entities and financial advisors were entered into in accordance with Endeavours compliance plan and policies on the basis of adequate security (the **related entities conduct**);
- (2) the misuse of investor funds by the provision of personal loans to Mr Raftery and Mr Daly, which while an aspect of the conduct described in (a), facilitated an additional

improper use of investor funds by Mr Raftery and Mr Daly contrary to s 601FD(1)(e) of the Corporations Act (the **personal loans conduct**); and

- (3) the failure to ensure proper disclosure in the PDSs that were issued to the investors (the **failure to disclose conduct**).

59 ASIC and Mr Nielsen jointly submit that there is no evidence that Mr Nielsen acted dishonestly and that ASIC made no such allegation.

60 The conduct in which Mr Nielsen engaged resulted in serious contraventions of ss 601FD(1)(b), (c), (f) and 601FD(3) the Corporations Act.

61 Mr Nielsen disregarded the PDSs, Endeavour's lending policy and compliance plan. He did not comply with his obligations as an officer of Endeavour. By his role on the Investment Committee he applied investors' funds, held on trust by Endeavour, as he saw fit. To be more specific, he applied investors' funds in a manner that was not consistent with the foundational scheme documents. Mr Nielsen created false entries in the conflicts of interest register to the effect where that the Registered Scheme had lent funds to entities in the Linchpin Group those loans had been "[d]isclosed in PDS together with legal sign off". That statement was not true. The fact of the loans, and their nature and extent, was not disclosed in the PDSs. ASIC did not allege that this was dishonest and Mr Nielsen was not called. It is clear that Mr Nielsen's conduct constituted a significant departure from the conduct and care expected of an officer of a responsible entity in his position.

62 Mr Nielsen is 57 years of age. He has not been the subject of any previous regulatory action or complaint aside from that which has resulted from his present relevant conduct. He is not currently acting as a director. His evidence is that he is not working in the financial industry.

63 On 19 November 2019, Mr Nielsen was banned by an ASIC delegate from providing financial services for five years, pursuant to s 920A of the Corporations Act. Mr Nielsen accepted the banning order and did not seek to review it. The banning order affords the public some protection but it does not detract from the need to protect the public by disqualifying Mr Nielsen from managing corporations. In the present circumstances, I am satisfied that notwithstanding the banning orders made against Mr Nielsen, a disqualification order is also justified.

64 There is no evidence that Mr Nielsen received any personal or financial gain from his contravening conduct.

65 Mr Nielsen's evidence is that he resigned as a director from Endeavour and Linchpin on 11 March 2019 and that he has not worked in the financial services industry since that time. He remained an officer of a dormant family company until he resigned as a director on 15 January 2019 and as the secretary on 15 February 2022.

66 Mr Nielsen's unchallenged evidence was that he has no present intention of being involved in the future in the financial services industry, managed investment schemes or otherwise in managing a corporation.

67 Mr Nielsen is currently unemployed and has not earned any income of substance for the past four years. His only significant asset is the balance of his superannuation fund. He has substantial credit card debts.

68 Although relatively late in the proceeding, Mr Nielsen ultimately accepted responsibility for his actions by not contesting liability. He has expressed remorse for his actions. His conduct has been publicly denounced and as noted the community has been given some measure of protection through the banning order. A significant period of time has elapsed since the contravening conduct and there is no evidence of further contraventions. Mr Nielsen is now of limited financial means. In the joint submission, ASIC acknowledges that it does not have any evidence that Mr Nielsen is not a person of good character.

69 Taking into account the conduct of Mr Williams, to which I will come, it is appropriate there be parity between the penalties imposed on Mr Nielsen and Mr Williams. I will address why that is so when I consider the relief against Mr Williams.

70 Taking into account all of these matters, I am satisfied that the relief agreed between ASIC and Mr Nielsen represents an appropriate remedy in all of the circumstances. I am further satisfied that the period of disqualification which has been agreed is justified. Accordingly, I will make orders that Mr Nielsen is to be disqualified from managing corporations for a period of four years, and that he pay to the Commonwealth a pecuniary penalty in the sum of \$100,000.

71 The parties have agreed that Mr Nielsen is to pay ASIC's costs, agreed in the sum of \$175,000. I will make an order to that effect. ASIC did not seek an order that Mr Nielsen pay a contribution towards its costs of the penalty hearing.

Mr Williams

72 Mr Williams was a director of Endeavour during the period 1 April 2015 to 7 August 2018. Along with Mr Nielsen he acted as joint chief executive officer and managing director of Endeavour during the whole of that period. Mr Williams was a member of the Investment Committee from at least around 1 April 2015 until around 7 August 2018.

73 In the Liability Judgment at paragraphs [353], [355], [356], [358], [360] and [362], I found that Mr Williams engaged in multiple contraventions of s 601FD(1)(b), (c), (f) and 601FD(3) of the Corporations Act on multiple occasions by his conduct, which may broadly be grouped in the same way as in respect of Mr Nielson, namely the related entities conduct, the personal loans conduct and the failure to disclose conduct. I note that Mr Williams and ASIC adopted slightly different ways of characterising the courses of conduct but that notwithstanding this, they agreed on the appropriate relief and agreed that Mr Williams should face a single pecuniary penalty referable to three distinct courses of conduct.

74 The conduct engaged in by Mr Williams was serious. Although not identical in every respect, it was co-extensive with that of Mr Nielsen. He too disregarded the PDSs, Endeavour's lending policy and compliance plan. He did not comply with his obligations as an officer of Endeavour. In his role on the Investment Committee, he applied investors' funds, held on trust by Endeavour, as he saw fit. As with Mr Nielsen, based on the evidence, in his role on the Investment Committee he approved investors' funds being applied in a manner that was not consistent with the foundational scheme documents. Mr Williams' conduct constituted a significant departure from the conduct expected of an officer in his position.

75 There was no evidence that Mr Williams acted dishonestly.

76 Mr Williams is 64 years of age. He is the sole carer for his wife who has a serious medical condition. Mr Williams and his wife receive income from his superannuation, a government carer's allowance and his wife's wages from part-time work. He is of modest means. He has been unable to find alternate gainful employment following his contravening conduct coming to light. He was forced to refinance his family home to secure a debt to Linchpin in respect of which he had provided a personal guarantee and mortgage as security.

77 Mr Williams volunteers his time with the Muscular Dystrophy Association of New South Wales and St James' Church in King Street, Sydney. He relied on a number of character references.

78 The joint submissions note that he is a respondent to a class action brought on behalf of investors in the Registered Scheme and the Unregistered Scheme for which Linchpin was responsible. He gives evidence that the class action has settled subject to Court approval.

79 While Mr Williams was at the time of the penalty hearing currently, or in the case of some companies was until recently, a director of certain companies that formed part of the Linchpin Capital Group, his evidence is that he has not been involved in the management of those companies for some time.

80 Mr Williams is currently a director of Endeavour, Linchpin and Beacon, each of which is under external administration, and Grove Financial Services Pty Limited and Grove Portfolio Services Pty Ltd.

81 Mr Williams also ceased being a director and company secretary of CPG as recently as 14 March 2023 and RIAA as recently as 7 April 2023.

82 On 19 November 2019, Mr Williams was banned by an ASIC delegate from providing financial services for five years, pursuant to s 920A of the Corporations Act. Mr Williams applied to the AAT to review the banning order, but subsequently withdrew that application.

83 Mr Williams has expressed remorse and regret that investors lost their investments in the Registered and Unregistered Schemes.

84 There is no evidence that Mr Williams received any personal or financial benefit from his contravening conduct.

85 Mr Williams has accepted responsibility for his actions by not contesting liability, albeit that occurred only shortly before the liability hearing. He has expressed remorse for his actions. His conduct has been publicly denounced and the community has been given some measure of protection through the banning order. As with Mr Nielsen, notwithstanding that Mr Williams has been subjected to a banning order, a disqualification order is also warranted in his case to protect the public.

86 ASIC and Mr Williams submit that Mr Williams had a long and previously unblemished career in the financial services industry before becoming involved with Linchpin and Endeavour. He deposed to that effect. He was not challenged on that evidence.

87 Mr Williams unchallenged evidence is that he does not presently intend to seek employment in the financial services industry or to manage a corporation in the future. ASIC and

Mr Williams jointly submit that he is unlikely in any event to ever manage a corporation in the future, given his age, personal circumstances and the very low prospect he would be able to find such a position due to the damage to his reputation.

88 Mr Williams is now of limited financial means.

89 I now turn to consider parity between Mr Williams and Mr Nielsen. Together they were the joint chief executive officer and managing director of Endeavour. Their contravening conduct is largely co-extensive in scale and seriousness. There are some points of distinction between them. They include the following, without being exhaustive. Mr Williams did not engage in the conduct addressed in the Liability Judgment at paragraph [318], namely entering false entries into the conflicts of interest register, whereas Mr Nielsen did. Mr Williams held some directorships until recently whereas Mr Nielsen did not. Mr Williams initially challenged his banning order whereas Mr Nielsen did not. These differences point in different directions. Having considered them, I do not regard them as warranting a departure from the position that there should be parity between Mr Williams and Mr Nielsen in relation to the relief ordered against them.

90 Taking into account all these matters I am satisfied that the relief agreed by ASIC and Mr Williams is an appropriate remedy in all of the circumstances. I am also satisfied that the period of disqualification is justified. Accordingly, I will order that Mr Williams be disqualified from managing corporations for a period of four years, and that he pay to the Commonwealth a pecuniary penalty in the sum of \$100,000.

91 The parties have agreed that Mr Williams is to pay ASIC's costs, agreed in the sum of \$175,000. I will make an order to that effect. ASIC did not seek an order that Mr Nielsen pay a contribution towards its costs of the penalty hearing.

Mr Raftery

92 Mr Raftery was a director of Endeavour during the period 1 April 2015 to 7 August 2018. Mr Raftery was a member of the Investment Committee from at least about January 2017. As mentioned, the Investment Committee's function was pivotal.

93 In the Liability Judgment at paragraphs [359], [363], [367], [375], [377], [392], [395] and [396], I found that Mr Raftery contravened ss 601FD(1)(b), (c), (e), (f) and 601FD(3) of the Corporations Act. His contravening conduct included the related entities conduct and the failure to disclose conduct which I have described in relation to Mr Nielsen and Mr Williams.

His part in the personal loans conduct had the additional element of improperly using his position as an officer of Endeavour to cause an advantage to himself and a detriment to members of the Registered Scheme by applying for, and obtaining in about April 2016, the Raftery Loan and a further advance from Linchpin in about December 2016.

94 The conduct engaged in by Mr Raftery was serious.

95 As with Mr Nielsen and Mr Williams, he disregarded the PDSs, Endeavour's lending policy and compliance plan. He did not comply with his obligations as an officer of Endeavour. In his role on the Investment Committee, he applied investors' funds, which were held on trust by Endeavour, as he saw fit. Again, I understand that description to be used by ASIC to mean that he applied funds in a way that was not consistent with the foundational scheme documents. Mr Raftery approved substantial loans to financial advisors and approved each PDS that failed to disclose matters required by the Corporations Act. Unlike Mr Nielsen and Mr Williams, Mr Raftery was not a person primarily responsible for the conduct of the Registered Scheme. However, his conduct includes inappropriately using his position as an officer of Endeavour to cause an advantage to himself and a detriment to the members of the Registered Scheme by obtaining a loan of \$70,000 from investors' funds that had been invested in the Registered Scheme. Mr Raftery's conduct constituted a significant departure from the conduct and care expected of an officer in his position.

96 There is no evidence that Mr Raftery acted dishonestly.

97 Mr Raftery is 64 years of age.

98 He is currently a director of Endeavour and Linchpin, each of which is under external administration. He was a director of Projects RH Pty Ltd and SIVIV Australia Pty Ltd until May 2023. An ASIC name search extracted on 19 May 2023 records that at that time he was a director of The Haigslea Innovation Foundation (Australia) Pty Ltd, although his evidence is that he has resigned as director.

99 On 19 November 2019, Mr Raftery was banned by an ASIC delegate from providing financial services for five years, pursuant to s 920A of the Corporations Act. Mr Raftery applied to the AAT to review the banning order, but subsequently withdrew that application. As with Mr Nielsen and Mr Williams, I do not regard the existence of the banning order as detracting from the appropriateness of making a disqualification order. In my view, such an order is justified.

100 Mr Raftery has accepted responsibility for his actions by not contesting liability. ASIC does not have any evidence that Mr Raftery has contravened his banning order. ASIC does not have any evidence that Mr Raftery has previously contravened any Australian corporations law. Further, he has repaid with interest the loan that he improperly obtained. He did that relatively early compared to Mr Daly. He has expressed remorse for his actions. His conduct has been publicly denounced and as noted the community has been given some measure of protection through the banning order. A significant period of time has elapsed since the contravening conduct and there is no evidence of further contraventions.

101 There are good reasons to impose lesser penalties on Mr Raftery than on Mr Nielsen and Mr Williams by reason of his more limited role in the contraventions.

102 Taking into account all of these matters, I am satisfied that the relief agreed by ASIC and Mr Raftery is an appropriate remedy. I am satisfied that the period of disqualification is justified. Accordingly, I will make orders that Mr Raftery be disqualified from managing corporations for a period of three years and that he pay to the Commonwealth a pecuniary penalty in the sum of \$40,000.

103 The parties have agreed that Mr Raftery is to pay ASIC's costs, agreed in the sum of \$175,000. I will make an order to that effect. ASIC did not seek an order that Mr Nielsen pay a contribution towards its costs of the penalty hearing.

RELIEF SOUGHT AGAINST MR DALY

104 I now turn to considering the appropriate relief to be awarded against Mr Daly, noting that immediately before the penalty hearing, ASIC and Mr Daly agreed the terms of the declaratory relief that should be made against him, subject to the Court's approval.

105 The dispute as to the balance of the relief against Mr Daly is summarised at [15] above.

ASIC's position in relation to Mr Daly

106 ASIC submitted that Mr Daly should be disqualified from managing corporations for a period of five years and pay a pecuniary penalty in the sum of \$200,000.

107 ASIC submitted in respect of Mr Daly's contravening conduct that:

- (1) he was a member of the Investment Committee from about 10 February 2014 and at all relevant times thereafter;

- (2) he was an officer of Endeavour during the whole of the period 1 April 2015 to 7 August 2018;
- (3) as found at LJ[251], he was centrally involved in a substantial and discrete part of the management of Endeavour in that he was a member of the Investment Committee which was the decision-making body that approved the way in which the funds raised in the Registered Scheme were passed to the Unregistered Scheme and thereafter approved loans utilising those funds;
- (4) he contravened s 601FD of the Corporations Act multiple times (as found in the Liability Judgment at paragraphs [353], [354], [356], [357], [360], [361], [367], [374], [376], [388], [390], [393], and [394]);
- (5) his contravening conduct broadly comprised two courses of conduct, namely:
 - (a) the failure to ensure that loans to financial advisors were entered into in accordance with Endeavour’s compliance plan and policies and on the basis of adequate security; and
 - (b) the misuse of investor funds by the provision of personal loans to Mr Raftery and the receipt by himself of personal loans at a time when he was in financial difficulty;
- (6) his conduct was serious in that he disregarded the PDSs, Endeavour’s lending policy and compliance plan and his responsibilities as an officer of Endeavour, and used investor monies, held on trust by Endeavour, “as he saw fit”.
- (7) his conduct has the additional feature in that he improperly used his position as an officer of Endeavour to cause an advantage to himself and a detriment to members of the Registered Scheme by applying for, and obtaining unsecured personal loans, over a period when he was experiencing financial difficulty, and in respect of which one of the loan deeds was backdated after ASIC commenced its investigation;
- (8) by his contravening conduct, investors in the Registered Scheme have suffered significant harm — as noted, the total amount of recoveries from the Registered Scheme is approximately \$113,000 whereas the debt to investors, who are the most significant creditors of the Registered Scheme, is in excess of \$16 million.

108 In relation to Mr Daly's personal circumstances, ASIC submits *inter alia* that:

- (1) he is currently a director of six companies — ALT Corporate Pty Ltd, Austland Management Pty Ltd, Austland Services Pty Ltd, Strathfieldsaye Estate Ltd, Courtal Pty Ltd (and company secretary) and Dalco Holdings Pty Ltd;
- (2) he ceased to be a director of RIAA as recently as 7 April 2023;
- (3) on 19 November 2019, pursuant to s 920A of the Corporations Act, an ASIC delegate banned Mr Daly from providing financial services for a period of five years, to 18 November 2024. He maintained his challenge in the AAT to his banning order between November 2019 and May 2022 (only withdrawing that challenge after the liability hearing in the present proceeding). ASIC submits that this is indicative of a lack of contrition;
- (4) he has not shown contrition for his contravening conduct;
- (5) he has not co-operated with ASIC and has caused significant additional public resources to be expended as a result;
- (6) he resisted findings of fact in relation to the operation of the Investment Committee that ASIC submits he must have known to be true, ASIC contends this too is indicative of a lack of contrition;
- (7) he made allegations of procedural unfairness that were not substantiated and which ASIC contends reflect his lack of contrition;
- (8) he actively resisted liability on a number of grounds which were rejected by the Court. Mr Daly's steadfast adherence to his position that he was not centrally involved in a substantial and discrete part of the management of Endeavour demonstrates a lack of proper insight and is a matter that bears significantly upon the need for public protection;
- (9) in the absence of any evidence of contrition, there can be no confidence that Mr Daly will be able to manage corporations with the requisite degree of care in the future; and
- (10) unlike Mr Raftery, who promptly repaid his personal loans, Mr Daly did not finally repay his personal loan until February 2023, by which time Linchpin by its liquidators had obtained default judgment and served a bankruptcy notice against him.

Mr Daly's position

109 Mr Daly submitted that the Court should order that he be disqualified from managing corporations for a period of two years and pay a pecuniary penalty of \$40,000.

110 He accepted that he has been found to have been an officer of Endeavour and to have contravened the relevant sections of the Corporations Act. He maintained, however, that his role was “more limited than that of the directors”, and that he had genuinely and honestly believed he was not an officer of Endeavour.

111 In seeking to demonstrate that his role was more limited than that of the directors, Mr Daly submits that:

Whilst accepting the Court's finding as to Mr Daly's involvement in the management of Endeavour, it remains the fact that his role was more limited than that of the directors. In particular, Mr Nielsen and Mr Williams acted as the joint chief executive officers and managing directors of Endeavour for the whole of the relevant period, with far greater responsibilities for the overall management of Endeavour than Mr Daly. Unlike the directors, Mr Daly did not attend board meetings, was not a member of the Compliance Committee and was otherwise not responsible for the management of Endeavour.

(Footnotes omitted)

112 I interpolate to note that contrary to his submission Mr Daly does not have the benefit of a finding that he did not attend board meetings: cf LJ[238-239].

113 Mr Daly submits that “[d]espite the declarations, it is important to note that there was no finding (or allegation) the Mr Daly acted dishonestly.”

114 In relation to the gravity of his conduct, Mr Daly accepts that, on the basis of the findings made against him that his conduct as a member of the Investment Committee led to contraventions of the Corporations Act that were serious but he takes issue with ASIC's submission that he used investors' monies “as he saw fit”. He says that there was no finding against him to that effect. He also submits that although he benefitted from the Daly Loans, he has since repaid those loans such that no investors have suffered loss from the Daly Loans.

115 In terms of harm to investors, Mr Daly submits that he believes that there will be at least some degree of recovery by investors as a result of the settlement of a related class action. At the time of the penalty hearing, the settlement was confidential and subject to Court approval.

116 Mr Daly makes the following submissions as to his personal circumstances:

(1) he is a 64 year old married man with two adult children;

- (2) his wife is 63 years old, she is very ill, unable to work and Mr Daly is her personal carer;
- (3) he is the director of six companies, four of which are not-for-profit companies related to a charitable organisation known as the Australian Landscape Trust. He understands and accepts that, upon a disqualification order being made, his directorships will cease, and that he must not be involved in the management of any corporation;
- (4) he has not previously been involved in, or the subject of, any regulatory or other complaints by ASIC prior to this proceeding, other than the financial services banning order made on the facts of this proceeding;
- (5) he has never been involved in any criminal proceedings or offences involving dishonesty; and
- (6) he has never declared bankruptcy or made use of bankruptcy laws.

117 Mr Daly makes the following submissions in relation to his financial position and the impact that a pecuniary penalty order and disqualification will have on him:

- (1) he is in a significantly distressed financial position;
- (2) the imposition of a pecuniary penalty will cause him severe financial hardship;
- (3) he does not see a way of paying the penalty sought by ASIC;
- (4) his liabilities exceed his assets by \$129,311.89;
- (5) his monthly expenses exceed his income;
- (6) his wife is unable to work and they are solely reliant on his income; and
- (7) he does not expect that he will continue to be employed on a long-term basis.

118 In relation to his co-operation with ASIC and his contrition, Mr Daly submits that:

- (1) he participated in a compulsory interview with ASIC (his evidence that in his view he had provided fulsome and truthful answers to ASIC's enquiries was rejected);
- (2) he held a genuine belief that he was not an officer of Endeavour, which he now accepts was mistaken;
- (3) he now accepts that he is liable to a period of disqualification from being involved in the management of corporations and also a pecuniary penalty;
- (4) he deposes that he deeply regrets that any investors lost money through the operation of the Registered Scheme;

- (5) apart from having the benefit of the Daly Loans, which he repaid in full, he did not personally gain anything from the Registered Scheme;
- (6) he did not defend the proceeding brought by Linchpin to recover the Daly Loans and was only able to obtain financing to repay the Loans in February 2023; and
- (7) he acknowledges and accepts that upon the Court imposing a disqualification order upon him, he will automatically cease to be a director of the companies of which he is currently a director and for the duration of the disqualification order, will be precluded from being involved in the management of any corporation in any capacity.

119 Mr Daly makes the following submissions in relation to considerations of parity as between him and the other respondents. He contends that had he adopted the same approach as the other respondents, his disqualification and penalty would have been less than that of Mr Raftery, on the basis that Mr Raftery was a director of Endeavour at all relevant times with greater responsibilities than him. Further, had agreement been reached with ASIC, the agreed relief against him would have been substantially less than that agreed between ASIC and Mr Nielsen and Mr Williams. He submits that the disqualification and penalty sought against him by ASIC offends the parity principle. He submits that other things being equal, there must be a persuasive rationale for any difference in the disqualification periods for each of the respondents. He submits that the factors relied upon by ASIC do not support a longer period of disqualification for Mr Daly than for the other respondents.

Consideration

120 Mr Daly was called as a witness and cross-examined on his affidavit in the penalty hearing. In his evidence, Mr Daly evinced a propensity to blame others and not to accept responsibility for his own actions. His evidence in cross-examination was in many respects contrary to contemporaneous documents of which he was aware and or involved in. In his affidavit, he asserted that he would not have promoted the fund to financial advisors in the Beacon Companies, many of whom were his personal friends, if he suspected that there were “any discrepancies in the way that the fund was being operated”. Yet he was taken to documents that showed he was actively promoting the Registered Scheme as a means of addressing cashflow concerns he had at the time with respect to the Beacon Companies. While he expressed remorse that investors had lost money, he did not express contrition for his part in that outcome. Yet throughout the relevant period he was a member of the Investment Committee which was responsible for operating the Registered Scheme in a way that was

contrary to the terms of the PDSs, which PDSs he himself used to promote investment in the Registered Scheme. He must have known at the relevant time that the loans approved by the Investment Committee, of which he was a member, were inconsistent with the terms of the PDSs.

121 Further, at the liability hearing, he submitted that he was a member of the Investment Committee of the Unregistered Scheme only and not a member of the Investment Committee for the Registered Scheme. The evidence was overwhelming that there was relevantly a single Investment Committee that operated the Unregistered Scheme and the Registered Scheme and of which Mr Daly was a member. He signed the 1 April 2015 circular resolution recording the decision that the Registered Scheme would invest in the Unregistered Scheme and thereafter as a member of that same committee approved many of the loans which comprised a crucial part of the contravening conduct. He was one of the architects of the strategy that was at the heart of the contravening conduct. His contention that he was a member of an Investment Committee that functioned only in relation to the Unregistered Scheme after 1 April 2015 was implausible. It relied on seeking to leverage off the same name being used in respect of both the Registered Scheme and the Unregistered Scheme.

122 Mr Daly's expressions of remorse were limited in that he focussed on the outcome that investors lost money but did not apologise for the fact that he had done the wrong thing. The central expression of Mr Daly's contrition was as follows:

15. I accept that, on the strength of those findings [in the Liability Judgment] the Court is able to impose a period of disqualification from managing corporations and a pecuniary penalty.
16. I deeply regret that any investors lost money through the operation of the Registered Scheme.

Later in his affidavit, Mr Daly deposes that he is "mortified and deeply regrets that investors lost monies...".

123 Notably missing from his affidavit is an acknowledgment or acceptance that it was Mr Daly's own conduct which contributed to the investors losing money. His regret is limited to the outcome of his conduct, and does not extend to an express acceptance that it was his conduct which led to that outcome. That is not a mere technical distinction. Rather, when coupled with the whole of his approach to the litigation and his continuing attempts to minimise his role, it reflects that Mr Daly lacks insight into the fact that the losses were caused by his contravening

conduct. That circumstance weighs heavily in favour of the need for specific deterrence in his case.

124 Mr Daly’s limited expression of remorse is consistent with his evidence as to the basis for his genuine belief that he was not an officer of Endeavour and not responsible for its operation. Mr Daly’s evidence is that Linchpin operated in a “silo” management structure, which he considered to be “a critical aspect of the management structure of Linchpin overall”. Mr Daly’s evidence is that the Submitting Respondents “were appointed as directors of Endeavour due to their experience in managing investment schemes” and that he “generally deferred to Mr Nielsen and Mr Williams in matters concerning Endeavour” because of their joint roles as chief executive officers and managing directors. The effect of Mr Daly’s evidence as to the structure of Linchpin’s management is to minimise any responsibility for his conduct and instead to shift the blame on to the other respondents. Mr Daly has not frankly accepted and acknowledged the part he played as a member of the Investment Committee throughout the whole of the relevant period. I reject Mr Daly’s oral submissions to the contrary. Mr Daly’s counsel submitted that Mr Daly’s acceptance of the Court’s ability to impose a period of disqualification from managing corporations and pecuniary penalties is an acceptance that his standard fell below the statutory standard to be expected of company officers. I reject that submission. The acceptance of an objective legal reality — that as a consequence of finding that Mr Daly is liable for contravening s 601FD the Corporations Act, the Court is empowered to impose penalties upon him — is quite different to accepting that one’s own conduct fell below the standard that is to be expected.

125 The conduct engaged in by Mr Daly was serious. He was an officer of Endeavour through his membership of the Investment Committee which was responsible for approving how the funds raised in the Registered Scheme were passed to the Unregistered Scheme and for the approval of many of the loans using those funds. He disregarded the PDSs, Endeavour’s lending policy and compliance plan and applied investor funds in a way that was not consistent with the scheme’s foundational documents. That is what is critical, not whether his conduct is properly characterised by ASIC’s appeal to the phrase used in *Trilogy Funds Management Pty Ltd v Sullivan (No 2)* [2015] FCA 1452; 331 ALR 185 at [902] (Wigney J). In addition, Mr Daly improperly used his position as an officer of Endeavour to obtain a personal benefit by applying for and receiving unsecured personal loans, to the detriment of the investors in the Registered Scheme. That he did so when he was in financial difficulty highlights his position of conflict and the self-interest that drove his conduct.

126 Mr Daly continues to be the director of four corporations related to a charitable organisation. Mr Daly understands that a disqualification order will mean that he must not be involved in the management of those corporations. He ceased to be a director of RIAA recently, on 7 April 2023. Mr Daly had not previously been the subject of regulatory action and has no prior criminal convictions.

127 On 19 November 2019, Mr Daly was banned by an ASIC delegate from providing financial services for a period of five years, pursuant to s 920A of the Corporations Act. He applied to the AAT to have the banning order reviewed. He only withdrew the application after the liability hearing in this proceeding.

128 Mr Daly did not repay the loans improperly made to him until February 2023, by which time the liquidators of Linchpin had obtained default judgment against him and served a bankruptcy notice on him. He did not defend the recovery proceedings against him, but says he used the time to raise the funds to repay the debt. Mr Daly led no evidence to suggest that he had taken steps to keep the liquidators informed of his attempts to raise funds to repay the Daly Loans and it appears that it was not until he was under threat of bankruptcy action that he marshalled funds to repay the loans.

129 Mr Daly is 64 years of age. His wife is 63 years of age and is too ill to work.

130 He deposed that he was in financial distress and that the imposition of a pecuniary penalty would cause him significant financial hardship. His liabilities exceed his assets, and his monthly expenses exceed his income. He does not expect to be employed on a long-term basis.

131 There is a risk that through his lack of insight and his lack of acceptance of responsibility for his actions that Mr Daly may engage in further contraventions in the future. The relief imposed must protect the community from such conduct. The community has received some level of protection from the imposition of the banning order, but that does not protect the public from the risks attendant on Mr Daly continuing to be involved in the management of corporations. Mr Daly's lack of insight into his own responsibility for the loss occasioned by conduct for which he shared responsibility warrants a longer period of disqualification than for the other respondents. The Submitting Respondents have accepted responsibility and shown insight into their conduct. That of itself suggests that there is a lesser need to protect the public from the risk of the Submitting Respondents engaging in similar conduct in the future.

132 I have considered the issue of parity. The parity principle derives from criminal sentencing, it requires that like cases to be treated alike, and different cases to be treated differently: *Green v The Queen* [2011] HCA 49; 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ). To apply the parity principle in the present context is not necessarily straightforward because notwithstanding the substantial overlap in the courses of conduct that comprise the contravening conduct, the starting point between the Submitting Respondents and Mr Daly is not the same.

133 The starting point for the Submitting Respondents is that for the reasons given, I am satisfied that the relief agreed between ASIC and the Submitting Respondents is *an* appropriate remedy, in all the circumstances pertaining to each of the Submitting Respondents. Those circumstances are not limited to the circumstances that pertain to the three courses of conduct that comprised the contraventions but extend to include the circumstances attending their conduct in the proceeding and their acceptance and insight into their culpability. The Submitting Respondents have negotiated an outcome with the regulator that reflects the value that the regulator places on the co-operation of those respondents, their acceptance of liability and the saving of public resources. Finally, in assessing whether the relief is *an* appropriate remedy, I have also factored in each of the Submitting Respondent's personal circumstances which are unique to each of them even though there are some common features with their personal circumstances and those of Mr Daly.

134 The starting point for Mr Daly is that he did not settle with ASIC. In his case, I must come to a decision applying the established principles in relation to civil penalties based on instinctive synthesis to arrive at the appropriate penalty, accepting that there may be a range within which the appropriate penalty falls. His conduct comprises two distinct courses of conduct, one of which involved him preferring his own personal interest above those of investors in the Registered Scheme in circumstances where he was an officer of the responsible entity. He contested liability. While he is not to be punished for that, he is not entitled to receive the benefit that the Submitting Respondents receive attendant on their having reached agreement with ASIC. I do not accept the underlying premise for Mr Daly's submissions by which he hypothesises as to the agreed outcome he may have achieved with ASIC relative to what ASIC agreed with the other respondents. The fact is that he did not reach any such agreement. His appeal to the parity principle by reference to a hypothetical settlement is misplaced.

135 I have not overlooked that during the course of the penalty hearing, Mr Daly agreed to the form of the declaration to be made against him. I do not regard his agreement to the form of the declaration as being a matter that should be given other than minor weight. Once he was found to have contravened s 601ED(3), the making of a declaration against him was required under s 1317(1) of the Corporations Act.

136 That Mr Daly did not accept his culpability by agreeing before the liability hearing that he was liable for the contraventions alleged against him reflects another factor in considering what is the appropriate penalty in his case. It is consistent with the fact that even after he has been found to have contravened s 601FD of the Corporations Act, that Mr Daly has only superficially accepted responsibility for his actions. He lacks real insight into his conduct and in substance has demonstrated limited remorse. Those factors emphasise that there is a greater need in Mr Daly's case for specific deterrence and public protection. The lack of remorse or contrition demonstrated by Mr Daly, assessed in light of his conduct as a whole, is relevant in that it suggests a higher penalty is warranted for the penalty to achieve the objective of specific deterrence: *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 at [47] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Australian Building and Construction Commission v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 1662 at [83] (Colvin J); *Commissioner of Taxation v Bogiatto (No 2)* [2021] FCA 98 at [79] (Thawley J).

137 Taking all of these matters into account, the critical factor is that there must not be unjustifiable disparity between the remedies agreed by the Submitting Respondents, and accepted as an appropriate outcome by the Court, and the relief granted against Mr Daly. The differences in relief ordered against them must be rational and fair, so that no justifiable sense of grievance may arise.

138 Taking into account all of these matters, as well as Mr Daly's difficult personal circumstances and his financial position, it is appropriate to order that Mr Daly be disqualified from managing corporations for a period of five years and that he pay to the Commonwealth a pecuniary penalty in the sum of \$150,000. I am satisfied that the period of disqualification of five years is justified having regard to Mr Daly's role on the Investment Committee through the whole of the relevant period coupled with the limited insight he has shown into his contravening conduct. These circumstances give rise to a greater need to protect the public such that a longer period of disqualification is warranted. I am satisfied that applying as I must a process of instinctive

synthesis that \$150,000 is an appropriate pecuniary penalty. I reject Mr Daly's contention that the penalty should be the same as that imposed on Mr Raftery. The whole of the circumstances demonstrate that the need for specific deterrence is much greater for Mr Daly than Mr Raftery, who it will be recalled repaid his loans relatively early and who has demonstrated remorse and insight. Mr Raftery also had a more limited role on the Investment Committee and his role in the contravening conduct was likewise more limited, notwithstanding he was a director of Endeavour. ASIC contend that Mr Daly should pay a pecuniary penalty of \$200,000 that is double that agreed with Mr Nielsen and Mr Williams. While I accept that Mr Daly should pay a higher pecuniary penalty I am satisfied that the appropriate amount in all of the circumstances to achieve the objective of general and specific deterrence is \$150,000.

139 Mr Daly is to pay ASIC's costs of the proceedings assessed at \$175,000 up the first day of the liability hearing, and thereafter he is to pay ASIC's costs for the remainder of the liability hearing, as agreed or assessed and one quarter of the costs of the penalty hearing as agreed or assessed.

CONCLUSION

140 I will make orders accordingly.

I certify that the preceding one hundred and forty (140) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Cheeseman.

Associate:



Dated: 10 January 2024

SCHEDULE OF PARTIES

QUD 269 of 2020

Respondents

Fourth Respondent: MR IAN COMRIE WILLIAMS