

JUD/*2019*FCA2056 -

FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Pavihi [2019] FCA 2056

File number: VID 1347 of 2018

Judge: **WHEELAHAN J**

Date of judgment: 4 December 2019

Catchwords: **TAXATION** – contraventions of s 68B of *Superannuation Industry (Supervision) Act 1993* (Cth) – promotion of illegal early release of funds from superannuation accounts – statement of agreed facts and joint submissions provided by the parties – declarations made and penalties ordered in substantially the form agreed by the parties.

Legislation: *Bankruptcy Act 1966* (Cth) ss 82(3), 153(1)
Crimes Act 1914 (Cth) s 4AA
Crimes Amendment (Penalty Unit) Act 2017 (Cth)
Evidence Act 1995 (Cth), s 191
Fair Work Act 2009 (Cth) s 557
Federal Court of Australia Act 1976 (Cth) s 53
Limitation of Actions Act 1958 (Vic) s 5(4)
Superannuation Guarantee Administration Act 1992 (Cth)
Superannuation Guarantee Charge Act 1992 (Cth)
Superannuation Industry (Supervision) Act 1993 (Cth) ss 6(1)(e), 10, 19, 31, 68B, 193(ca), 196, 197, 200, 315

Federal Court Rules 2011 (Cth) r 41.10
Superannuation Industry (Supervision) Regulations 1994 (Cth) Part 1 of Schedule 1, rr 6.01(5)(a), 6.17(1) and (2), 6.18
Supreme Court (General Civil Procedure) Rules 2015 (Vic)

Cases cited: *Australian Building and Construction Commissioner v CFMEU* [2017] FCAFC 113; 254 FCR 68
ACCC v Chaste Corporation Pty Ltd (in liquidation) [2005] FCA 1212
ACCC v Cornerstone Investment Aust Pty Ltd (in liq) (No 5) [2019] FCA 1544
ACCC v High Adventure Pty Ltd [2005] FCAFC 247; (2006) ATPR ¶42-091
ACCC v Nonchalant Pty Ltd (in liq) [2013] FCA 605
ACCC v South East Melbourne Cleaning Pty Ltd (in liq)

(No 2) [2015] FCA 257
ACCC v Reckitt Benckiser (Australia) Pty Ltd (2016)
 FCAFC 181; 340 ALR 25
Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union
 [2019] FCAFC 84; 368 ALR 643
Commissioner of Taxation v Arnold (No 2) [2015] FCA 34;
 324 ALR 59
*Commissioner of Taxation v International Indigenous
 Football Foundation Australia Pty Ltd (In Liq)* [2017] FCA
 538
*Commonwealth v Director, Fair Work Building Industry
 Inspectorate* [2015] HCA 46; 258 CLR 482
Fair Work Ombudsman v Al Hilfi [2016] FCA 193
Mathers v Commonwealth [2004] FCA 217; 134 FCR 135
*Minister for Industry, Tourism and Resources v Mobil Oil
 Australia Pty Ltd* [2004] FCAFC 72; ATPR ¶41-993
NW Frozen Foods Pty Ltd v ACCC (1996) 71 FCR 285
Roy Morgan Research Pty Ltd v Commissioner of Taxation
 [2011] HCA 35; 244 CLR 97
Trade Practices Commission v CSR Limited [1990] FCA
 762; (1991) 13 ATPR ¶41-076
*Transport Workers' Union of Australia v Registered
 Organisations Commissioner [No 2]* [2018] FCAFC 203;
 363 ALR 464

Date of hearing:	4 December 2019
Registry:	Victoria
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	64
Counsel for the Applicant:	Mr T Begbie with Mr S Linden
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	Mr M Peckham

Table of Corrections

Date of Judgment	Date of judgment amended to 4 December 2019, when judgment was delivered in Court.
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ORDERS

VID 1347 of 2018

BETWEEN: **COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA**
Applicant

AND: **KALANGALUPE PAVIHI**
Respondent

JUDGE: **WHEELAHAN J**

DATE OF ORDER: **4 DECEMBER 2019**

THE COURT DECLARES THAT:

1. The respondent, Kalangalupe Pavihi, contravened section 68B(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) on 22 occasions by promoting the following schemes:
 - (a) a scheme, promoted between September and November 2016, which was likely to result, and did result, in payment of Toma Kite's preserved benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the payment standards prescribed under s 31(1) of the SIS Act and contained in Part 6 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (Payment Standards);
 - (b) a scheme, promoted between September and November 2016, which was likely to result, and did result, in payment of Lino Moata'Ane Tu'Itufu's preserved benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the Payment Standards;
 - (c) a scheme, promoted between September and November 2016, which was likely to result, and did result, in payment of Tupou Lakepa Tu'Itufu's preserved benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the Payment Standards;
 - (d) a scheme, promoted between September and November 2016, which was likely to result, and did result, in payment of Angahiki Fooou Pahulu's preserved

benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the Payment Standards;

- (e) a scheme, promoted between January and February 2017, which was likely to result, and did result, in payment of Fakauo-‘I-Ha’ Amalo’ Uhatafe’s preserved benefits being made from the Uhatafe Superfund otherwise than in accordance with the Payment Standards;
- (f) a scheme, promoted between January and February 2017, which was likely to result, and did result, in payment of Siahi Wendy Uhatafe’s preserved benefits being made from the Uhatafe Superfund otherwise than in accordance with the Payment Standards;
- (g) a scheme, promoted in January 2017, which was likely to result, and did result, in payment of Jenner Orayenza’s preserved benefits being made from the Orayenza Superfund otherwise than in accordance with the Payment Standards;
- (h) a scheme, promoted in February 2017, which was likely to result, and did result, in payment of Ilaisaane Van Gestel’s preserved benefits being made from the Fonohema Superfund otherwise than in accordance with the Payment Standards;
- (i) a scheme, promoted in February 2017, which was likely to result, and did result, in payment of Ofa Pahulu’s preserved benefits being made from the Fonohema Superfund otherwise than in accordance with the Payment Standards;
- (j) a scheme, promoted between February and April 2017, which was likely to result, and did result, in payment of Uate Tupou’s preserved benefits being made from the Kolofale & Tupou Superfund otherwise than in accordance with the Payment Standards;
- (k) a scheme, promoted between February and April 2017, which was likely to result, and did result, in payment of Robert Dicks Kolofale’s preserved benefits being made from the Kolofale & Tupou Superfund otherwise than in accordance with the Payment Standards;
- (l) a scheme, promoted between March and April 2017, which was likely to result, and did result, in payment of Ioane Maka’s preserved benefits being made

from the Atelea Maka Superfund otherwise than in accordance with the Payment Standards;

- (m) a scheme, promoted between March and April 2017, which was likely to result, and did result, in payment of Susan Maka's preserved benefits being made from the Atelea Maka Superfund otherwise than in accordance with the Payment Standards;
- (n) a scheme, promoted in April 2017, which was likely to result, and did result, in payment of Mele Eke Ngungutau's preserved benefits being made from the Ngungutau & Aviga Superfund otherwise than in accordance with the Payment Standards;
- (o) a scheme, promoted in April 2017, which was likely to result, and did result, in payment of Petulisa Finehika Aviga's preserved benefits being made from the Ngungutau & Aviga Superfund otherwise than in accordance with the Payment Standards;
- (p) a scheme, promoted between June and July 2017, which was likely to result, and did result, in payment of Patelisio Fonua Loloa's preserved benefits being made from the Patelisio Loloa Superfund otherwise than in accordance with the Payment Standards;
- (q) a scheme, promoted between June and July 2017, which was likely to result, and did result, in payment of Katinia Loloa's preserved benefits being made from the Patelisio Loloa Superfund otherwise than in accordance with the Payment Standards;
- (r) a scheme, promoted between June and July 2017, which was likely to result in payment of Ivoni Tupou's preserved benefits being made from the Tupou & Tolu Superfund otherwise than in accordance with the Payment Standards;
- (s) a scheme, promoted between June and July 2017, which was likely to result in payment of Solomone Tupou's preserved benefits being made from the Tupou & Tolu Superfund otherwise than in accordance with the Payment Standards;
- (t) a scheme, promoted between July and August 2017, which was likely to result, and did result, in payment of Laumanu Moli Walter's preserved benefits being made from the Walter Superfund otherwise than in accordance with the Payment Standards;

- (u) a scheme, promoted between July and August 2017, which was likely to result, and did result, in payment of Siasia Matakaionga Walter's preserved benefits being made from the Walter Superfund otherwise than in accordance with the Payment Standards;
- (v) a scheme, promoted between July and August 2017, which was likely to result in payment of Eseta Taupeamuhu's preserved benefits being made from the Taupeamuhu Superfund otherwise than in accordance with the Payment Standards.

THE COURT ORDERS THAT:

- 2. The respondent pay to the Commonwealth civil penalties in respect of the 22 contraventions in paragraph 1 above in the total sum of \$220,000.
- 3. For a period of 7 years from the making of this order, the respondent be restrained, whether by herself or her employees, servants or agents, directly or indirectly, from inducing, advising or assisting or facilitating any person to:
 - (a) establish a self-managed superannuation fund;
 - (b) rollover or transfer money or property from any other funds into a self-managed superannuation fund; or
 - (c) make payments from a self-managed superannuation fund.
- 4. There be no order as to costs.

THE COURT NOTES:

- 5. The applicant undertakes not to take any steps to enforce the civil penalties in paragraph 2 above following the expiry of 6 years from the date of these orders, unless:
 - (a) the applicant has first sought, in light of any changes to the respondent's financial circumstances, the leave of the Court to take that step;
 - (b) pending such application for leave, the applicant considers it necessary to seek ex parte interim relief to preserve or control assets for that purpose.

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

REASONS FOR JUDGMENT

(Ex tempore, revised)

WHEELAHAN J:

Introduction

- 1 By an amended originating application filed 17 May 2019 the applicant seeks declaratory relief, a final injunction, and orders for the imposition of civil penalties on the respondent in respect of 22 contraventions of s 68B(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (*SIS Act*). The contraventions of the *SIS Act* relate to the conduct of the respondent in promoting to trustees or intended trustees of self-managed superannuation funds (SMSFs) a scheme that resulted, or was likely to result in the early release of funds otherwise than as permitted by the legislation.
- 2 The respondent is a single mother who is impecunious. She was initially unrepresented, but is now represented by *pro bono* counsel, Mr Matthew Peckham of the Victorian Bar, who accepted the brief upon a referral by the Court. After *pro bono* counsel became involved, the Court referred the proceeding to mediation which was conducted by a National Judicial Registrar of the Court. Following the mediation, the parties filed a statement of agreed facts, and joint submissions addressing the final orders that the Court should make. The statement of agreed facts was tendered by the applicant at the hearing pursuant to the *Evidence Act 1995* (Cth), s 191. I attach as Annexure A to these reasons the parties' statement of agreed facts. That statement is subject to one agreed change to [115] which I have marked and initialled, and to a revised table under [177] which is attached separately as Annexure B.

Background

- 3 Section 68B of the *SIS Act* proscribes the promotion of a scheme that results in the payment of monies from a superannuation fund otherwise than in accordance with prescribed standards. The respondent admits that she contravened s 68B of the *SIS Act* in 22 instances involving 11 SMSFs by promoting schemes that led to the early release of monies from those funds. The contraventions occurred over the period between September 2016 and August 2017.
- 4 In the relevant period, the respondent was employed by Westpac Banking Corporation as a credit card customer service operator. There is no suggestion that any of the contraventions

occurred with the involvement, or knowledge, or ostensible authority of Westpac. I infer from the agreed facts that the respondent undertook her promotion of the schemes in a private capacity. However, at no relevant time was the respondent a registered tax agent, the holder of an Australian financial services licence, or an authorised representative of an Australian financial services licensee. I shall return to the respondent's circumstances later when considering the proposed relief.

5 The schemes that are the subject of the agreed facts had common traits. The trustees had worked in a range of businesses, trades, and professions, including nursing, as a carer, a quality auditor, a credit analyst, a concreter, a warehouse supervisor, a truck driver, a mechanic, a commercial cleaner, and a metal fabricator. Some of the trustees were unemployed. None of the trustees had previously acted as a trustee of a SMSF. In each instance, the trustees had accumulated monies in superannuation funds, such as an industry fund, that were regulated superannuation funds and supervised by the Australian Prudential Regulation Authority. The accumulated monies were either rolled over or intended to be rolled over into a SMSF that the respondent assisted the trustees to establish. In most cases, the trustees of the SMSFs then released the funds otherwise than in accordance with the payment standards, and the funds were used for purposes including payment of everyday expenses, travel, renovations, medical expenses, gifts, and paying down debts.

6 The schemes involved the following steps –

- (1) the respondent discussed the establishment of a SMSF with one or more of the intended trustees of the proposed SMSF for the purpose of the intended trustees accessing or gaining control over their superannuation funds;
- (2) the respondent obtained personal details of the intended trustees and used those details to complete an online application form on the website of an organisation, **ESuperfund** Pty Ltd, which was a business that provided services in relation to SMSFs, including the provision and lodgement of documentation required to set up a SMSF;
- (3) the respondent received pre-populated documents for the establishment of the SMSF, which had been prepared by ESuperfund following its receipt of the online application;
- (4) the respondent handed or otherwise provided the documents, or at least signature pages for those documents, to the intended trustees for them to sign;

- (5) the respondent obtained the signed documents or signature pages from the intended trustees and lodged them with ESuperfund to enable it to complete the establishment of the SMSF as a self-managed superannuation fund within the meaning of s 17A and s 17B of the *SIS Act* and a regulated superannuation fund within the meaning of s 19 of the *SIS Act*; and
- (6) the respondent provided to ESuperfund, as required, further information necessary to complete the establishment of the SMSF.

7 The respondent did not advise the proposed trustees of the possible consequences of paying monies from a superannuation fund otherwise than in accordance with a lawful condition of release permitted by the payment standards prescribed under s 31(1) of the *SIS Act*. Those potential consequences were very significant, and included the following –

- (1) the dissipation of accumulated superannuation benefits that had been saved for retirement;
- (2) inclusion of the amount of the superannuation benefits in their assessable income;
- (3) imposition of interest and administrative penalties;
- (4) disqualification as a trustee of an SMSF;
- (5) exposure to civil penalties of up to 2,000 penalty units; and
- (6) exposure to imprisonment for up to 5 years, although counsel for the applicant disclaimed any suggestion that there was any real possibility that the trustees the subject of this proceeding might face criminal sanctions.

8 In most instances, the respondent charged a fee for her services that ranged from \$600 to \$7,000. The respondent did not declare the fees as assessable income for taxation purposes. In two instances, the trustees made loans to the respondent from monies that were transferred out of their SMSF.

9 A summary of the transactions that were effected pursuant to the schemes is set out in the following table –

SMSF	No of Members	\$ Rolled into the SMSF	\$ Withdrawn from the SMSF	\$ paid or lent to the respondent
Tuitufu Pahulu Kite Superfund	4	149,680.42	149,680	0

Uhatafe Superfund	2	46,763.21	48,317.02	7,000
Orayenza Superfund	1	108,935.61	111,240	4,300
Fonohema Superfund	2	121,921.80	61,919.07	4,000
Kolofale & Tupou Superfund	2	50,759.34	50,759.34	2,000
Atelea Maka Superfund	2	118,471.22	134,012	4,000
Ngungutau & Aviga Superfund	2	75,736.24	75,736.24	2,000
Patelasio Loloa Superfund	2	49,056.55	49,781.78	0
Tupou & Tolu Superfund	2	0	0	600
Walter Superfund	2	120,413.08	120,420	4,000
Taupeamuhu Superfund	1	0	0	0
Totals:	22	\$841,737.47	\$801,865.45	\$27,900

- 10 The parties agree that the personal circumstances of the respondent are relevant to the orders that the Court should make. The respondent’s circumstances were difficult at the time of the contraventions, and remain so. Those circumstances are set out in the statement of agreed facts in Annexure A to these reasons at [184] to [195], and I will not repeat at length what is set out there in plain terms. I highlight that the respondent is a single mother who is the victim of domestic violence, and is living in rented accommodation in straightened circumstances. She is currently unemployed, insolvent, and her future earning capacity is limited.

The legislation

- 11 In *Bluescope Steel (AIS) Pty Ltd v Australian Workers’ Union* [2019] FCAFC 84; 368 ALR 643, Allsop CJ described the *Superannuation Guarantee Charge Act 1992* (Cth) and the *Superannuation Guarantee Administration Act 1992* (Cth) as, “pieces of legislation at the heart of the national economy, of the national arrangements for the financial welfare and financial security of Australian employees and retirees, and Australians generally.” In *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35; 244 CLR 97, the

Court explained that the effect of that legislation is to supply an incentive to employers to make contributions to superannuation for their employees, which gives effect to a national policy which encourages savings for retirement. The objective is to ensure that Australians have adequate provision for their retirement and, through this, to reduce the burden on government, and thereby the community more generally, in providing social security benefits to persons who have retired from the workforce. There are other substantial components of the legislative matrix governing superannuation, including legislation providing for favourable tax treatment of monies paid into superannuation funds, and of income earned by superannuation funds. The legislative matrix includes the *SIS Act* and the regulations made thereunder, which contain detailed provisions relating to the regulation of superannuation funds, including the circumstances in which benefits may be paid out from funds.

- 12 Section 19 of the *SIS Act* provides for the criteria to be satisfied for a superannuation fund to be a “regulated superannuation fund” –

19 Regulated superannuation fund

Definition

- (1) A regulated superannuation fund is a superannuation fund in respect of which subsections (2) to (4) have been complied with.

Fund must have a trustee

- (2) The superannuation fund must have a trustee.

Trustee must be a constitutional corporation or fund must be a pension fund

- (3) Either of the following must apply:
- (a) the trustee of the fund must be a constitutional corporation pursuant to a requirement contained in the governing rules;
 - (b) the governing rules must provide that the sole or primary purpose of the fund is the provision of old-age pensions.

Election by trustee

- (4) The trustee or trustees must have given to APRA, or such other body or person as is specified in the regulations, a written notice that is:
- (a) in the approved form; and
 - (b) signed by the trustee or each trustee;
- electing that this Act is to apply in relation to the fund.

Note: The approved form of written notice may require the trustee or the trustees to set out the tax file number of the fund. See subsection 299U(1).

...

- 13 In the present case, it is not in dispute that the SMSFs satisfy the above criteria.
- 14 Section 31 of the *SIS Act* provides for a regulation-making power to prescribe standards applicable to the operation of regulated superannuation funds.
- 15 Regulation 6.17 of the *Superannuation Industry (Supervision) Regulations 1994 (Cth) (SIS Regulations)* provides for restrictions on the payment of a member's benefit from a regulated superannuation fund. Material to this case are sub-regs 6.17(1) and (2), which provide –

6.17 Restriction on payment

- (1) For the purposes of subsections 31(1) and 32(1) of the Act, the standards set out in subregulations (2), (2A) and (2B) are applicable to the operation of regulated superannuation funds and approved deposit funds.
 - (2) A member's benefits in a fund:
 - (a) may be paid:
 - (i) by being cashed in accordance with Division 6.3; or
 - (ii) by being rolled over or transferred in accordance with Division 6.4, 6.5 or 6.7; or
 - (iii) by being allotted under Division 6.7; and
 - (b) must not be paid in that way except when, and to the extent that, the fund is required or permitted under this Part to pay them; and
 - (c) must be paid in that way when, and to the extent that, the fund is required under this Part to pay them.
- 16 Regulation 6.18 of the *SIS Regulations* provides that a member's preserved benefits in a regulated superannuation fund may be cashed on or after the satisfaction by the member of a "condition of release". Part 1 of Schedule 1 of the *SIS Regulations* specifies the conditions of release of benefits for regulated superannuation funds. Those conditions of release include retirement, death, a terminal medical condition, permanent incapacity, and attaining the age of 65. There are other conditions of release prescribed by Part 1, and they include "severe financial hardship" in respect of which there is a cashing restriction of a single lump sum in each 12 month period of not less than \$1,000 and not more than \$10,000. Sub-regulation 6.01(5)(a) provides for criteria to be satisfied in order that a person is taken to be in severe financial hardship for the purposes of Schedule 1 of the Regulations.
- 17 Section 68B of the *SIS Act*, which is the provision that the respondent contravened, provides as follows –

68B Promotion of illegal early release schemes

- (1) A person must not promote a scheme that has resulted, or is likely to result, in a payment being made from a regulated superannuation fund otherwise than in accordance with payment standards prescribed under subsection 31(1).
- (2) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or being involved in a contravention of, that subsection.
- (3) In this section:

promote, in relation to a scheme, includes the following:

- (a) enter into the scheme;
- (b) induce another person to enter into the scheme;
- (c) carry out the scheme;
- (d) commence to carry out the scheme;
- (e) facilitate entry into, or the carrying out of, the scheme.

scheme means:

- (a) any agreement, arrangement, understanding, promise or undertaking:
 - (i) whether express or implied; or
 - (ii) whether or not enforceable, or intended to be enforceable, by legal proceedings; or
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

18 Section 193(ca) of the *SIS Act* provides that sub-section 68B(1) is a civil penalty provision.
Section 196 of the *SIS Act* provides –

196 Court may make civil penalty orders

- (1) This section applies if the Court is satisfied that a person has contravened a civil penalty provision, whether or not the contravention also constitutes an offence because of section 202.

Note: Section 220 provides that a certificate by a court that the court has declared a person to have contravened a civil penalty provision is conclusive evidence of the contravention.

- (2) The Court is to declare that the person has, by a specified act or omission, contravened that provision in relation to a specified superannuation entity, but need not so declare if such a declaration is already in force under Division 4.
- (3) The Court may also make against the person an order that the person pay to the Commonwealth a monetary penalty of an amount

specified in the order that does not exceed 2,000 penalty units.

- (4) The Court is not to make an order under subsection (3) unless it is satisfied that the contravention is a serious one.
- (5) The Court is not to make an order under subsection (3) if it is satisfied that an Australian court has ordered the person to pay damages in the nature of punitive damages because of the act or omission constituting the contravention.

19 The following should be noted –

- (1) section 196 is engaged upon the Court’s satisfaction that a person has contravened a civil penalty provision;
- (2) sub-section 196(2) mandates that a declaration is to be made;
- (3) the power to make an order for a monetary penalty is discretionary, but the power is not engaged unless the Court is satisfied that the contravention is a serious one; and
- (4) the maximum penalty for a contravention is 2,000 penalty units.

20 As noted at [3] above, the admitted contraventions span the period between September 2016 and August 2017. Until 30 June 2017, s 4AA of the *Crimes Act 1914* (Cth) provided that a penalty unit was \$180. Section 4AA was amended by the *Crimes Amendment (Penalty Unit) Act 2017* (Cth) with effect from 1 July 2017, by which the value of a penalty unit increased to \$210, subject to indexation from 1 July 2020. The parties are agreed that it is appropriate to apply the penalty unit in force prior to 1 July 2017, and to proceed on the basis that the maximum penalty for each contravention is \$360,000.

21 Under s 197 of the *SIS Act* only the Regulator, or a delegate of the Regulator, may make an application for a civil penalty order. The term “Regulator” is defined in the Act in s 10 as follows –

Regulator means:

- (a) APRA if the provision in which it occurs is, or is being applied for the purposes of, a provision that is administered by APRA; and
- (b) ASIC if the provision in which it occurs is, or is being applied for the purposes of, a provision that is administered by ASIC; and
- (c) the Commissioner of Taxation if the provision in which it occurs is, or is being applied for the purposes of, a provision that is administered by the Commissioner of Taxation; and

...

22 The applicant to this proceeding falls within the definition of “Regulator” because by s 6(1)(e) of the Act the Commissioner of Taxation has the general administration of a number of provisions of the Act to the extent that they relate to self-managed superannuation, including in particular part 7 of the Act, of which s 68B forms part.

23 Section 200 of the *SIS Act* provides that an order for a monetary penalty may be enforced as if it were a judgment of the Court –

200 Enforcement of order to pay monetary penalty

If the Court makes under subsection 196(3) an order that a person pay a monetary penalty:

- (a) the penalty is payable to the Regulator on the Commonwealth’s behalf; and
- (b) the Regulator or the Commonwealth may enforce the order as if it were a judgment of the Court.

24 Section 315 of the *SIS Act* confers power on the Court to grant injunctions. The relevant provisions of s 315 are –

315 Injunctions

Restraining injunctions

- (1) If a person (**the perpetrator**) has engaged, is engaging or is proposing to engage, in conduct that constituted, constitutes or would constitute:
 - (a) a contravention of this Act, a condition imposed on an RSE licence or a direction given under this Act by APRA or the Regulator; or
 - (b) attempting to contravene this Act, a condition imposed on an RSE licence or a direction given under this Act by APRA or the Regulator; or
 - (c) aiding, abetting, counselling or procuring a person to contravene this Act, a condition imposed on an RSE licence or a direction given under this Act by APRA or the Regulator; or
 - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act, a condition imposed on an RSE licence or a direction given under this Act by APRA or the Regulator; or
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act, a condition imposed on an RSE licence or a direction given under this Act by APRA or the Regulator; or
 - (f) conspiring with others to contravene this Act, a condition

imposed on an RSE licence or a direction given under this Act by APRA or the Regulator;

the Court may grant an injunction in accordance with subsection (2).

Nature of injunction

- (2) If granted, the injunction:
- (a) is to restrain the perpetrator from engaging in the conduct; and
 - (b) if in the opinion of the Court it is desirable to do so, may also require that person to do any act or thing.

The Court may only grant the injunction on the application of the Regulator, or of a person whose interests have been, are, or would be, affected by the conduct and may grant it on such terms as the Court thinks appropriate.

...

Consent injunctions

- (4) If an application for an injunction under subsection (1) or (3) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that that subsection applies.

...

Restraining injunctions

- (7) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

...

25 The enforcement of judgments of the Court is the subject of s 53(1) of the *Federal Court of Australia Act 1976* (Cth), which provides –

53 Enforcement of judgment

- (1) Subject to the Rules of Court, a person in whose favour a judgment of the Court is given is entitled to the same remedies for enforcement of the judgment in a State or Territory, by execution or otherwise, as are allowed in like cases by the laws of that State or Territory to

persons in whose favour a judgment of the Supreme Court of that State or Territory is given.

26 The above provision is to be read together with r 41.10 of the *Federal Court Rules 2011* (Cth), which provides –

41.10 Execution generally

- (1) A party who wants to enforce a judgment or order of the Court may apply to the Court to make an order, to issue any writ, or to take any other step that can be taken in the Supreme Court of the State or Territory in which the judgment or order has been made as if the judgment or order was a judgment or order of that Supreme Court.
- (2) An order made under subrule (1) authorises the Sheriff, when executing the orders of the Court, to act in the same manner as a similar officer of the Supreme Court of the State or Territory in which the order is being executed is entitled to act.
- (3) A party who wants to enforce an order in more than one State or Territory may adopt the procedures and forms of process of the Supreme Court of the State or Territory in which the judgment or order has been made.

27 In the present case, the above provisions and the question of enforcement of orders for penalties direct attention to the applicable Victorian legislation, including the enforcement procedures under the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), and to s 5(4) of the *Limitation of Actions Act 1958* (Vic), which provides that an action shall not be brought upon any judgment after the expiration of 15 years from the date on which the judgment became enforceable.

28 Finally, it is necessary to mention the *Bankruptcy Act 1966* (Cth). Under s 153(1), subject to some exceptions not presently relevant, a discharge from bankruptcy operates to release the bankrupt only from debts provable in the bankruptcy. And under s 82(3), a penalty or fine imposed by a court in respect of “an offence against a law” is not provable in bankruptcy. In *Mathers v Commonwealth* [2004] FCA 217; 134 FCR 135 Heerey J held that a civil penalty imposed upon a corporation under s 76 of the *Trade Practices Act 1974* (Cth) was a penalty or fine imposed by a court in respect of “an offence against a law” for the purposes of s 533B (as then in force) of the *Corporations Act 2001* (Cth) which was modelled on s 82(3) of the *Bankruptcy Act*. Heerey J reasoned that the word “offence” was not confined to a criminal offence, so that a contravention of s 46 or 47 of the *Trade Practices Act* attracting a civil penalty was an offence against a law. *Mathers* has been followed in *ACCC v Chaste Corporation Pty Ltd (in liquidation)* [2005] FCA 1212 at [169] (Lander J); *ACCC v Nonchalant Pty Ltd (in liq)* [2013] FCA 605 at [48] (Gordon J); *ACCC v South East*

Melbourne Cleaning Pty Ltd (in liq) (No 2) [2015] FCA 257 at [11] (Murphy J); *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193 at [49] (Besanko J); *Commissioner of Taxation v International Indigenous Football Foundation Australia Pty Ltd (In Liq)* [2017] FCA 538 at [9] (Logan J); and *ACCC v Cornerstone Investment Aust Pty Ltd (in liq) (No 5)* [2019] FCA 1544 at [31] (Gleeson J).

Consideration

29 The joint position of the parties is that the Court should –

- (1) make declarations of contravention pursuant to s 196(2) of the *SIS Act*;
- (2) pursuant to s 196(3) of the *SIS Act* make orders for penalties against the respondent in the total sum of \$220,000; and
- (3) enjoin the respondent pursuant to s 315 of the *SIS Act* for a period of seven years from inducing, advising, assisting or facilitating any person to establish a SMSF, rolling money over into a SMSF, or making payments from a SMSF.

Agreed remedies

30 In *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (the ***Agreed Penalties case***) the Court held that in civil penalty proceedings a court is not precluded from receiving and, if appropriate, accepting agreed submissions as to civil penalties. The Court endorsed the practice that had been followed in relation to civil penalty proceedings generally that had been recognised in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; ATPR ¶41-993. At [46] French CJ, Kiefel, Bell, Nettle and Gordon JJ held that there is an important public policy involved in promoting predictability of outcome in civil penalty proceedings and that the practice of receiving and, if appropriate, accepting agreed penalty submissions increases the predictability of outcome for regulators and wrongdoers. Their Honours observed that such predictability of outcome encourages the acknowledgment of contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the Courts to deal with other matters. And their Honours stated at [48] that, in considering an agreed civil penalty submission, the Court is not bound by any figure suggested by the parties, but the Court asks itself “whether their proposal can be accepted as fixing an *appropriate* amount”, citing *NW Frozen Foods* at 291. For that purpose, the Court must be satisfied itself that the submitted penalty is appropriate.

31 In the present case, the agreement of the parties is to be regarded as a desirable outcome. This case is illustrative of some of the benefits of encouraging parties to civil penalty proceedings to reach agreed positions. As is evident, the circumstances of the respondent are difficult, and somewhat complex. By her admissions, the respondent has spared the applicant the time and resources that would have been necessary to prove each of the 22 contraventions. Further, considerable court time has been saved by the presentation of the statement of agreed facts, and the joint submissions. In the special circumstances of this case, I shall therefore give considerable weight to the agreement reached by the parties in assessing whether the relief that is sought is appropriate. I also recognise, that in the unusual circumstances of this case, there is likely to be a broad range of reasonable views as to the appropriate orders, including as to monetary penalties.

Declarations

32 Having regard to the respondent's admissions which are the subject of the statement of agreed facts, I am satisfied of the 22 contraventions by the respondent of s 68B(1) of the *SIS Act*. Being so satisfied, s 196(2) of the *SIS Act* requires that declarations be made by the Court. Even absent that mandate, there would be sound arguments favouring the making of declarations, as they record formally the findings of contravention, and may serve important law enforcement purposes, and there is thereby a public interest in making declarations in these enforcement proceedings on the application of a statutory regulator.

33 The Court will accordingly make declarations substantially in the form submitted by the parties.

Injunctions

34 The findings that the respondent has engaged in conduct that constituted a contravention of the *SIS Act* engages the Court's power to grant an injunction under s 315 in accordance with the very broad terms of s 315(2). The parties are agreed on the terms of the injunctions, and I consider that in the circumstances the granting of the injunctions is appropriate.

Penalties

35 As I have mentioned, the parties jointly submit that penalties in the total sum of \$220,000 should be imposed. The parties' rationale for arriving at that total sum was the subject of a joint submission. The parties prepared a schedule to that submission that provided an indicative rationale supporting the calculation which I attach as Annexure C to these reasons.

It is necessary to emphasise that the fixing of civil penalties is an inexact process. I shall take the schedule into account, but only as being indicative of one of potentially many ways in which one might arrive at an appropriate assessment of penalties in the circumstances of this proceeding.

General deterrence

36 The purpose of civil penalties, such as those provided for by s 196 of the *SIS Act* is well established, and uncontroversial. The principal object of the imposition of civil penalties is deterrence: *The Agreed Penalties Case* at [55], citing *Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) ATPR ¶41-076.

37 For the reasons set out below, I accept that there are a number of considerations as to why contraventions such as those in this proceeding should attract penalties which will act as a strong deterrent to others. Similar considerations have been held to apply in relation to the imposition of penalties for the promotion of tax-related schemes: *Commissioner of Taxation v Arnold (No 2)* [2015] FCA 34; 324 ALR 59 at [164] – [176] and [206] – [207]; *Commissioner of Taxation v International Indigenous Football Foundation Australia Pty Ltd* [2018] FCA 528; 107 ATR 769 at [56]. Those considerations may be summarised as follows.

38 *First*, the adverse consequences for the immediate participants in the schemes are serious. I have identified some of those consequences at [7] above in another context. For completeness, the potential consequences that I have taken into account are as follows –

- (1) the dissipation of the trustees' accumulated superannuation benefits, resulting in reduced superannuation for use in retirement, with consequent potential reductions in living standards, financial support and the like;
- (2) the immediate expenditure in making payments, or providing benefits, to the promoter;
- (3) liability for a tax shortfall arising from the superannuation benefits being treated as assessable income in the year in which they are received;
- (4) administrative penalties of up to 75% on the tax shortfall;
- (5) shortfall interest charges or general interest charges in respect of unpaid tax;
- (6) legal action being taken by the applicant, either in respect of taxation liabilities or, potentially, for related breaches of the *SIS Act*; and
- (7) significant incidental costs and stress associated with all of the above.

39 As is apparent, the individuals who were persuaded to enter into the schemes that were promoted by the respondent are ordinary men and women whose retirement savings were held in their superannuation accounts, and were the product of many years of work. They benefited from a statutory scheme which encouraged their employers to make payments into their superannuation funds. I am prepared to infer that most, if not all of the trustees, by reason of their inexperience in managing superannuation funds were not financially sophisticated, and were therefore quite vulnerable. Penalties that act as a strong deterrent are therefore appropriate so that promoters of early release schemes are sufficiently deterred from taking fees or other benefits while leaving vulnerable persons, such as the trustees in the present case, with significant burdens and risks.

40 *Second*, as the Chief Justice indicated in *Bluescope Steel*, the superannuation regime is at the heart of the national economy: it is of critical significance to the Australian economy and to the well-being of Australians. By 30 June 2018 the superannuation system held total assets of \$2.7 trillion, of which \$1.774 trillion was held in APRA-regulated superannuation funds, and \$749.9 billion was held in SMSFs. APRA-regulated funds had 26.8 million member accounts at 30 June 2018, while the 596,225 SMSFs registered at that time had 1,118,650 members. The conduct of the respondent in this case encouraged the trustees to take short term advantage of their retirement savings. Such conduct tends to undermine confidence in the value of the compulsory superannuation system. Any such diminution in the integrity of the superannuation regime thereby leaves the community bearing the social and economic costs associated therewith. It is therefore appropriate that those who might promote early release schemes face strong levels of deterrence.

41 *Third*, in *Arnold (No 2)* Edmonds J observed at [168] that it can be difficult for the Commissioner to detect ineffective tax schemes. His Honour stated that those difficulties are inherent in the self-assessment regime, under which taxpayers are effectively required to determine their own taxable income. I accept that similar considerations apply in relation to superannuation schemes. The nature, variety and number of superannuation schemes, particularly SMSFs, is such that it is not possible for the establishment and administration of each fund to be scrutinised or audited. I accept that this is a further consideration supporting the fixing of penalties at an appropriate level so as to give effect to the object of general deterrence.

42 *Fourth*, non-compliant superannuation schemes impose compliance costs on the regulators, and therefore upon the whole community. This is a further reason why promoters of schemes for the early release of funds should face the real risk of significant penalties.

Specific deterrence

43 In the present case, considerations of general deterrence are much more significant than specific deterrence. The respondent has ceased undertaking the promotion of schemes, has made full admissions, has shown appropriate contrition, and has consented to the granting of injunctions. For these reasons, the parties submitted, and I accept, that no penalty greater than that necessary to secure general deterrence is necessary.

Course of conduct

44 Section 196 of the *SIS Act* has the effect that liability for a penalty attaches to each contravention. There is no provision in the *SIS Act* that corresponds to s 557 of the *Fair Work Act 2009* (Cth) by which conduct may be aggregated for the purposes of making findings of contravention. The consequence is that each of the 22 admitted contraventions potentially attracts the maximum penalty that might be imposed under s 196(3) of the *SIS Act*.

45 However, in assessing appropriate penalties for each contravention, it is necessary to have regard to whether the conduct giving rise to each contravention is factually related. An examination of the respondent's conduct and its course and its explanation factually and legally is necessary so as to inform the imposition of penalty orders, in particular so as to avoid double punishment: *Transport Workers' Union of Australia v Registered Organisations Commissioner [No 2]* [2018] FCAFC 203; 363 ALR 464 at [91] (Allsop CJ, Collier and Rangiah JJ).

46 The parties submitted that it is appropriate to group the contraventions relating to each of the 11 SMSFs into a single course of conduct with the consequence that the 22 admitted contraventions would be grouped into 11 courses of conduct. The parties also agreed that it was appropriate to allocate penalties by reference to the 11 courses of conduct, relying on what was said by the Full Court in *Australian Building and Construction Commissioner v CFMEU* [2017] FCAFC 113; 254 FCR 68 at [149] (Dowsett, Greenwood and Wigney JJ) –

In an appropriate case, however, the Court may impose a single penalty for multiple contraventions where that course is agreed or accepted as being appropriate by the parties. It may be appropriate for the Court to impose a single penalty in such circumstances, for example, where the pleadings and facts reveal that the contraventions arose from a course of conduct and the precise number of

contraventions cannot be ascertained, or the number of contraventions is so large that the fixing of separate penalties is not feasible, or there are a large number of relatively minor related contraventions that are most sensibly considered compendiously. As revealed generally by the reasoning in *Commonwealth v Director, FWBII*, there is considerably greater scope for agreement on facts and orders in civil proceedings than there is in criminal sentence proceedings. As with agreed penalties generally, however, the Court is not compelled to accept such a proposal and should only do so if it is considered appropriate in all the circumstances. It is also at the very least doubtful that such an approach can be taken if it is opposed or the proceedings are defended.

47 See also, *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [165].

48 Given the joint position of the parties, it is appropriate in this case to evaluate penalties by reference to the contraventions relating to the 11 SMSFs, and further, it is appropriate for the Court to make an order for the payment of penalties in one lump sum.

Other factors

49 Relevant factors in the overall assessment of civil penalties were identified by French J in *Trade Practices Commission v CSR Limited* [1990] FCA 762; (1991) 13 ATPR ¶41-076, and they have been cited and applied in many cases since. The relevant factors that are material to this proceeding may be summarised as being: the nature, character and seriousness of the conduct; the loss and damage caused; the circumstances in which the conduct took place; the circumstances of the respondent; the deliberateness of the conduct and the time over which it occurred; and the respondent's degree of co-operation with the applicant as the regulator. It is also necessary to have regard to the maximum penalty: *Reckitt Benckiser* at [154]-[156]. As identified at [20] above, the parties agreed that the maximum penalty that should be regarded as applicable for each contravention is \$360,000.

50 *Nature and extent of conduct:* The parties agreed that over a period of about 11 months the respondent encouraged 22 trustees to rollover their superannuation benefits into SMSF for the purposes of transferring those monies from the funds in circumstances that were not permitted by the *SIS Act* and the *SIS Regulations*. The respondent played a central role in the schemes.

51 *Relevant circumstances, including deliberateness:* The parties agreed that the respondent understood the basic and central requirements that made it unlawful for the trustees to have early access to their superannuation benefits in circumstances that were outside the payment standards prescribed by the Regulations. Paragraph [171] of the statement of agreed facts

refers to a telephone conversation between the respondent and an officer of the ATO on 1 February 2012, in which the respondent confirmed that she understood that the purpose of a SMSF was to save money for retirement, that it was illegal to access superannuation funds before meeting a condition of release, such as retirement, and the trustees of SMSFs are required to lodge tax returns and to have the fund audited by an approved auditor each year. It was also agreed that the respondent was informed during the telephone conversation that trustees of SMSFs are bound by the *SIS Act* and that breaches of the legislation can have serious consequences, such as civil and criminal penalties. It is further agreed that despite being aware of the legal obligations of trustees of SMSFs, and of the consequences of illegal early release of preserved benefits, the respondent failed to advise the intended trustees of these things. In my view, these circumstances indicate a consciousness of breach which warrants significant penalties.

52 The parties also agree that the 22 contraventions in this proceeding occurred in the context where the respondent had assisted a total of 68 trustees or intended trustees in the establishment or proposed establishment of some 35 SMSFs. However, the applicant does not allege in this proceeding that those other activities gave rise to any contraventions of s 68B of the *SIS Act*.

53 It is also agreed that the respondent took steps to conceal her involvement in the establishment of the SMSFs, including by using different email addresses, by using the participants' names when communicating with Esuperfund, and by failing to disclose the fees which she earned as assessable income for taxation purposes.

54 *Loss or damage caused:* I have referred already to the very significant detriment that has been suffered by the trustees as a result of the respondent's contraventions. In addition to the detriment that has been mentioned, the parties agree that the trustees also experienced significant non-financial losses associated with the stress and anxiety of the financial and taxation consequences for them of the respondent's conduct. I take account also the broader harm to the public interest which is furthered by the superannuation regime which has been undermined by the respondent.

55 *Benefits and potential benefits:* As already indicated, the respondent charged the trustees fees in most cases in order to assist or facilitate the establishment of the SMSFs for the proscribed purpose of achieving the early release of funds. In addition, the respondent was loaned monies on two occasions from funds that were transferred from a SMSF, which amounts she

has not repaid. The parties submit that while the amounts that the respondent received from her wrongdoing are not large, particularly in comparison to the harm that has been caused to the trustees, they underline the need for general deterrence so that other would-be promoters are dissuaded from securing fees through the promotion of illegal early release schemes.

56 *Prior similar conduct:* The respondent has not previously been found by a court to have engaged in any similar conduct, or any other wrongdoing more generally. The parties are agreed that this is properly to be taken into account in the respondent's favour.

57 *The personal circumstances of the respondent:* I have referred already to the difficult personal circumstances of the respondent that are identified at [184] to [195] of the statement of agreed facts which is Annexure A to these reasons. It is very likely that the respondent will never have the capacity to pay the penalties that are to be imposed. The respondent proposes to petition for bankruptcy; however as indicated at [28] above the penalties will not be provable in a bankruptcy, and a discharge from bankruptcy will not extinguish her liability for the penalties. The respondent will remain liable to processes of execution under enforcement procedures available in Victoria for a period of 15 years. In that respect, the position of the respondent, as a natural person, is quite different to that of an insolvent corporation which may cease to exist upon the completion of a winding-up.

58 Given the respondent's circumstances and her high level of co-operation, the applicant offers an undertaking with respect to any enforcement action that might be taken after six years from the date of the penalty. The effect of the undertaking is that before taking enforcement action after six years from the date of the order the applicant will be required seek the leave of the Court in light of any changes to the respondent's financial circumstances which may arise or come to light. The undertaking would not prevent the applicant after a period of six years from seeking to enforce the penalties with leave of the Court in light of any significant change to the respondent's financial circumstances, such as a financial windfall, the discovery of any concealed assets, or a significant increase in earning capacity. Otherwise, within the period of six years from the making of the order for the payment of the penalty, the order will be enforceable in the normal way.

59 Although the respondent's personal circumstances require some attention, and are to be taken into account, it remains necessary to ensure that the penalties imposed remain at a level which is sufficient to give effect to the object of general deterrence and which give appropriate recognition to the harm that the respondent has caused. Giving effect to the object

of general deterrence may often require that a court impose penalties which are beyond the financial means of the wrongdoer: see *ACCC v High Adventure Pty Ltd* [2005] FCAFC 247; (2006) ATPR ¶42-091 at [11]; *Arnold (No 2)* at [200]-[204]; *NW Frozen Foods* at [293]. The joint position of the parties is that the penalties proposed are at the lowest end of the statutory range, but are still substantial when regard is had to the respondent's current and historic financial means. I would add that the respondent's likely impaired future earning capacity is also a material consideration.

60 *Co-operation:* The applicant submitted that the respondent's level of co-operation in this proceeding has been at the highest level. With the advice and assistance of counsel, that co-operation has included making complete admissions, and joining in the statement of agreed facts and joint submissions. For the reasons identified by the plurality in the *Agreed Penalties Case* and for the reasons I have identified at [30]-[31] above, the respondent's co-operation is a very significant matter to take into account in considering an appropriate penalty.

An appropriate penalty

61 Having regard to all the circumstances, including especially the deliberate nature of the respondent's conduct and the very significant harm that the respondent has caused, or was liable to cause to vulnerable individuals, I am of the view that each of the 22 contraventions was serious, and that the power in s 196(3) of the *SIS Act* to impose penalties is engaged.

62 I must accept the parties' joint submission that the total penalty that they propose is at the very lowest end of the range. This is especially so having regard to the very significant harm to which I have referred, and to the deliberate nature of the respondent's contravening conduct. However, given the other circumstances, including the respondent's high level of co-operation, her difficult circumstances, and the public resources that have been spared by the parties' agreement, I am persuaded that *one* appropriate response is to accept the joint submissions of the parties that there should be declarations, an injunction, and penalties totalling \$220,000, and that the calculation of those penalties in the parties' table attached as Annexure C to these reasons is *an* appropriate rationale.

Conclusions

63 I will make declarations and grant an injunction substantially in the terms presented by the parties. Upon the applicant making the undertaking relating to the enforcement of the order for the payment of penalties, I will order that the respondent pay to the Commonwealth

penalties for the 22 contraventions in the total sum of \$220,000. The applicant did not seek costs, and there will be no order as to costs.

Pro Bono counsel

64 Before passing from this matter, the Court acknowledges the invaluable assistance that Mr Matthew Peckham of the Victorian Bar gave to the respondent, and to the Court, on a *pro bono* basis. Mr Peckham was initially involved in preparing written submissions and appearing for the respondent in opposition to a foreshadowed application by the applicant for default judgment. He thereafter acted for the respondent during the course of the mediation, the negotiation of the agreed documents, and appeared for the respondent at the hearing. Mr Peckham provided that assistance in the highest and best traditions of the Bar, and he is to be commended.

I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wheelahan.

Associate:

Dated: 4 December 2019

Annexure A



STATEMENT OF AGREED FACTS
BY THE APPLICANT AND THE RESPONDENT

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

NO VID 1347 OF 2018

THE COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA

Applicant

KALANGALUPE PAVIHI

Respondent

PART I INTRODUCTION AND ADMISSION OF CONTRAVENTIONS

1. This statement of agreed facts is filed jointly by:
 - 1.1. the applicant, the Commissioner of Taxation of the Commonwealth of Australia (**Commissioner**); and
 - 1.2. the respondent, Kalangalupe Pavihi (**Ms Pavihi**).
2. It sets out:
 - 2.1. admissions by Ms Pavihi; and
 - 2.2. the relevant facts agreed between the parties, pursuant to s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**).
3. By these proceedings, the Commissioner alleges that in the period from September 2016 to August 2017, Ms Pavihi contravened s 68B(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) by promoting schemes in respect of self-managed superannuation funds (**SMSFs**) that resulted, or were likely to result, in payments being made from regulated superannuation funds, which were not in accordance with the payment standards prescribed under s 31(1) of the **SIS Act** and contained in Part 6 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regs**) (**Payment Standards**).

Filed on behalf of the Applicant, the Commissioner of
Taxation, jointly with the Respondent
Prepared by: Glenn Owbridge
AGS lawyer within the meaning of s 551 of the *Judiciary Act*
1903

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34485546

A handwritten signature in black ink, appearing to be 'G. Owbridge', written over a horizontal line.

4. Ms Pavihi admits the matters pleaded in paragraphs 1 to 289 of the Statement of Claim dated 17 May 2019 and admits, for the purposes of the proceedings, that:
- 4.1. between September and November 2016, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Toma Kite's preserved benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the Payment Standards;
 - 4.2. between September and November 2016, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Lino Moata'Ane Tu'itufu's preserved benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the Payment Standards;
 - 4.3. between September and November 2016, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Tupou Lakepa Tu'itufu's preserved benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the Payment Standards;
 - 4.4. between September and November 2016, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Angahiki Fooou Pahulu's preserved benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the Payment Standards;
 - 4.5. between January and February 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Fakauo-'I-Ha'Amalo' Uhatafe's preserved benefits being made from the Uhatafe Superfund otherwise than in accordance with the Payment Standards;
 - 4.6. between January and February 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Siahi Wendy Uhatafe's preserved benefits being made from the Uhatafe Superfund otherwise than in accordance with the Payment Standards;
 - 4.7. in January 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Jenner Orayenza's preserved benefits being made from the Orayenza Superfund otherwise than in accordance with the Payment Standards;
 - 4.8. in February 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Ilaisaane Van Gestel's preserved benefits being made from the Fonohema Superfund otherwise than in accordance with the Payment Standards;
 - 4.9. in February 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Ofa Pahulu's preserved benefits being made from the Fonohema Superfund otherwise than in accordance with the Payment Standards;



- 4.10. between February and April 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Uate Tupou's preserved benefits being made from the Kolofale & Tupou Superfund otherwise than in accordance with the Payment Standards;
- 4.11. between February and April 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Robert Dicks Kolofale's preserved benefits being made from the Kolofale & Tupou Superfund otherwise than in accordance with the Payment Standards;
- 4.12. between March and April 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Ioane Maka's preserved benefits being made from the Atelea Maka Superfund otherwise than in accordance with the Payment Standards;
- 4.13. between March and April 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Susan Maka's preserved benefits being made from the Atelea Maka Superfund otherwise than in accordance with the Payment Standards;
- 4.14. in April 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Mele Eke Ngungutau's preserved benefits being made from the Ngungutau & Aviga Superfund otherwise than in accordance with the Payment Standards;
- 4.15. in April 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Petulisa Finehika Aviga's preserved benefits being made from the Ngungutau & Aviga Superfund otherwise than in accordance with the Payment Standards;
- 4.16. between June and July 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Patelisio Fonua Loloa's preserved benefits being made from the Patelisio Loloa Superfund otherwise than in accordance with the Payment Standards;
- 4.17. between June and July 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Katinia Loloa's preserved benefits being made from the Patelisio Loloa Superfund otherwise than in accordance with the Payment Standards;
- 4.18. between June and July 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result in payment of Ivoni Tupou's preserved benefits being made from the Tupou & Tolu Superfund otherwise than in accordance with the Payment Standards;
- 4.19. between June and July 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result in payment of Solomone Tupou's preserved benefits being made from the Tupou & Tolu Superfund otherwise than in accordance with the Payment Standards;

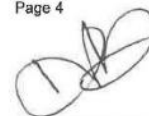


- 4.20. between July and August 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Laumanu Moli Walter's preserved benefits being made from the Walter Superfund otherwise than in accordance with the Payment Standards;
- 4.21. between July and August 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result, and did result, in payment of Siaosi Matakaionga Walter's preserved benefits being made from the Walter Superfund otherwise than in accordance with the Payment Standards;
- 4.22. between July and August 2017, she contravened s 68B(1) of the SIS Act by promoting a scheme which was likely to result in payment of Eseta Taupeamuhu's preserved benefits being made from the Taupeamuhu Superfund otherwise than in accordance with the Payment Standards.

PART II FACTS GOING TO EACH CONTRAVENTION

Ms Pavihi's usual practice

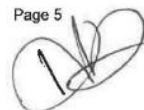
5. In the period September 2016 to August 2017, Ms Pavihi engaged in the practice described at paragraphs 6 to 9 below in relation to the establishment of SMSFs for the abovementioned persons (**her Usual Practice**).
6. Ms Pavihi:
 - 6.1. discussed the establishment of an SMSF with one or more of the intended trustees of the proposed SMSF for the purpose of the intended trustees accessing or gaining control over their superannuation funds;
 - 6.2. obtained relevant personal details of the intended trustees and used those details to complete an online application form on ESuperfund's website;
 - 6.3. received pre-populated documents for the establishment of the SMSF, which had been prepared by ESuperfund and provided to Ms Pavihi following receipt of the online application;
 - 6.4. handed or otherwise provided the documents, or at least signature pages for those documents, to the intended trustees for them to execute/sign;
 - 6.5. obtained the executed/signed documents or signature pages from the intended trustees;
 - 6.6. lodged the signed documents or signature pages with ESuperfund to enable ESuperfund to complete the establishment of the SMSF as a self-managed superannuation fund within the meaning of s 17A and s 17B of the SIS Act and a regulated superannuation fund within the meaning of s 19 of the SIS Act; and
 - 6.7. provided to ESuperfund, as required, further information necessary to complete the establishment of the SMSF.



7. Ms Pavihi conveyed to intended trustees by the conduct described in paragraph 6, and statements made in the course of that conduct, that she had the relevant skills and experience to establish SMSFs and could, accordingly, be relied upon to inform and advise the trustees as to the lawful use of, and access to, funds of the SMSF.
8. Ms Pavihi is not, and has never been, a registered tax agent, the holder of an Australian financial services licence or an authorised representative of an Australian financial services licensee.
9. Ms Pavihi did not:
 - 9.1. provide the intended trustees with copies of the signed documents, or advise the intended trustees how they could obtain copies, though she understood (incorrectly) that ESuperfund would be providing copies to the intended trustees;
 - 9.2. ensure, or take steps to ensure, that the intended trustees read and understood the documents;
 - 9.3. provide appropriate advice to the intended trustees, or ensure the intended trustees obtained advice as to how to comply with all their legal obligations as trustees;
 - 9.4. advise the intended trustees of the possible consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release permitted by the payment standards prescribed under s 31(1) of the SIS Act and contained in the Payment Standards including the following consequences:
 - 9.4.1. inclusion of the amount of the preserved benefits in their assessable income;
 - 9.4.2. imposition of interest and administrative penalties;
 - 9.4.3. disqualification as a trustee of an SMSF;
 - 9.4.4. civil penalties of up to 2,000 penalty units; and
 - 9.4.5. imprisonment for up to 5 years;
 - 9.5. make any, or any adequate, checks or enquiries, including by reference to the trustees' skills, experience, training or education, to ensure that the trustees understood the matters referred to in paragraphs 9.2 to 9.4 above, such as would have made it unnecessary for her to take the steps referred to therein.

The Tuitufu Pahulu Kite Superfund – 4 contraventions

10. In the period September to November 2016, Ms Pavihi provided services to Mr Toma Kite, Mr Lino Moata'Ane Tu'itufu, Mrs Tupou Lakepa Tu'itufu and Mr Angahiki Foou Pahulu for the establishment of an SMSF (the **Tuitufu Pahulu Kite Superfund**) in accordance with her Usual Practice.



11. In that period each of Mr Kite, Mr Tu'ltufu, Mrs Tu'ltufu and Mr Pahulu was an employee, had one or more superannuation funds regulated by the Australian Prudential Regulation Authority (APRA) and had never been a trustee of an SMSF.
12. Mr Kite was employed as a concreter and had preserved benefits of approximately \$12,590; Mr Tu'ltufu was employed as warehouse assistant and had preserved benefits of approximately \$37,650; Mrs Tu'ltufu was employed as an aged care nurse and had preserved benefits of approximately \$12,800; and Mr Pahulu was employed as truck driver and had preserved benefits of approximately \$115,000.
13. Save for Mr and Mrs Tu'ltufu, who were husband and wife, the intended trustees of the Tuitufu Pahulu Kite Superfund did not know one another. Mr Kite was a personal friend of Ms Pavihi. Mr Tu'ltufu was referred to Ms Pavihi by her uncle. Mr Pahulu was related to Mrs Tu'ltufu.
14. Further to her Usual Practice, Ms Pavihi gave oral advice to Mr Kite to the effect that it would be permissible for him to use his superannuation money if he was having financial difficulties, though Ms Pavihi did not explain to Mr Kite the conditions upon which someone could access their superannuation on the ground of *severe financial hardship* as set out in regulations 6.01, 6.17(2) and 6.18 and Schedule 1 of the SIS Regs.
15. As a result of Ms Pavihi's services, on or before 21 December 2016, the Tuitufu Pahulu Kite Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act. Ms Pavihi did not receive any payment or other material benefit from providing those services.
16. At no relevant time did Mr Kite, Mr Tu'ltufu, Mrs Tu'ltufu, or Mr Pahulu understand:
 - 16.1. their legal obligations as trustees so as to manage the Tuitufu Pahulu Kite Superfund in compliance with the law; or
 - 16.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
17. On or about 21 December 2016, CBUS rolled over into the Tuitufu Pahulu Kite Superfund preserved benefits of \$12,590.47 from Mr Kite's CBUS fund, and thereafter that amount was deposited into Commonwealth Bank of Australia (CBA) account number 067167-19809277 established for the SMSF (the **Tuitufu Pahulu Kite CBA account**).
18. On 22 and 23 December 2016, \$12,590 was transferred from that account to Mr Kite's personal CBA account. Thereafter, Mr Kite used the money to pay for everyday expenses, such as food and rent.
19. On or about 3 January 2017, MLC Super Fund (previously, Universal Super) rolled over into the Tuitufu Pahulu Kite Superfund preserved benefits of \$37,172.87 from Mr Tu'ltufu's MLC Super (previously, Universal Super) fund, and thereafter that amount was deposited into the Tuitufu Pahulu Kite CBA account.

20. On 6 January 2017, Mr Tu'ltufu's preserved benefits were paid out of the Tuitufu Pahulu Kite CBA account by 4 separate transfers totalling \$37,173 to one or more unknown accounts.
21. On or about 9 January 2017, Prime Super rolled over into the Tuitufu Pahulu Kite Superfund preserved benefits of \$12,808.77 from Mrs Tu'ltufu's Prime Super fund, and thereafter that amount was deposited into the Tuitufu Pahulu Kite CBA account.
22. On 10 January 2017, Mrs Tu'ltufu's preserved benefits were paid out of the Tuitufu Pahulu Kite CBA account by the transfer of \$12,808 to an unknown account.
23. On or about 16 January 2017, AustralianSuper rolled over into the Tuitufu Pahulu Kite Superfund preserved benefits of \$87,108.31 from Mr Pahulu's AustralianSuper fund, and thereafter that amount was deposited into the Tuitufu Pahulu Kite CBA account.
24. On 17 January 2017, Mr Pahulu's preserved benefits were paid out of the Tuitufu Pahulu Kite CBA account by the transfer of \$87,109 to an unknown account.
25. The payments of Mr Kite's, Mr and Mrs Tu'ltufu's and Mr Pahulu's preserved benefits out of the Tuitufu Pahulu Kite CBA account were not in accordance with the Payment Standards.
26. By providing services for the establishment of the Tuitufu Pahulu Kite Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Mr Kite, Mr Tu'ltufu, Mrs Tu'ltufu and Mr Pahulu entering into, and carrying out, a course of action which was likely to result, and did result, in:
 - 26.1. each of them becoming a trustee of the Tuitufu Pahulu Kite Superfund;
 - 26.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and
 - 26.3. payments of those preserved benefits being made from the Tuitufu Pahulu Kite Superfund otherwise than in accordance with the Payment Standards.

The Uhatafe Superfund – 2 contraventions

27. In or around January and February 2017, Ms Pavihi provided services to Mr Fakauo-'I-Ha'Amalo' Uhatafe and Mrs Siahi Wendy Uhatafe for the establishment of an SMSF (the **Uhatafe Superfund**) in accordance with her Usual Practice.
28. In that period, each of Mr and Mrs Uhatafe was an employee, had one or more superannuation funds regulated by APRA and had never been a trustee of an SMSF. Mr and Mrs Uhatafe were husband and wife. Mr Uhatafe was employed as a warehouse supervisor and had preserved benefits of between approximately \$29,800 and \$33,400. Mrs Uhatafe was employed as a nurse and had preserved benefits of approximately \$12,500.
29. Mr Uhatafe was a person who had grown up with Ms Pavihi.

30. Further to her Usual Practice:

30.1. At a meeting or meetings between Ms Pavihi and Mr Uhatafe:

- 30.1.1. Mr Uhatafe told Ms Pavihi that he intended to use his superannuation money for renovations and to help family;
 - 30.1.2. Ms Pavihi made statements to the effect that Mr Uhatafe could use the money in circumstances of financial hardship, but did not tell him that he could not use the money for his intended purposes and did not explain to Mr Uhatafe the conditions upon which someone could access their superannuation on the ground of *severe financial hardship* as set out in regulations 6.01, 6.17(2) and 6.18 and Schedule 1 of the SIS Regs; and
 - 30.1.3. Mr Uhatafe understood from what he was told by Ms Pavihi that it would be permissible for him to use the money for his intended purposes.
- 30.2. Mr Uhatafe paid Ms Pavihi \$4,000 for setting up the Uhatafe Superfund, being \$2,000 for him and \$2,000 on behalf of his wife, via online bank transfer to an account nominated by Ms Pavihi; and
- 30.3. Ms Pavihi requested a loan from Mr and Mrs Uhatafe of approximately \$3,000. Mr and Mrs Uhatafe lent Ms Pavihi this amount from monies deposited into the Uhatafe CBA account (as defined in paragraph 32 below), which monies comprised one or both of Mr or Mrs Uhatafe's preserved benefits as referred to in paragraph 35 below.
31. As a result of Ms Pavihi's services, on or before 1 March 2017, the Uhatafe Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act.
32. At no relevant time did Mr or Mrs Uhatafe understand:
- 32.1. their legal obligations as trustees so as to manage the Uhatafe Superfund in compliance with the law; or
 - 32.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
33. On or about 1 March 2017, AMP Super rolled over into the Uhatafe Superfund preserved benefits of \$34,177.97 from Mr Uhatafe's AMP Super fund, and thereafter that amount was deposited into CBA bank account number 067167-20012169 established for the SMSF (the **Uhatafe CBA account**).
34. On or about 1 March 2017, HESTA rolled over into the Uhatafe Superfund preserved benefits of \$12,585.24 from Mrs Uhatafe's HESTA fund, and thereafter that amount was deposited into the Uhatafe CBA account.

35. Thereafter, Mr and Mrs Uhatafe's preserved benefits were paid out of the Uhatafe CBA account as follows:

35.1. Between 2 March 2017 and 6 March 2017, a total of \$21,390.02 was transferred out of the Uhatafe CBA account as follows:

35.1.1. \$18,000 was transferred to a CBA account with a number ending 5157, being a personal bank account belonging to Mr Uhatafe (Mr Uhatafe's personal account);

35.1.2. \$1,991.19 was used to repay Mr Uhatafe's son's CBA credit card;

35.1.3. \$557.99 was paid to the Liverpool City Council in respect of rates;

35.1.4. \$422.13 was paid to Sydney Water;

35.1.5. \$218.71 was paid to Optus; and

35.1.6. \$200 was paid to Mr Uhatafe's daughter.

35.2. Between 10 March 2017 and 20 May 2017, approximately \$26,927 was transferred out of the Uhatafe CBA account as follows:

35.2.1. approximately \$13,889 was transferred to Mr Uhatafe's personal account;

35.2.2. approximately \$9,918 was transferred to Mrs Uhatafe's personal account;

35.2.3. approximately \$1,120 was transferred to one or more unknown accounts; and

35.2.4. \$2,000 was transferred to Ms Pavihi,

36. Mr and Mrs Uhatafe thereafter used the money:

36.1. to pay bills;

36.2. for travel expenses;

36.3. for renovations;

36.4. to help family; and

36.5. for a loan to Ms Pavihi as referred to in paragraph 30.3 above.

37. The payments of Mr and Mrs Uhatafe's preserved benefits out of the Uhatafe CBA account were not in accordance with the Payment Standards.



38. By providing services for the establishment of the Uhatafe Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Mr and Mrs Uhatafe entering into, and carrying out, a course of action which was likely to result, and did result, in:
- 38.1. each of them becoming a trustee of the Uhatafe Superfund;
 - 38.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and
 - 38.3. payments of those preserved benefits being made from the Uhatafe Superfund otherwise than in accordance with the Payment Standards.

The Orayenza Superfund – 1 contravention

39. In January 2017, Ms Pavihi provided services to Mr Jenner Orayenza for the establishment of an SMSF (the **Orayenza Superfund**) in accordance with her Usual Practice.
40. As at January 2017, Mr Orayenza was employed as a body maker and mechanic, had two superannuation funds regulated by APRA with preserved benefits of between approximately \$132,000 and \$133,000, and had never been a trustee of an SMSF.
41. Mr Orayenza was referred to Ms Pavihi by her uncle, Polo Loloa, who worked with Mr Orayenza.
42. Further to her Usual Practice:
- 42.1. at meetings between Ms Pavihi and Mr Orayenza in or about January 2017:
 - 42.1.1. Mr Orayenza told Ms Pavihi that he intended to use his superannuation money to renovate his home;
 - 42.1.2. Ms Pavihi made statements to the effect that Mr Orayenza could use the money in circumstances of financial hardship, but did not tell him that he could not use the money for his intended purposes and did not explain to Mr Orayenza the conditions upon which someone could access their superannuation on the ground of *severe financial hardship* as set out in regulations 6.01, 6.17(2) and 6.18 and Schedule 1 of the SIS Regs; and
 - 42.1.3. Mr Orayenza understood from what he was told by Ms Pavihi that it would be permissible for him to use the money for his intended purposes.
 - 42.1.4.
 - 42.1.5. Ms Pavihi requested that Mr Orayenza pay Ms Pavihi approximately \$600 upfront and a further \$700 after Mr Orayenza had rolled over his super into the Orayenza Superfund; and

- 42.1.6. prior to the establishment of the Orayenza Superfund, Mr Orayenza met Ms Pavihi at a shopping centre in Chullora, Sydney, and paid Ms Pavihi approximately \$600 in cash;
- 42.2. at a meeting between Ms Pavihi and Mr Orayenza in or about February 2017, Mr Orayenza met Ms Pavihi in Parramatta, Sydney, and paid Ms Pavihi approximately \$700 in cash.
43. On 16 January 2017, Orayenza Pty Ltd was incorporated with Mr Orayenza as the sole director, secretary and shareholder.
44. As a result of Ms Pavihi's services, on or before 31 January 2017, the Orayenza Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act.
45. At no relevant time did Mr Orayenza understand:
- 45.1. his legal obligations as the sole director of the corporate trustee so as to manage the Orayenza Superfund in compliance with the law; or
- 45.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
46. On or about 31 January 2017, AustralianSuper rolled over into the Orayenza Superfund preserved benefits of \$108,935.61 from Mr Orayenza's AustralianSuper fund, and thereafter that amount was deposited into CBA account number 067167-19933526 established for the SMSF (the **Orayenza CBA account**).
47. Mr Orayenza's preserved benefits were paid out of the Orayenza CBA account between 1 February 2017 and 8 August 2017, when \$111,240 was transferred from the Orayenza CBA account to Mr Orayenza's personal accounts or one or more unknown accounts.
48. Those preserved benefits were thereafter used by Mr Orayenza as follows:
- 48.1. approximately \$91,500 for renovations to Mr Orayenza's home; and
- 48.2. more than \$3,000 paid to Ms Pavihi by way of loans.
49. The payment of Mr Orayenza's preserved benefits out of the Orayenza CBA account was not in accordance with the Payment Standards.
50. By providing services for the establishment of the Orayenza Superfund in the ways and circumstances admitted, Ms Pavihi facilitated Mr Orayenza entering into, and carrying out, a course of action which was likely to result, and did result, in:
- 50.1. him becoming the sole director of the corporate trustee of the Orayenza Superfund;

50.2. the rollover into that fund of preserved benefits held by him in his APRA regulated superannuation fund; and

50.3. payments of those preserved benefits being made from the Orayenza Superfund otherwise than in accordance with the Payment Standards.

The Fonohema Superfund – 2 contraventions

51. In or about February 2017, Ms Pavihi provided services to Ms Ilaisaane Van Gestel and Ms Ofa Pahulu for the establishment of an SMSF (**the Fonohema Superfund**) in accordance with her Usual Practice.
52. As at February 2017, each of Ms Van Gestel and Ms Pahulu was an employee, had one or more superannuation funds regulated by APRA and had never been a trustee of an SMSF. Ms Van Gestel was employed as a warehouse manager and had preserved benefits of approximately \$108,845. Ms Pahulu was employed as a carer and had preserved benefits of between approximately \$25,175 and \$30,175.
53. Ms Pahulu was referred to Ms Pavihi by her uncle, Lino Tuitufu.
54. Further to her Usual Practice:
 - 54.1. at a meeting or meetings between Ms Pavihi and Ms Van Gestel in or about February 2017, Ms Pavihi gave oral advice to her to the effect that she could look after her own superannuation; and
 - 54.2. in or about August 2017:
 - 54.2.1. Ms Pahulu signed a form titled "Invoice Remittance Agent Application Fee Agent's Copy" in relation to Ms Pavihi's fee for services in respect of the Fonohema Superfund. The amount payable to Ms Pavihi, as agent, was specified as \$2,000;
 - 54.2.2. Ms Van Gestel signed a form titled "Invoice Remittance Agent Application Fee Client's Copy" in relation to Ms Pavihi's fee for services in respect of the Fonohema Superfund. The amount payable to Ms Pavihi, as agent, was specified as \$2,000; and
 - 54.2.3. Lavinia Pahulu, paid Ms Pavihi \$4,000 by bank transfer on behalf of Ms Van Gestel and Ms Pahulu.
55. As a result of Ms Pavihi's services, on or before 21 August 2017, the Fonohema Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act.
56. At no relevant time did Ms Van Gestel or Ms Pahulu understand:
 - 56.1. their legal obligations as trustees so as to manage the Fonohema Superfund in compliance with the law; or

- 56.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
57. On or about 21 August 2017, AustralianSuper rolled over into the Fonohema Superfund preserved benefits of \$108,845.87 from Ms Van Gestel's AustralianSuper fund, and thereafter that amount was deposited into CBA account number 067167-20015220 established for the SMSF (the **Fonohema CBA account**).
58. On or about 22 August 2017, HESTA rolled over into the Fonohema Superfund preserved benefits of \$13,075.93 from Ms Pahulu's HESTA fund, and thereafter that amount was deposited into the Fonohema CBA account.
59. Between 23 August 2017 and 24 July 2018, \$61,920 was paid out of the Fonohema CBA account in 4 separate transactions, of which:
- 59.1. at least \$48,844.07 was Ms Van Gestel's preserved benefits; and
- 59.2. an unknown amount of no more than \$13,075 was Ms Pahulu's preserved benefits.
60. Ms Van Gestel thereafter used her preserved benefits as follows:
- 60.1. to send to family in Tonga;
- 60.2. to play poker machines;
- 60.3. to pay her tax debt; and
- 60.4. to travel back to Tonga.
61. The payments of Ms Van Gestel's and Ms Pahulu's preserved benefits out of the Fonohema CBA account were not in accordance with the Payment Standards.
62. By providing services for the establishment of the Fonohema Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Ms Van Gestel and Ms Pahulu entering into, and carrying out, a course of action which was likely to result, and did result, in:
- 62.1. each of them becoming a trustee of the Fonohema Superfund;
- 62.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and
- 62.3. payments of those preserved benefits being made from the Fonohema Superfund otherwise than in accordance with the Payment Standards.

The Kolofale & Tupou Superfund – 2 contraventions

63. In the period February to April 2017, Ms Pavihi provided services to Mr Uate Tupou and Mr Robert Dicks Kolofale for the establishment of an SMSF (**the Kolofale & Tupou Superfund**) in accordance with her Usual Practice.
64. In that period, each of Mr Tupou and Mr Kolofale was an employed as a concreter, had one or more superannuation funds regulated by APRA and had never been a trustee of an SMSF. Mr Tupou had preserved benefits of approximately \$22,100 and Mr Kolofale had preserved benefits of approximately \$32,700.
65. Mr Tupou and Mr Kolofale both worked with Mr Kite and were referred to Ms Pavihi by Mr Kite.
66. Further to her Usual Practice, at a meeting between Ms Pavihi and Mr Tupou in or about March 2017 Mr Tupou signed a form in relation to Ms Pavihi's fee for services in respect of the Kolofale & Tupou Superfund. Mr Tupou paid Ms Pavihi a fee of \$2,000. This amount was paid from Mr Tupou's personal bank account to a Westpac bank account at Ms Pavihi's direction.
67. As a result of Ms Pavihi's services, on or before 5 April 2017, the Kolofale & Tupou Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act.
68. At no relevant time did Mr Tupou or Mr Kolofale understand:
 - 68.1. their legal obligations as trustees so as to manage the Kolofale & Tupou Superfund in compliance with the law; or
 - 68.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
69. On or about 5 April 2017, CBUS rolled over into the Kolofale & Tupou Superfund preserved benefits of \$22,155.07 from Mr Tupou's CBUS fund, and thereafter that amount was deposited into CBA account number 067167-20160276 established for the SMSF (**the Kolofale & Tupou CBA account**).
70. Mr Tupou's preserved benefits were paid out of the Kolofale & Tupou Superfund on 6 April 2017 when \$22,155.07 was transferred from that account to his personal account. Mr Tupou thereafter transferred the money to family in Tonga.
71. On or about 7 April 2017, AustralianSuper rolled over into the Kolofale & Tupou Superfund preserved benefits of \$14,248.79 from Mr Kolofale's AustralianSuper fund, and thereafter that amount was deposited into the Kolofale & Tupou CBA account.
72. On or about 12 April 2017, CBUS rolled over into the Kolofale & Tupou Superfund preserved benefits of \$14,355.48 from Mr Kolofale's CBUS superannuation fund, and thereafter that amount was deposited into the Kolofale & Tupou CBA account.

73. Mr Kolofale's preserved benefits were paid out of the Kolofale & Tupou CBA account as follows:
- 73.1. on 13 April 2017, \$14,355.48 of Mr Kolofale's preserved benefits was transferred out of that account to an unknown account; and
- 73.2. on 21 April 2017, \$14,248.79 of Mr Kolofale's preserved benefits was transferred out of that account to an unknown account.
74. The payments of Mr Tupou and Mr Kolofale's preserved benefits out of the Kolofale & Tupou CBA account were not in accordance with the Payment Standards.
75. Mr Tupou intended to and did use his superannuation money to help his family in Tonga. Ms Pavihi says that she was not informed of Mr Tupou's intention, but accepts that she understood that he was likely in the circumstances to release otherwise than in accordance with the Payment Standards, and did not give Mr Tupou any advice to the contrary.
76. By providing services for the establishment of the Kolofale & Tupou Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Mr Tupou and Mr Kolofale entering into, and carrying out, a course of action which was likely to result, and did result, in:
- 76.1. each of them becoming a trustee of the Kolofale & Tupou Superfund;
- 76.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and
- 76.3. payments of those preserved benefits being made from the Kolofale & Tupou Superfund otherwise than in accordance with the Payment Standards.

The Atelea Maka Superfund – 2 contraventions

77. In the period March to April 2017, Ms Pavihi provided services to Mr Ioane Atelea Maka and Mrs Susan Michael Maka for the establishment of an SMSF (the **Atelea Maka Superfund**) in accordance with her Usual Practice.
78. In that period, each of Mr and Mrs Maka was an employee, had one or more superannuation funds regulated by APRA and had never been a trustee of an SMSF. Mr and Mrs Maka were husband and wife. Mr Maka was employed as a truck driver and had preserved benefits of between approximately \$90,600 and \$90,700. Mrs Maka was employed as a quality auditor and had preserved benefits of approximately \$27,900.
79. Mr Maka had a connection to Ms Pavihi through his family.

80. Further to her Usual Practice, at a meeting or meetings between Ms Pavihi and Mr Maka:
- 80.1. Mr Maka gave Ms Pavihi \$4,000 in cash for setting up the Atelea Maka Superfund; \$2,000 for him and another \$2,000 for Mrs Maka;
 - 80.2. Mr Maka told Ms Pavihi that he intended to use his superannuation money to pay stamp duty on the purchase of a house;
 - 80.3. Ms Pavihi made statements to the effect that Mr Maka could use the money in circumstances of financial hardship, but did not tell him that he could not use the money for his intended purposes and did not explain to Mr Maka the conditions upon which someone could access their superannuation on the ground of *severe financial hardship* as set out in regulations 6.01, 6.17(2) and 6.18 and Schedule 1 of the SIS Regs; and
 - 80.4. Mr Maka understood from what he was told by Ms Pavihi that it would be permissible for him to use the money for his intended purposes.
81. As a result of Ms Pavihi's services, on or before 1 May 2017, the Atelea Maka Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act.
82. At no relevant time did Mr or Mrs Maka understand:
- 82.1. their legal obligations as trustees so as to manage the Atelea Maka Superfund in compliance with the law; or
 - 82.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
83. On or about 1 May 2017, TWU Super rolled over into the Atelea Maka Superfund preserved benefits of \$90,502.17 from Mr Maka's TWU Super fund, and thereafter that amount was deposited into CBA account number 067167-20195006 established for the SMSF (the **Atelea Maka CBA account**).
84. On or about 12 May 2017, LUCRF Super rolled over into the Atelea Maka Superfund preserved benefits of \$27,969.05 from Mrs Maka's LUCRF Super fund, and thereafter that amount was deposited into the Atelea Maka CBA account.
85. Mr and Mrs Maka's preserved benefits were paid out of the Atelea Maka CBA account as follows:
- 85.1. on 11 May 2017, a total of \$56,500 was transferred out of that account in 4 separate transactions to one or more unknown accounts; and
 - 85.2. on 25 May 2017, \$77,512, of which \$34,002.17 is referrable to Mr Maka's preserved benefits and the remainder to Mrs Maka's preserved benefits, was transferred out of that account to an unknown account.

86. Of those preserved benefits, \$33,000 was thereafter used by Mr Maka to pay stamp duty.
87. The payments of Mr and Mrs Maka's preserved benefits out of the Atelea Maka CBA account were not in accordance with the Payment Standards.
88. By providing services for the establishment of the Atelea Maka Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Mr and Mrs Maka entering into, and carrying out, a course of action which was likely to result, and did result, in:
 - 88.1. each of them becoming a trustee of the Atelea Maka Superfund;
 - 88.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and
 - 88.3. payments of those preserved benefits being made from the Atelea Maka Superfund otherwise than in accordance with the Payment Standards.

The Ngungutau & Aviga Superfund – 2 contraventions

89. In or around April 2017, Ms Pavihi provided services to Mrs Mele Eke Ngungutau and Mrs Petulisa Finehika Aviga for the establishment of an SMSF (the **Ngungutau & Aviga Superfund**) in accordance with her Usual Practice.
90. As at April 2017, each of Mrs Ngungutau and Mrs Aviga was an employee, had one or more superannuation funds regulated by APRA and had never been a trustee of an SMSF. Mrs Ngungutau was employed in the aged care industry as a provider of personal care and had preserved benefits of between approximately \$47,100 and \$47,300. Mrs Aviga was employed as a commercial cleaner and had preserved benefits of approximately \$31,900.
91. Mrs Ngungutau was referred to Ms Pavihi by Mr Kite.
92. Further to her Usual Practice:
 - 92.1. at a meeting or meetings between Ms Pavihi and Mrs Ngungutau:
 - 92.1.1. Mrs Ngungutau paid Ms Pavihi \$2,000 in cash; and
 - 92.1.2. Ms Pavihi gave oral advice to Mrs Ngungutau to the effect that it would be permissible for her to use her superannuation money to help her family in Tonga.
 - 92.2. Mrs Ngungutau and Mrs Aviga signed the following documents:
 - 92.2.1. the Ngungutau & Aviga Trust Deed; and
 - 92.2.2. the self-managed super fund trustee declarations.

93. As a result of Ms Pavihi's services, on or before 16 June 2017, the Ngungutau & Aviga Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act.
94. At no relevant time did Mrs Ngungutau or Mrs Aviga understand:
- 94.1. their legal obligations as trustees so as to manage the Ngungutau & Aviga Superfund in compliance with the law; or
 - 94.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
95. On or about 16 June 2017, HESTA rolled over into the SMSF preserved benefits of \$45,832.70 from Mrs Ngungutau's HESTA fund, and thereafter that amount was deposited into CBA account number 067167-20361318 established for the SMSF (the **Ngungutau & Aviga CBA account**).
96. On 20 June 2017, Mrs Ngungutau's preserved benefits were paid out of the Ngungutau & Aviga CBA account by the transfer of \$45,832.70 to an unknown account.
97. Thereafter, Mrs Ngungutau used the money:
- 97.1. to buy material to build her house in Tonga;
 - 97.2. to pay her father's medical expenses; and
 - 97.3. for her own expenses.
98. On or about 20 June 2017, AustralianSuper rolled over into the SMSF preserved benefits of \$29,903.54 from Mrs Aviga's AustralianSuper fund, and thereafter that amount was deposited into the Ngungutau & Aviga CBA account.
99. On 21 June 2017, Mrs Aviga's preserved benefits were paid out of the Ngungutau & Aviga CBA account by the transfer of \$29,903.54 to an unknown account.
100. The payments of Mrs Ngungutau's and Mrs Aviga's preserved benefits out of the Ngungutau & Aviga CBA account were not in accordance with the Payment Standards.
101. By providing services for the establishment of the Ngungutau & Aviga Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Mrs Ngungutau and Mrs Aviga entering into, and carrying out, a course of action which was likely to result, and did result, in:
- 101.1. each of them becoming a trustee of the Ngungutau & Aviga Superfund;
 - 101.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and
 - 101.3. payments of those preserved benefits being made from the Ngungutau & Aviga Superfund otherwise than in accordance with the Payment Standards.

The Patelisio Loloe Superfund – 2 contraventions

102. In or around June to July 2017, Ms Pavihi provided services to Mr Patelisio Fonua Loloe and Mrs Katinia Loloe for the establishment of an SMSF (the **Patelisio Loloe Superfund**) in accordance with her Usual Practice.
103. In that period, each of Mr and Mrs Loloe had one or more superannuation funds regulated by APRA and had never been a trustee of an SMSF. Mr and Mrs Loloe were husband and wife. Mr Loloe was employed as a mechanic and had preserved benefits of approximately \$206,830. Mrs Loloe was unemployed and had preserved benefits of approximately \$3,230.
104. Mr and Mrs Loloe are related to Ms Pavihi.
105. The Commissioner contends that, further to her Usual Practice, at a meeting or meetings between Ms Pavihi and Mr Loloe, Ms Pavihi gave oral advice to Mr Loloe to the effect that it would be permissible for him to use his superannuation money to renovate his home.
106. Ms Pavihi denies that contention, but accepts that she understood that he was likely in the circumstances to release the funds for an unlawful purpose, and she did not give any advice to the contrary.
107. As a result of Ms Pavihi's services, on or before 15 August 2017, the Patelisio Loloe Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act. Ms Pavihi did not receive any payment or other material benefit for providing those services.
108. At no relevant time did Mr or Mrs Loloe understand:
 - 108.1. their legal obligations as trustees so as to manage the Patelisio Loloe Superfund in compliance with the law; or
 - 108.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
109. On or about 15 August 2017, BT Super rolled over into the Patelisio Loloe Superfund preserved benefits of \$45,815.26 from Mr Loloe's BT Super fund, and thereafter that amount was deposited into CBA account number 067167-20479332 established for the SMSF (the **Patelisio Loloe CBA account**).
110. Mr Loloe's preserved benefits were paid out of the Patelisio Loloe CBA account as follows:
 - 110.1. on 25 October 2017, \$5,000 was transferred to the Loloe Smart Access Account;
 - 110.2. on 16 November 2017, \$890.49 was transferred to the Loloe Smart Access Account;

110.3. between 13 December 2017 and 28 September 2018:

110.3.1. approximately \$31,560 was withdrawn at the Mount Druitt branch of the CBA; and

110.3.2. approximately \$9,090 was withdrawn at the Plumpton branch of the CBA,

of which approximately \$39,924.77 was Mr Loloa's preserved benefits

111. On or about 16 August 2017, AMP Super rolled over into the Patelsio Loloa Superfund preserved benefits of \$3,241.29 from Mrs Loloa's AMP Super fund, and thereafter that amount was deposited into the Patelsio Loloa CBA account.


112. On 19 August 2017, Mrs Loloa's preserved benefits were paid out of the Patelsio Loloa CBA account by the transfer of \$3,241.29 to the Loloa Smart Access Account.

113. Thereafter, Mr and Mrs Loloa used the preserved benefits to:

113.1. pay for their daughter's engagement and wedding expenses; and

113.2. travel to Tonga for funerals.

114. The payments of Mr and Mrs Loloa's preserved benefits out of the Patelsio Loloa CBA account were not in accordance with the Payment Standards.

 115. Mr Loloa intended to ~~and did~~ use his superannuation money to renovate his home. Ms Pavihi says that she was not informed of Mr Loloa's intention, but accepts that she understood that he was likely in the circumstances to release the funds otherwise than in accordance with the Payment Standards, and she did not give any advice to the contrary.

116. By providing services for the establishment of the Patelsio Loloa Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Mr and Mrs Loloa entering into, and carrying out, a course of action which was likely to result, and did result, in:

116.1. each of them becoming a trustee of the Patelsio Loloa Superfund;

116.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and

116.3. payments of those preserved benefits being made from the Patelsio Loloa Superfund otherwise than in accordance with the Payment Standards.

The Tupou & Tolu Superfund – 2 contraventions

117. In the period June to July 2017, Ms Pavihi provided services to Ms Ivoni Tupou and Mr Solomon Tolu for the establishment of an SMSF (**the Tupou & Tolu Superfund**) in accordance with her Usual Practice.

118. In that period, each of Ms Tupou and Mr Tolu had one or more superannuation funds regulated by APRA and had never been a trustee of an SMSF. Ms Tupou was unemployed and had preserved benefits of approximately \$17,279. Mr Tolu was employed as a metal fabricator and had preserved benefits of approximately \$133,286.
119. Mr Tupou is Ms Pavihi's cousin.
120. Further to her Usual Practice:
- 120.1. at meetings between Ms Pavihi and Ms Tupou in or about June or July 2017:
- 120.1.1. Ms Tupou told Ms Pavihi that she intended to use her superannuation money to travel overseas to visit her father who was having an operation;
- 120.1.2. Ms Pavihi did not advise Ms Tupou of the circumstances in which release of superannuation money was permitted by the Payment Standards or the consequences of paying monies from a superannuation fund otherwise than in accordance with a lawful condition of release; and
- 120.1.3. Ms Tupou understood that it would be permissible for her to use the money for her intended purpose.
- 120.2. Ms Tupou and Mr Tolu signed :
- 120.2.1. the Tupou & Tolu Trust Deed; and
- 120.2.2. the self-managed super fund trustee declarations.
121. At no relevant time did Ms Tupou or Mr Tolu understand:
- 121.1. their legal obligations as trustees so as to manage the Tupou & Tolu Superfund in compliance with the law; or
- 121.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
122. On or about 10 July 2017, an ATO officer employed in the Superannuation Business Line, phoned Ms Tupou. During the phone call, Ms Tupou advised that:
- 122.1. she had set up the Tupou & Tolu Superfund because she had recently separated and could not afford to pay her rent and her bills, and was planning on using her super money to cover her expenses;
- 122.2. Ms Pavihi had assisted her to set up the Tupou & Tolu Superfund; and
- 122.3. she had paid Ms Pavihi \$600.

123. On or about 12 July 2017, a Deputy Commissioner wrote a letter to the trustees of the Tupou & Tolu Superfund, which stated:
- 123.1. the ATO was auditing the Tupou & Tolu Superfund's application for registration to determine whether it was eligible to be registered and whether it should be registered on Super Fund Lookup, an external register of super funds;
 - 123.2. until the audit was complete, the Tupou & Tolu Superfund's details would not appear on Super Fund Lookup;
 - 123.3. where an SMSF's details are not recorded on Super Fund Lookup, superfunds will not generally allow rollovers into the SMSF; and
 - 123.4. to finish the audit, the trustees needed to:
 - 123.4.1. call a nominated officer of the ATO; and
 - 123.4.2. provide certain requested documents.
124. Further to her Usual Practice, by emails dated 31 July 2017, 4 August 2017 and 29 August 2017, Ms Pavihi, using the email address ivoni2pou2010@hotmail.com.au, communicated with ESuperfund:
- 124.1. to request ESuperfund's assistance to provide the documents requested by the ATO for the audit and to answer any questions asked by the ATO; and
 - 124.2. on 2 occasions in relation to the Tupou & Tolu Superfund's CBA bank account, because the ATO required evidence of bank and share trading accounts for its audit. On both occasions, ESuperfund responded on the same date and informed Ms Pavihi that at that stage, the CBA bank account and Commsec share trading account applications were pending.
125. On 4 September 2017, a Deputy Commissioner wrote to the trustees of the Tupou & Tolu Superfund to inform them that:
- 125.1. the audit was finished; and
 - 125.2. the ABN registration of the Tupou & Tolu Superfund was cancelled because, *inter alia*, all requested information had not been provided.
126. At or around the time of the cancellation of the Tupou & Tolu Superfund's ABN, Ms Pavihi advised Ms Tupou that the SMSF was not approved and Ms Tupou would need to open an SMSF by herself, and pay a fee of \$600. Ms Tupou declined the offer to open an SMSF by herself.
127. By providing services for the establishment of the Tupou & Tolu Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Ms Tupou and Mr Tolu entering into, and carrying out, a course of action which was likely to result in:
- 127.1. each of them becoming a trustee of the Tupou & Tolu Superfund;

127.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and

127.3. payments of those preserved benefits being made from the Tupou & Tolu Superfund otherwise than in accordance with the Payment Standards.

The Walter Superfund – 2 contraventions

128. In the period July to August 2017, Ms Pavihi provided services to Mrs Laumanu Moli Walter and Mr Siaosi Matakaionga Walter for the establishment of an SMSF (the **Walter Superfund**) in accordance with her Usual Practice.

129. In that period, each of Mrs and Mr Walter had one or more superannuation funds regulated by APRA and had never been a trustee of an SMSF. Mrs and Mr Walter were husband and wife. Mrs Walter was unemployed and had preserved benefits of approximately \$51,129. Mr Walter was employed as a quality auditor and had preserved benefits of approximately \$79,368.

130. Further to her Usual Practice, at meetings between Ms Pavihi and one or both of Mrs and Mr Walter, in or about July or August 2017:

130.1. Mrs Walter told Ms Pavihi she was struggling financially and suffering, and Ms Pavihi gave oral advice to her to the effect that it would be permissible for her and her husband to use their superannuation money for financial hardship, though Ms Pavihi did not explain to Mrs Walter the conditions upon which someone could access their superannuation on the ground of *severe financial hardship* as set out in regulations 6.01, 6.17(2) and 6.18 and Schedule 1 of the SIS Regs;

130.2. Ms Pavihi gave Mrs or Mr Walter a document in relation to Ms Pavihi's fee for services in respect of the Walter Superfund. Mrs and Mr Walter subsequently signed the document and gave it back to Ms Pavihi; and

130.3. Mrs and Mr Walter paid Ms Pavihi a fee of \$2,000 each (a total of \$4,000). This amount was paid from either Mrs and Mr Walter's personal bank account or the Walter CBA account (as defined in paragraph 132 below) to a bank account nominated by Ms Pavihi at Ms Pavihi's direction.

131. As a result of Ms Pavihi's services, on or before 7 August 2017, the Walter Superfund was established as a regulated superannuation fund within the meaning of s 19 of the SIS Act.

132. At no relevant time did Mr or Mrs Walter understand:

132.1. their legal obligations as trustees so as to manage the Walter Superfund in compliance with the law; or

132.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.

133. On or about 7 August 2017, Colonial Super rolled over into the Walter Superfund preserved benefits of \$50,963.08 from Mrs Walter's Colonial Super fund, and thereafter that amount was deposited into CBA account number 067167-20493409 established for the SMSF (the **Walter CBA account**).
134. On or about 9 August 2017, Plum Super rolled over into the Walter Superfund preserved benefits of \$69,450 from Mr Walter's Plum Super fund, and thereafter that amount was deposited into the Walter CBA account.
135. Mrs and Mr Walter's preserved benefits were paid out of the Walter CBA account as follows:
 - 135.1. Between 7 and 9 August 2017, a total of \$10,900 was transferred into the personal account of Mrs and Mr Walter in 3 separate transactions;
 - 135.2. Between 11 August 2017 and 19 January 2018:
 - 135.2.1. approximately \$88,600 was transferred to Mrs and Mr Walter's personal account; and
 - 135.2.2. approximately \$20,920 was transferred to one or more unknown accounts,
136. Those preserved benefits were thereafter used by Mrs and Mr Walter for:
 - 136.1. renovations for their home;
 - 136.2. travel to Tonga;
 - 136.3. paying bills;
 - 136.4. paying down their debt, including the mortgage on their home; and
 - 136.5. gifts to their children.
137. The payments of Mrs and Mr Walter's preserved benefits out of the Walter CBA account were not in accordance with the Payment Standards.
138. By providing services for the establishment of the Walter Superfund in the ways and circumstances admitted, Ms Pavihi facilitated each of Mr and Mrs Walter entering into, and carrying out, a course of action which was likely to result, and did result, in:
 - 138.1. each of them becoming a trustee of the Walter Superfund;
 - 138.2. the rollover into that fund of preserved benefits held by each of them in their APRA regulated superannuation funds; and
 - 138.3. payments of those preserved benefits being made from the Walter Superfund otherwise than in accordance with the Payment Standards.

The Taupeamuhu Superfund – 1 contravention

139. In the period July to August 2017, Ms Pavihi provided services to Ms Eseta Taupeamuhu for the establishment of an SMSF (**the Taupeamuhu Superfund**) in accordance with her Usual Practice, with the exception that Ms Taupeamuhu lodged the documents with ESuperfund by an email sent on 18 August 2017.
140. In that period, Ms Taupeamuhu was employed as a credit analyst, had two superannuation funds regulated by APRA with preserved benefits of approximately \$71,622, and had never been a trustee of an SMSF. Ms Taupeamuhu and Ms Pavihi worked together at Westpac.
141. Ms Taupeamuhu was Ms Pavihi's colleague and work friend.
142. Further to her Usual Practice, at a meeting or meetings between Ms Pavihi and Ms Taupeamuhu in or about July to August 2017 Ms Taupeamuhu told Ms Pavihi that she was experiencing financial difficulties and wished to access her superannuation, and Ms Pavihi gave oral advice to Ms Taupeamuhu to the effect that Ms Pavihi could assist her in setting up an SMSF and transferring her superannuation to the SMSF. Ms Pavihi did not explain to Ms Taupeamuhu the conditions upon which someone could access their superannuation on the ground of *severe financial hardship* as set out in regulations 6.01, 6.17(2) and 6.18 and Schedule 1 of the SIS Regs.
143. On 21 July 2017, Taupeamuhu Pty Ltd was incorporated with Ms Taupeamuhu as the sole director, secretary and shareholder.
144. At no relevant time did Ms Taupeamuhu understand:
- 144.1. her legal obligations as a the sole director of the corporate trustee so as to manage the Taupeamuhu Superfund in compliance with the law; or
 - 144.2. the consequences of paying monies from the superannuation fund otherwise than in accordance with a lawful condition of release.
145. On an unknown date, but after 18 August 2017 when the documents for the establishment of the Taupeamuhu Superfund were lodged with ESuperfund, Ms Taupeamuhu received a phone call from the CBA in which the CBA advised Ms Taupeamuhu that she needed to contact the ATO before they could assist with establishing a bank account for the Taupeamuhu Superfund.
146. After receiving this phone call, Ms Taupeamuhu decided not to proceed any further with the establishment of the Taupeamuhu Superfund.
147. By providing services for the establishment of the Taupeamuhu Superfund in the ways and circumstances admitted, Ms Pavihi facilitated Ms Taupeamuhu entering into, and carrying out, a course of action which was likely to result in:
- 147.1. her becoming the sole director of the corporate trustee of the Taupeamuhu Superfund;

- 147.2. the rollover into that fund of preserved benefits held by him in his APRA regulated superannuation fund; and
- 147.3. payments of those preserved benefits being made from the Taupeamuhu Superfund otherwise than in accordance with the Payment Standards.
148. Ms Pavihi did not receive any payment or material benefit from providing services described above to Ms Taupeamuhu.

PART III OTHER MATTERS RELEVANT TO PENALTY

The superannuation regime

149. The fundamental purpose of the superannuation system is to encourage Australians to save for their retirement. The objective is to ensure that Australian's have adequate provision for their retirement and, through this, to reduce the burden on government, and thereby the community more generally, in providing social security benefits to persons who have retired from the workforce.
150. By 30 June 2018 the superannuation system held total assets of \$2.7 trillion, of which \$1.774 trillion was held in APRA-regulated superannuation funds and \$749.9 billion was held in SMSFs. APRA-regulated funds had 26.8 million member accounts at 30 June 2018 while the 596,225 SMSFs registered at that time had 1,118,650 members.
151. The Commonwealth Treasurer's 2015 Intergenerational Report examined the role the superannuation system plays in reducing the financial burden borne by the community when individuals retire without sufficient superannuation savings. The report notes, at p 67, that:
- Future growth in retirement balances has potential implications for the size of Australian Government outlays on the Age Pension. In 2013-14, around 70 per cent of people of Age Pension age were receiving the Age Pension. Of these, 60 per cent were in receipt of the full-rate pension. As Australia's superannuation system matures, and compulsory contributions increase, many Australian workers will retire with much larger superannuation balances. The proportion of part-rate pensioners relative to full-rate pensioners is expected to increase. The proportion of retirees receiving any pension is not projected to decline.
152. It is vital to the integrity and effectiveness of the superannuation system that sufficient amounts are saved for use in retirement. In general terms, this means that taxpayer earnings that would otherwise have been available for ordinary use must be put aside and preserved.
153. The 2015 Intergenerational Report modelled, at page 69, that Australian Government spending on the age pension will increase from 2.9% of gross domestic product in 2014-15 to 3.6% of gross domestic product in 2054-55, equating to \$165 billion in 2014-15 dollars. Any reduction in superannuation balances, for example when members of the community illegally access their preserved superannuation benefits, will further increase the reliance on age pension and its cost to the community.

154. The superannuation system recognises and addresses the fact that, given the choice, many taxpayers, would simply access and use that money rather than having it preserved for retirement. Accordingly, the system operates on the basis that taxation concessions are provided to the trustees of superannuation funds, and thereby the members of those funds, in exchange for the trustees submitting to the regulatory regime created by the SIS Act and the SIS Regs. This favourable tax treatment of retirement savings is critical to the effectiveness of the system because it creates a strong financial incentive for trustees and taxpayers to ensure that superannuation savings are made and maintained for retirement purposes.
155. A key aspect of the regulatory regime created by the SIS Act and the SIS Regs are the Payment Standards. The framework provided for in the Payment Standards is designed to ensure that payments made from, rolled over or transferred between superannuation funds are used for genuine retirement purposes.
156. The Payment Standards achieve this objective by restricting access to superannuation benefits to situations where a superannuation fund member has met a 'condition of release'. These conditions are generally for the purpose of retirement or other specific conditions such as death, disability or terminal medical conditions.
157. In the case of APRA regulated superannuation funds, there are generally strong systems in place to ensure that members do not access benefits other than in accordance with the Payment Standards. As noted in APRA Prudential Practice Guide SPG 280 – Payment Standards, APRA expects the trustees of funds it regulates to consider risks arising from processing and paying benefits and address these risks through its risk management framework. SPG 280 also specifically discusses the illegal early release of superannuation benefits and outlines APRA's expectations that the trustees of the funds it regulates will include provisions in their risk management frameworks to establish robust systems and procedures that substantially mitigate the risk of, and opportunity for, illegal early release schemes.
158. One part of the regulatory regime created by the SIS Act and the SIS Regs is the right granted to individuals to self-manage their superannuation savings by the use of SMSFs rather than APRA regulated superannuation funds. In an SMSF, the members are also the trustees or directors of the corporate trustee of the fund and are responsible for managing the fund in all aspects.
159. The use of SMSFs has grown over time. In October 1999 when the Commissioner became the regulator of SMSFs, there were 197,000 SMSFs with 387,000 members, and these funds held \$55 billion in retirement savings. By June 2019, this had increased to 600,000 SMSFs with 1.125 million members, and these funds held \$748 billion in retirement savings. As a result, a significant proportion of retirement savings in Australia now falls to be managed and protected through SMSFs.

The need to deter illegal early release schemes

160. Illegal early release schemes allow access to preserved superannuation benefits in circumstances where a 'condition of release' has not been met. Such schemes undermine the basic objectives of the superannuation system and harms members in the process. Where superannuation benefits are released and used as ordinary

earnings, rather than in accordance with a condition of release, those savings will not be available to the person for use in retirement. This puts at risk that person's quality of life in retirement and (subject to the provision of government or outside support) may impact upon such things as their ability to meet living and health expenses. This in turn leaves the government, and ultimately the community, to provide support and security which would otherwise have been unnecessary had the person maintained the required level of superannuation benefits.

161. Additionally, persons who access retirement savings through illegal early release schemes are subject to a number of immediate taxation consequences which reduce the value of those savings and may lead to significant additional financial burdens. These include the following:
- 161.1. Superannuation benefits that are paid in breach of the Payment Standards are included in the assessable income of the participants. Superannuation benefits are afforded concessional income tax treatment however the age at which an individual accesses their superannuation benefits affects the extent of the concession granted. In particular, an individual who accesses their superannuation benefits when they are younger than their preservation age receives less concessional income tax treatment than if they access the same benefit once they have reached their preservation age. This means that the illegal early release will generally give rise to a tax shortfall payable in respect of the increase to the recipient's assessable income.
- 161.2. There may be administrative penalties imposed, potentially up to 75% of the tax shortfall, depending on the participants' level of culpability: s 284-75 and s284-85 in Sch 1 to the *Taxation Administration Act 1953* (Cth) (**TAA 1953**).
- 161.3. There may also be interest charges (shortfall interest charges or general interest charges) imposed in respect of the unpaid tax.
162. In the Commissioner's experience, SMSFs are particularly vulnerable to misuse through illegal early release schemes because they can be used to circumvent the controls APRA regulated superannuation funds use to prevent the payment of superannuation benefits in breach of the Payment Standards. Because the members of SMSFs are trustees and directors, they have control over, and responsibility for, ensuring that benefits are only accessed in accordance with the Payment Standards. As a result, there is generally a greater risk that members and trustees will use the assets for purposes other than the provision of retirement income.
163. The illegal early release of superannuation benefits is particularly difficult to detect when SMSFs are used given the funds are privately managed. The Commissioner is reliant on obtaining information from the individuals involved with the fund, for example the information provided when registering an SMSF and the information provided in annual returns given to the Commissioner, to identify that illegal early release has occurred. Given the number of SMSFs within the system, the Commissioner must allocate his limited resources based on his assessment of the risk of illegal early release occurring within a particular fund as he does not have the resources to investigate every payment of benefits by an SMSF.

164. Even when the Commissioner has identified that a particular SMSF presents a risk of illegal early release, his investigation of the issue requires significant time and resources to complete. To ensure such investigations are accurate, and are fair to the affected taxpayers and trustees, the Commissioner collects substantial information, including from third parties such as banks and APRA-regulated superannuation funds to support any allegation of illegal early release.
165. Of particular concern is activity which promotes and encourages illegal early release schemes. The Super System Review, also known as the 'Cooper Review', found that stronger sanctions were required to deter promoters of illegal early release schemes. The review recommended that both civil and criminal sanctions be introduced to enable the Commissioner of Taxation (as regulator of SMSFs) to seek civil and criminal remedies in order to discourage the promotion of illegal early release schemes.

The nature, extent and context of the wrongdoing

166. Ms Pavihi has admitted 22 contraventions of s 68B of the SIS Act, involving 11 SMSFs and 22 trustees or intended trustees. These contraventions spanned a period of some 12 months from September 2016 to August 2017.
167. Ms Pavihi held herself out as having the relevant skills and experience to establish an SMSF by discussing the establishment of an SMSF with the intended trustees, taking the steps required to prepare the required documents, arranging for the signing of the documents and then lodging the signed documents with ESuperfund.
168. In all cases except for one (being, the Taupemauhu Scheme), Ms Pavihi communicated with ESuperfund on behalf of the intended trustee(s). Ms Pavihi took steps to conceal her involvement, including by using different email addresses, and by using the intended trustees' names when communicating with ESuperfund. She did not declare the income she received in relation to her promotion of the schemes in her tax returns.
169. Ms Pavihi made representations to 7 of the intended trustees that their intended use of their preserved benefits, for example to pay stamp duty, to fund house renovations and to help family, was lawful. She was aware of the consequences of illegal early release and, nevertheless, encouraged the intended trustees to illegally access their superannuation. In some cases, she was incentivised to promote the schemes because she would be paid a fee for her role.
170. Ms Pavihi failed to explain the documents she asked the intended trustees to sign and did not provide them with copies of the documents they had signed. The intended trustees did not read the documents and did not understand the contents or nature of the documents, or the legal effect of the documents. Ms Pavihi did not take steps to ensure that the intended trustees understood the documents or the legal effect of the documents.
171. Ms Pavihi, in a telephone conversation with an ATO officer on 1 February 2012, confirmed that she understood that:
- 171.1. the purpose of a SMSF is to save money for retirement;

- 171.2. it is illegal to access superannuation before meeting a condition of release, such as retirement;
- 171.3. trustees of SMSFs are required to lodge tax returns and have the fund audited by an approved auditor each year.
172. She was also informed during the said telephone conversation that SMSFs trustees are bound by the SIS Act and that breaches of the legislation can have serious consequences, such as civil and criminal penalties.
173. Despite being aware of the legal obligations of trustees of SMSFs and the consequences of illegal early release of preserved benefits, Ms Pavihi failed to advise the intended trustees of these things. Ms Pavihi did not make any, or any adequate, checks or enquiries to ensure that the intended trustees understood their obligations and the consequences. The intended trustees did not understand their obligations as trustees of an SMSF, or the consequences of illegal early access of their preserved benefits.
174. The following additional facts are identified and agreed to assist the court to understand the context in which the above wrongdoing took place.
- 174.1. Ms Pavihi was at the time employed by Westpac Bank, where she had worked for approximately 20 years, and for the past 5 years held the position of credit analyst, which involved work as a customer service operator.
- 174.2. In 2016/2017, Ms Pavihi had assisted some 68 trustees or intended trustees in the establishment or intended establishment of 35 SMSFs, inclusive of the trustees and SMSFs described at paragraphs 10 to 148 above. The total value of the preserved benefits rolled over and accessed through those SMSFs was approximately \$1.9 million. The Commissioner does not allege in these proceedings that this broader activity was in breach in s 68B and, it having been taken into account as relevant context, the Commissioner will not take enforcement action against Ms Pavihi in relation to any of those further SMSFs.
- 174.3. Ms Pavihi was living in rented accommodation with her husband and five children. Her husband was unemployed and drinking heavily. He had subjected Ms Pavihi to domestic violence over the course of their marriage, which had escalated to the point of a serious physical assault on Ms Pavihi for which he received a suspended sentence of imprisonment.

Harms from the wrongdoing

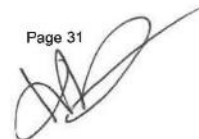
175. In relation to 19 of the 22 schemes, the affected trustees rolled over, transferred and dissipated all or part of their preserved benefits. Those trustees will, ultimately, have less superannuation to rely upon in their retirement. Although in each case the bulk of the amounts withdrawn from superannuation were for the trustees' own use, rather than going to profit Ms Pavihi, any short-term benefit that the trustees may have derived from access to their funds will have been substantially outweighed by the significant long-term detriment, and the detriment to the integrity of the compulsory superannuation regime.

176. In some cases, Ms Pavihi requested and was paid a fee by the trustee or intended trustee (generally \$2,000) for her assistance in establishing the SMSF and accessing the trustee's or intended trustee's preserved benefits. Ms Pavihi received fees totalling \$21,900 in respect of the 22 trustees or intended trustees. A small number of the trustees also made loans to Ms Pavihi out of the money they withdrew from their superannuation. Neither the fees nor the loans have been repaid.

177. The following table sets out the loss of preserved benefits and the fees paid and loans made by the trustees and intended trustees to Ms Pavihi:

	Trustee or intended trustee	Amount rolled over	Amount withdrawn from SMSF bank account	Fee paid	Loan made
1.	Mr Kite	\$12,590.00	\$12,590.00	-	-
2.	Mr Tu'ltufu	\$37,173.00	\$37,173.00	-	-
3.	Mrs Tu'ltufu	\$12,808.00	\$12,808.00	-	-
4.	Mr Pahulu	\$87,109.00	\$87,109.00	-	-
5.	Mr Uhatafe	\$34,177.97	\$34,177.97	\$2,000	\$3,000
6.	Mrs Uhatafe	\$12,585.24	\$12,585.24	\$2,000	-
7.	Jenner Orayenza (Orayenza Pty Ltd)	\$111,240.00	\$111,240	\$1,300	Approx \$3,000
8.	Ms Van Gestel	\$108,845.87	\$48,844.07	\$2,000	-
9.	Ms Pahulu	\$13,075.93	\$13,075	\$2,000	-
10.	Mr Tupou	\$22,155.07	\$22,155.07	\$2,000	-
11.	Mr Kolofale	\$28,604.27	\$28,604.27	-	-
12.	Mr Maka	\$90,502.17	\$90,502.17	\$2,000	-
13.	Mrs Maka	\$27,969.05	\$27,969.05	\$2,000	-
14.	Mrs Ngungutau	\$45,832.70	\$45,832.70	\$2,000	-
15.	Mrs Aviga	\$29,903.54	\$29,903.54	-	-
16.	Mr Loloa	\$45,815.26	\$45,815.26	-	-
17.	Mrs Loloa	\$3,241.29	\$3,241.29	-	-
18.	Ms Tupou	[No rollover]	-	\$600	-
19.	Mr Tolu	[No rollover]	-	-	-
20.	Mrs Walter	\$50,963.08	\$50,963.08	\$2,000	-
21.	Mr Walter	\$69,540.00	\$69,540.00	\$2,000	-
22.	Ms Taupeamuhu	[No rollover]	-	-	-
	Totals	\$831,541.44	\$748,128.71	\$21,900.00	\$6,000

178. There is a further financial loss caused to trustees who accessed their superannuation benefits by reason of the taxation consequences of the illegal early release of their



superannuation benefits. Pursuant to the relevant provisions of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) and the TAA 1953, the tax consequences of illegal early release of superannuation are as follows:

- 178.1. The amount of the superannuation benefit is included in the recipient's assessable income in the year in which the benefit was received, and subject to taxation under Division 301 of the ITAA 1997. This will give rise to an amount of tax payable (the tax shortfall) in respect of the increase to the recipient's assessable income. The Commissioner has calculated the potential tax shortfall for the trustees of the SMSFs to total \$179,607.
- 178.2. There may be administrative penalties imposed, calculated as being either 25%, 50% or 75% of the tax shortfall, depending on the participants' level of culpability (s 284-75 in Sch 1 to the TAA 1953). The Commissioner has calculated the potential administrative penalties for the trustees of the SMSFs to total \$44,901, assuming that the penalty assessed to each trustee is imposed at 25% of the tax shortfall for lack of reasonable care. The shortfall penalty may, however, ultimately be reduced or remitted following the exercise of the Commissioner's discretion in relation to reduction of penalty or application of safe harbour provisions.
- 178.3. There may also be interest charges (shortfall interest charges or general interest charges) imposed in respect of the unpaid tax. The Commissioner has calculated the potential shortfall interest charge imposed in respect of the potential tax shortfall amount, set out at paragraph 178.1 above, to be \$13,330.73.
179. There is likely to be harm to the general public, by reason of the dissipation of the trustees' preserved benefits. This is because there is a burden placed on the public to financially support retirees in their retirement, who do not have sufficient superannuation to support themselves.
180. More broadly, the harms from the wrongdoing are those explained in paragraphs 149 to 165 above by reference to the integrity of the superannuation scheme.

Cooperation and contrition

181. Ms Pavihi has cooperated fully in these proceedings by making admissions to all of the allegations in the statement of claim, joining with the Commissioner in this statement of agreed facts and joining with the Commissioner in submissions as to the appropriate penalty. In so doing she has saved a potentially lengthy hearing, avoided the related costs to the Court, the community and the Commissioner and has avoided the need to call evidence from a large number of witnesses.
182. The Commissioner accepts that Ms Pavihi's early non-participation in the proceedings does not reflect an attitude of non-cooperation but arose from the difficult personal circumstances described below. Since obtaining pro-bono legal representation she has engaged actively and constructively in the proceedings.

183. Ms Pavihi accepts full responsibility for her wrongdoing. She acknowledges that it was serious and that it has had, and will have, significant adverse consequences as described in this statement of facts. She expresses her remorse and regret for having caused those harms. She has assured the Commissioner, and assures the Court, that she will not seek to engage in such conduct in the future.

Ms Pavihi's personal circumstances

184. Ms Pavihi's personal circumstances were difficult at the time of the wrongdoing, and continue to be difficult. Paragraphs 185 to 195, below, contain Ms Pavihi's account of her personal circumstances at the time of the wrongdoing and at present. The Commissioner does not dispute her account.
185. Ms Pavihi was born in Tonga, completing the equivalent of Year 11 at secondary school before moving to Australia in 1988, where she subsequently obtained a TAFE qualification, and became a citizen. She is 50 years old, with five children aged 25, 24, 22, 19 and 9 years old.
186. At the time of the wrongdoing, Ms Pavihi was working as a credit card customer service operator at Westpac Bank, where she had worked for over 20 years. Her annual salary was approximately \$60,000.
187. Ms Pavihi is a survivor of domestic violence perpetrated by her estranged husband in the period approximately 1993 to 2018, which included verbal denigration, punching, slapping, kicking, spitting, pushing, being thrown down a flight of stairs, and being threatened with a knife (escalating during the latter part of that period).
188. The family lost their house in approximately 2011, after Ms Pavihi's husband lost his job as a factory worker, and they were unable to pay their mortgage. At some point prior to 2010, Ms Pavihi had obtained an early release of her own superannuation funds, held with Westpac Super.
189. At the time of the wrongdoing:
- 189.1. Ms Pavihi was living in rented accommodation with her husband and five children;
- 189.2. Ms Pavihi's husband was again unemployed, having suffered a stroke in early 2016, and was drinking very heavily;
- 189.3. the domestic violence escalated substantially during this period, both in frequency and intensity – by way of example, Ms Pavihi's husband was convicted of the offence of assault occasioning actual bodily harm to Ms Pavihi in the Paramatta Local Court, and sentenced on 15 November 2016 to a term of imprisonment for 14 months (wholly suspended);
- 189.4. Ms Pavihi herself was also drinking very heavily;

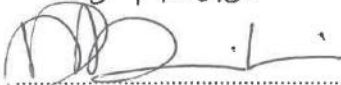
- 189.5. Ms Pavihi and her family were in significant financial difficulty, and Ms Pavihi made numerous inquiries or loans via payday lenders from February 2016 onwards.
190. Following a collapse at work on 28 August 2017, Ms Pavihi was diagnosed by her general practitioner with post-traumatic stress disorder associated with domestic violence. She presently suffers from insomnia, thyroid nodules, haemorrhoids, systemic arterial hypertension, and chronic pain due to a degenerative disease of the spine.
191. Between September 2017 and February 2019, Ms Pavihi was on extended sick leave from her employment with Westpac, suffering panic attacks, before her employment was terminated.
192. On 2 May 2018, Ms Pavihi left her family home in Sydney in order to escape her husband, and moved with her three youngest children to rented accommodation in Rye, Victoria.
193. Ms Pavihi is presently unemployed, insolvent, and a single mother, and her future earning capacity is likely to be limited (even aside from the impact of any publicity associated with the present proceeding).
194. The money which Ms Pavihi made from the contraventions (and similar conduct in establishing other SMSFs) has been dissipated through personal and family expenditure, in the circumstances indicated above.
195. Ms Pavihi intends to file for bankruptcy. Absent some presently unforeseen change in her financial circumstances it is unlikely that she will be able to pay penalties imposed on her in this matter.

Date: 28 November 2019



Glenn Cowbridge, AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Applicant

Date: 28 November 2019



Kalangalupe Pavihi
Respondent

Annexure B

Amended table: paragraph [177] of SAF (clean)

	Trustee or intended trustee	Amount rolled over	Amount withdrawn from SMSF bank account	Total amount withdrawn from SMSF bank account	Fee paid	Loan made
	Mr Kite	\$12,590.47	\$12,590.00	\$12,590.00	-	-
2.	Mr Tu'itufu	\$37,172.87	\$37,173.00	\$37,173.00	-	-
3.	Mrs Tu'itufu	\$12,808.77	\$12,808.00	\$12,808.00	-	-
4.	Mr Pahulu	\$87,108.31	\$87,109.00	\$87,109.00	-	-
5.	Mr Uhatafe	\$34,177.97	\$34,177.97	\$48,317.02 (combined)	\$2,000	\$3,000
6.	Mrs Uhatafe	\$12,585.24	\$12,585.24		\$2,000	-
7.	Jenner Orayenza (Orayenza Pty Ltd)	\$108,935.61	\$108,935.61	\$111,240.00	\$1,300	Approx \$3,000
8.	Ms Van Gestel	\$108,845.87	\$48,844.07	\$48,844.07	\$2,000	-
9.	Ms Pahulu	\$13,075.93	\$13,075.00	\$13,075.00	\$2,000	-
10.	Mr Tupou	\$22,155.07	\$22,155.07	\$22,155.07	\$2,000	-
11.	Mr Kolofale	\$28,604.27	\$28,604.27	\$28,604.27	-	-
12.	Mr Maka	\$90,502.17	\$90,502.17	\$134,012.00 (combined)	\$2,000	-
13.	Mrs Maka	\$27,969.05	\$27,969.05		\$2,000	-
14.	Mrs Ngungutau	\$45,832.70	\$45,832.70	\$45,832.70	\$2,000	-
15.	Mrs Aviga	\$29,903.54	\$29,903.54	\$29,903.54	-	-
16.	Mr Loloa	\$45,815.26	\$45,815.26	\$46,540.49	-	-
17.	Mrs Loloa	\$3,241.29	\$3,241.29	\$3,241.29	-	-
18.	Ms Tupou	[No rollover]	-	-	\$600	-
19.	Mr Tolu	[No rollover]	-	-	-	-
20.	Mrs Walter	\$50,963.08	\$50,963.08	\$120,420.00 (combined)	\$2,000	-
21.	Mr Walter	\$69,450.00	\$69,450.00		\$2,000	-
22.	Ms Taupeamuhu	[No rollover]	-	-	-	-
Totals		\$841,737.47	\$781,734.32	801,865.45	\$21,900.00	<u>\$6,000</u>

Annexure C

AMENDED ANNEXURE A – TABLE OF PROPOSED PENALTIES

SMSF	Members	Total \$ rolled over	Total \$ withdrawn	Potential tax burden	Total \$ paid or lent	Total maximum	Appropriate penalty	
							% of max	\$ amount
Tutufu Panulu Kite Superfund	4	\$149,680.42	\$149,680.00	\$18,587.74	N/A	\$1,440,000	~ 4%	\$60,000
Uhatafe Superfund	2	\$46,763.21	\$48,317.02	\$13,217.84	\$7,000	\$720,000	~ 4%	\$30,000
Orayenza Superfund	1	\$108,935.61	\$111,240.00	\$30,996.28	\$4,300	\$360,000	~ 14%	\$50,000
Fonohema Superfund	2	\$121,921.80	\$61,919.07	\$32,451.72	\$4,000	\$720,000	~ 7%	\$50,000
Kolofale & Tupou Superfund	2	\$50,759.34	\$50,759.34	\$15,067.06	\$2,000	\$720,000	~ 4%	\$30,000
Atelea Maka Superfund	2	\$118,471.22	\$134,012.00	\$56,709.58	\$4,000	\$720,000	~ 7%	\$50,000
Ngungutau & Aviga Superfund	2	\$75,736.24	\$75,736.24	\$22,127.26	\$2,000	\$720,000	~ 4%	\$30,000
Pateliso Loloa Superfund	2	\$49,056.55	\$49,781.78	\$12,986.02	N/A	\$720,000	~ 3%	\$20,000
Tupou & Tolu Superfund	2	N/A	N/A	N/A	\$600	\$720,000	~ 1%	\$10,000
Walter Superfund	2	\$120,413.08	\$120,420.00	\$35,697.07	\$4,000	\$720,000	~ 7%	\$50,000
Taupeamuhu Superfund	1	N/A	N/A	N/A	N/A	\$360,000	~ 3%	\$10,000
Totals	22	\$841,737.47	\$801,865.45*	\$237,840.57*	\$27,900	\$7,920,000	~ 5%	\$390,000
Less ~ 30% discount for cooperation (\$120,000)								\$270,000
Less ~ 20% discount for totality (\$50,000)								\$220,000
Total penalties							~ 3%	\$220,000

* This includes the total tax shortfall, 25% administrative penalties and interest charges described in the SAF at [178].

* The amounts withdrawn from the SMSF bank accounts which comprise amounts rolled over by the trustees from ARPA regulated superannuation funds totalled approximately \$781,734. The additional amounts withdrawn from the SMSF bank account comprise other funds deposited or credited to the bank accounts, such as interest.