**IN THE HIGH COURT OF AUSTRALIA**
**ADELAIDE REGISTRY** No. A37 of 2017

**ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA**

BETWEEN:

**ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY (ACN 087 648 842)**
Appellant

AND:


**LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LIMITED (ACN 087 649 492)**
First Respondent

**FUNERAL PLAN MANAGEMENT PTY LTD (ACN 003 769 640)**
Second Respondent

## APPELLANT'S SUBMISSIONS

### PART I: CERTIFICATION

1. We certify that this submission is in a form suitable for publication on the internet.

### PART II: ISSUES

2. This appeal raises the following questions:

   (a) Was there a sufficient connection between the breaches of fiduciary duty by Messrs Woff (**Woff**) and Corby (**Corby**), which the appellant (**Foresters**) knowingly assisted, and the profit the subject of the account ordered by the Full Court (**the profit**) because, but for the BCP breaches,[1] Foresters would not have proceeded with the development of its funeral fund business as proposed by Woff and Corby?

   (b) Does the proper approach to the question in (a) involve consideration, by analogy, of common law principles in relation to causation and, in particular, scope of liability, remoteness and *novus actus interveniens* in respect of the profit?

   (c) Was the profit an anticipated, rather than an actual, profit made or realised by Foresters?

   (d) Do the same principles apply in determining a profit for the purposes of s 1317H of the *Corporations Act 2001* (**the Act**) as apply for the purposes of an equitable account of profits?

[1] See [11] below.

3. Foresters answer to the questions are as follows: (a) No; (b) Yes; (c) Yes; (d) No.

## PART III: SECTION 78B NOTICE

4. The appellant considers that no notice is required to be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

## PART IV: REASONS FOR JUDGMENT IN PRIMARY AND INTERMEDIATE COURT

5. The judgment of the primary judge is reported as *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Limited* (2017) 120 ACSR 421; [2017] FCAFC 74 (**PJ's reasons**). The judgment of the Full Court of the Federal Court is reported as *Lifeplan Australia Friendly Society v Woff* (2016) 259 IR 384; [2016] FCA 248 (**FC's reasons**).

## PART V: FACTS

*The primary judge*

6. At all material times the respondents (**Lifeplan**) and Foresters were competitors in relation to the promotion, marketing and distribution throughout Australia of funeral bonds and prepaid funeral plans. These were sold through approximately 250 funeral directors in Australia to their customers, who on purchase of the bond or plan became members of the relevant company's funeral fund. A funeral bond or plan can only be claimed following the death of the member for the purposes of paying for or contributing to the member's funeral expenses. Lifeplan's and Foresters' clients were the funeral directors who encouraged their customers seeking a pre-paid funeral or a funeral bond to invest the customers' moneys with the funeral director's preferred friendly society, which earned a management fee from its investment of the funds.[2]

7. Woff and Corby were longstanding employees of Lifeplan. Their personal relationship with the funeral directors played an important role in the success of Lifeplan's funeral fund business, which led to it having about 70% of that market in Australia in 2010. During the second half of 2010, while Woff and Corby were still employees of Lifeplan, they persuaded Foresters to employ them, and enter into business arrangement with their company, Funeral Planning Australia Pty Ltd (**FPA**), to develop Foresters' smaller funeral fund business.

8. Late in 2010, Woff and Corby left the employ of Lifeplan and became employees of Foresters.[3] They incorporated FPA, which provided promotional and marketing services for Foresters' funeral fund business in return for the payment of commission under a Marketing and Service Agreement dated 31 December 2010 between FPA and Foresters (the **FPA Agreement**). As explained in the PJ's reasons at [7], after Woff and Corby became employees of Foresters its funeral fund business grew very substantially and Lifeplan's funeral fund business diminished. The primary judge discussed at [427]-[429] some of the factors leading to the growth of Foresters' business and the diminution of Lifeplan's including, for example, the previous poor performance of Lifeplan's

[2] Friendly societies are regulated as life companies pursuant to Pt 2A and 4 of the *Life Insurance Act 1995* (Cth).

[3] Corby and Woff commenced their employment with Foresters on 6 December 2010 and 4 January 2011 respectively.

Funeral Benefits Fund No 2. Relevantly, Foresters growth came about entirely from lawful competition.

9. Lifeplan's case was that Woff and Corby acted in breach of the contractual and fiduciary duties and the duties of confidence they owed to Lifeplan and that Foresters knowingly assisted in the breaches. Lifeplan also claimed that the same conduct resulted in Woff contravening ss 181, 182 and 183 of the *Corporations Act 2001* (Cth) (**the Act**) as an officer of Lifeplan and that, pursuant to s 79 of the Act, Foresters was a person involved in the contraventions. At an early stage of the case, Lifeplan elected to claim an account of profits against Woff, Corby, FPA and Foresters, rather than to claim damages.

10. Lifeplan's pleaded case, which was rejected by the primary judge at [8], was that without Foresters unlawful participation in Woff's and Corby's wrongdoing, Foresters would not have had the financial capacity or the skills and systems to operate the funeral fund business conducted by it from 2011 onwards. However, Lifeplan's case, as developed at trial, concentrated on 11 acts or courses of conduct by Woff and Corby (set out at [10]-[20] of the PJ's reasons), which were claimed to involve breaches of duty which Lifeplan claimed Foresters had knowingly assisted or for which it was otherwise liable.

11. The primary judge found that Foresters knowingly assisted breaches of fiduciary duty and of confidence by Woff and Corby only in three respects. The main breach related to a document prepared by Woff and Corby entitled Funeral Fund Business Concept (**the BCP**), which contained certain confidential or valuable information of Lifeplan that was relied upon by Foresters as set out at [19]-[21] below (**the BCP breaches**). The BCP was presented by Woff and Corby to the Foresters' Board on 13 September 2010. The primary judge at [324] found that the confidential information in the BCP gave the Foresters' Board confidence that the annual sale targets proffered in the BCP were achievable, or might be achieved, and at a more general level, had the potential to give the reader confidence that Woff and Corby "knew what they were talking about". The primary judge also found at [324] that the confidential information played a part in Foresters' decision to proceed (by moving discussions forward), but he did not reach a conclusion as to how significant the information was to that decision beyond finding that "it was not irrelevant or completely peripheral".

12. The second breach (set out at [22]-[24] below) related to approaches in the latter part of 2010 by Woff and Corby to funeral directors to solicit business for Foresters while they were still employees of Lifeplan (**the approach to funeral directors' breaches**). The third breach (set out at [25]-[28] below) related to steps taken by Woff and Corby, while still employed by Lifeplan, to review the Rules governing the Foresters Funeral Fund and to prepare disclosure documents for Foresters (**the Rules and disclosure documents breaches**). The primary judge found at [444] that after they left the employ of Lifeplan it was open to Woff and Corby, who were not under any restrictive covenant, to approach funeral directors, prepare disclosure documents and advise Foresters on the rules of its funeral fund.

13. The PJ's reasons at [441] to [444] for dismissing Lifeplan's case for an account of profits, may be summarised as follows. (i) The confidential information in the BCP was not used by Foresters to generate any profits and Foresters' participation in Woff and Corby's breaches of duty in relation to the BCP did not result in the profits earned or to be earned on the Foresters Funeral Fund; (ii) Although the business proposed by Woff and Corby to Foresters would not have proceeded but for the BCP breaches, that was

not sufficient to conclude that the profits claimed, by Lifeplan were attributable to those breaches; (iii) The approach to funeral directors breaches and the Rules and disclosure documents breaches might have led to Foresters having a head start when the proposed association with Foresters commenced in January 2011, but the breaches did not lead to the profits earned or to be earned in relation to Foresters' funeral fund; in any event Lifeplan did not advance a case on a head start basis.

*The Full Court*

14. The Full Court, on the basis of the primary judge's findings of fact, stated at [3] that it differed from the primary judge on the question of causation. Relying particularly on the finding that the proposed business with Foresters would not have proceeded without Foresters' reliance on the confidential information in the BCP, the Full Court at [61] and [66] relied upon the "but-for" test to provide the requisite causal connection.

15. Lifeplan claimed it was entitled to the capital value of the whole of the Foresters' funeral fund business, less any just allowances properly proved, because that business would not have proceeded without the breaches of duty, which Foresters knowingly assisted. The Full Court at [85]-[89] accepted the whole of business approach, but stated that a degree of proportionality of response was required which warranted that the business be valued on the basis of the net present value of contracts entered into between 1 January 2011 and 30 June 2015 in the Foresters' funeral fund business. In ordering an account of profit in the sum of $6,558,495, based upon the calculated net present value of the past and expected income streams from funeral bond contracts entered into by Foresters between 1 January 2011 to 30 June 2015 of $7,656,526 (less the present value of actual accumulated losses from 1 January 2011 to 30 June 2014 of $1,098,031), the Full Court effectively treated Foresters as a constructive trustee of all of those contracts for the benefit of Lifeplan.

16. The Full Court acknowledged at [82] and [87] that its valuation of what it characterised at [116] as an "existing capital profit" was not driven by any logical analysis beyond the recognition that it should support and fortify the underlying principles being vindicated: fidelity, trust and honesty.

17. Finally, the Full Court at [109]-[117] found that the facts constituting Foresters knowing assistance made it a person involved in Woff's contraventions of ss 181, 182 and 183 of the Act and saw no reason why its account of profits order in equity should not also be made under s 1317H of the Act.

*The BCP Breaches*

18. It is of first importance to ascertain precisely what it was that was acquired by Foresters in consequence of its knowing assistance in the breaches of fiduciary duty by Woff and Corby.[4] That necessarily involves ascertaining the relevant circumstances and conduct constituting the breaches and the knowing assistance.

19. The BCP breaches related to the confidential or valuable information of Lifeplan found by the primary judge to be "the annual inflows and contract numbers in Appendix B and the annual sales in the table in section 4.2", "statements about FPA in section 3", "statements about the industry in section 4.1", the "annual inflows and contract numbers

[4] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (***Warman***) at 565.2 and *Consul Development Pty Ltd v DPC Estate Pty Ltd* (1975) 132 CLR 373 (***Consul Developments***) at 397.4.

in Appendix B", "the words and table in section 4.2", "the table in section 6.2" and "the heading to Appendix D" (see the PJ's reasons [191](3), (5), (6) and (8) and [377] and [378]).

20. At [303], the primary judge found that Mr Fleming (**Fleming**), the Chair of the Board of Foresters, and other members of the Foresters' Board placed emphasis on Woff and Corby's projected annual inflows,[5] rather than on any confidential information in the BCP, but Fleming accepted in his evidence that he "had a good look at Appendix B", that the figures in Appendix B did not have "a massive impact" and the Board did not make any decision based solely on those figures as he, like most of the Board, were relying on "the profit revenue model provided by Woff on 5 August 2010, and Foresters' own analysis of that". The primary judge also accepted at [304] that, although the information in Appendix B was not the "driver" of Foresters' decision or "decisive" in the decision, Fleming did not say it did not play a part in the decision. Fleming's explanation as to why the BCP was submitted to the Board with the confidential information in it was that, "it would have made no sense to ask Woff and Corby to remove the confidential information from the BCP". At [324], the primary judge said the confidential information contained in the BCP, "was not irrelevant or completely peripheral".

21. The primary judge accepted that Foresters did not procure, induce or encourage Woff or Corby to provide to it Lifeplan's confidential information the subject of the BCP breaches, but found that Foresters' knowing assistance arose because it was open to it, through Mr Hughes (**Hughes**), who was Foresters' CEO, and Fleming, to require Woff and Corby to remove Lifeplan's confidential information from the BCP before it was presented to the Foresters' Board: see [312] and [379] of the PJ's reasons.

*The approach to funeral directors' breaches*

22. The primary judge at [214]-[226] described the approaches made by Woff and Corby to solicit the business of funeral directors for FPA and Foresters before they left the employ of Lifeplan but observed at [225] that there was insufficient evidence to make a finding as to the number of funeral directors that were approached. The primary judge found at [386] that that conduct was in breach of Woff and Corby's fiduciary and contractual duties and at [326], [387] and [388] found that Foresters' knowing assistance arose from Mr Hughes knowledge from 20 October 2010 that Woff was soliciting business from funeral directors for the purposes of the proposed business and that he was likely to continue to do so.

23. There was no finding by the primary judge, nor did the evidence disclose, that any of the approaches to funeral directors the subject of these breaches resulted in any contracts being entered into by Woff, Corby or FPA on behalf of Foresters before, or after, they commenced their employment with Foresters.

24. The primary judge dealt with the consequences of the approach to funeral directors' breaches observing at [444] that Woff and Corby were not subject to restrictive covenants and that funeral directors (other than Tobins) did not enter into contracts with

[5] The projected annual inflows were set out in section 6.1 of the BCP under the heading "Five Year Sales Projections", and in Appendix E, "Foresters Profit Revenue Model". The projected new business inflows that Woff and Corby expected to be secured over the 5 years, which were Year 1 - $10m, Year 2 - $25m, Year 3 - $35m, Year 4 - $40m, Year 5 - $45m, were stated to be supported by Appendix B. The inflows, which were referred to in the FC's Reasons (at [88]) as the 5-year plan, were set out in the PJ's reasons at [160]-[161].

fund managers to invest in a particular fund for an agreed period. The primary judge then concluded that it was open to Woff and Corby, after they left the employ of Lifeplan, to approach funeral directors and seek their business and that, in those circumstances, while these breaches might have led Foresters to be able to establish the proposed business earlier than might have been the case they did not lead to the profits earned or to be earned in relation to the Foresters' funeral fund. The primary judge then observed that while such breaches might be relevant to a case on a head start basis, no such case was advanced by Lifeplan.

*The Rules and disclosure documents breaches*

10

25. The primary judge at [230]-[241] set out his findings to the effect that Woff and Corby reviewed and suggested changes to Foresters' Rules[6] and Foresters' disclosure documents which were required by law to be provided to members of the public entering into funeral bonds and funeral pre-paid funeral plans. Woff and Corby's conduct in relation to other documents (which was not found to be conduct which Foresters knowingly assisted) was set out at [242]-[246].[7]

26. Woff and Corby's involvement in the changes made to the Rules and in the preparation of the disclosure documents was found by the primary judge at [401]-[402] to go well beyond the conduct a current employee with a view to new employment, or establishing
20 a new business, may permissibly undertake and therefore amounted to a breach by Woff and Corby of their fiduciary and contractual duties. Foresters' knowing assistance arose because the primary judge, referring back to his findings at [230]-[237] and [252]-[255], found that Hughes played an active role in that conduct which he would have known had nothing to do with Woff's employment by Lifeplan.

27. The primary judge at [444] dealt with the Rules and disclosure documents breaches as part of Woff and Corby's preparation for the new business of Foresters. For the reasons set out at [24] above the primary judge observed that it was open to Woff and Corby after they left the employ of Lifeplan to prepare disclosure documents and to advise Foresters as to its Rules. The primary judge then observed that the Rules and disclosure
30 documents breaches might have led Foresters to be able to establish the proposed business earlier than might have been the case had there been no such breaches, but they did not lead to the profits earned or to be earned in the Foresters' funeral fund. The primary judge also made the head start case observation described in [24] above in relation to these breaches.

28. On 5 September 2011, Lifeplan's parent company, Australian Unity and Minter Ellison, Solicitors, wrote to Foresters about serious breaches of law and equity said to have been committed by Woff, Corby and FPA. As explained in the PJ's reasons at [285]-[286], although Foresters didn't think there was anything to the complaints it took steps to remove the cause of the complaints, notifying funeral directors on or about 19

---

[6] The review of the Rules, which was discussed in the PJ's reasons at [252]-[254], resulted in a change in the management fee from 1.5% to 2% with respect to future business.

[7] The primary judge noted at [5] and [397] that shortly before trial Lifeplan abandoned its copyright claim in relation to the disclosure documents, stationery request forms, claim forms and marketing flyers. See also [33] below in respect of the factual errors of the Full Court concerning these documents (other than the disclosure documents).

September 2011 that existing documents should no longer be used. Foresters issued replacement documents at the start of October 2011.

*The five year sales plan*[8]

29. At [310] the primary judge referred to Hughes' evidence that he used the 5-year sales plan, which was set out in the letters from Woff and Corby dated 23 July 2010, and 5 August 2010 and in section 6.1 of the BCP, to set the initial sales targets and budgets for FPA but he said that other than that use "Foresters made no use of the 23 July 2010 letter, the 5 August 2010 profit revenue model, or the BCP or the information contained in any of them after the Board meeting on 13 September 2010".

30. The primary judge at [192] and [283] found that the only subsequent use by Foresters of the information in the documents set out in [191][9] after the Board meeting of 13 September 2010, involved the use of the annual sales figures (or some of them) of funeral directors in Appendix B to the BCP, which appeared in FPA reports to Foresters' Board for January 2011 and March 2011. The primary judge at [298] referred to Fleming's evidence (the substance of which the primary judge stated at [60] he accepted) that "the Board (meaning himself and the other members) did not make use of the BCP or the information contained in it after the meeting on 13 September 2010".

31. The 5-year sales plan that was provided for in Annexure 2 to the FPA agreement differed from the 5-year sales plan in the BCP (which is described in footnote 5 above) in that the targets for years 2-5 in Annexure 2 were $5m less for each year. The new 5-year sales plan targets were the initial Sales Budget agreed between Foresters and FPA (see cl 1.1). In cl 4.1(l) FPA agreed to use its best endeavours to achieve the sales targets and to report on its sales achievements against the targets. Apart from the $10m sales target for 2011 being referred to in the January and March 2011 FPA reports to Foresters' Board, the evidence does not disclose any other use of or reliance on those targets.[10]

*The account of profits against Woff and Corby*

32. Lifeplan also claimed an account of profits against Woff and Corby in respect of their breaches of fiduciary and contractual duties. The primary judge at [446]-[447] rejected the claim for their salaries as employees of Foresters because "there was nothing to suggest a link between the breaches and the earning of salaries". The primary judge observed that Woff and Corby were entitled to leave the employ of Lifeplan for Foresters and to be paid a salary. The primary judge stated he was disposed not to make any allowances or assumptions in favour of the defaulting fiduciaries and found that the "blatant and deliberate nature of the breaches" enabled FPA to establish its business one year earlier than might otherwise have been the case. Accordingly, Woff

[8] The Full Court relied on the 5-year plan in the BCP (at [69] and [88]) on the basis that it continued to be used to measure performance. See [36] below in relation to factual errors of the Full Court in relation to the 5-year plan.

[9] Relevantly, in relation to Foresters, information in [191] (3), (5), (6) and (8) of the PJ's reasons.

[10] Eight FPA reports to Foresters Board, the earliest of which was January 2011 and the latest of which was April 2013, were in evidence before the primary judge. The reports referred to sales budgets or targets, but save for the explicit reference to the $10m budget for 2011 referred to in the January and February 2011 sales reports of FPA, the figures in the later reports are not those set out in the 5-year sales plan in the BCP. The primary judge found at [192] that information from Appendix B to the BCP was used in the January and March 2011 reports, but made no such finding in respect of any reports after that date.

and Corby were ordered to account for the drawings and distributions to them from FPA in respect of that year. Lifeplan did not appeal against the orders of the primary judge in relation to Woff and Corby.

*Factual errors of the Full Court*

33. The Full Court erred at [11] and [109] in stating that the primary judge found Foresters knowingly assisted breaches in respect of the preparation of "other documents" (ie other than the disclosure documents), which appears to be intended to include the stationary request forms, funeral benefit claim forms, marketing flyers and pre-paid funeral contracts described in the FC's reasons at [43]. As appears in [25] and [26] above the only documents prepared in breach of their duties by Woff and Corby, which Foresters was found to have knowingly assisted, were the disclosure documents.[11]

34. The Full Court's statements at [38] that the BCP was "a body of information to be used by the board to measure the success of the venture" and that "The BCP ... was to play an important role ... in the implementation of the decision" go well beyond the finding of the primary judge at [324] that the, significance of the confidential information in the BCP was that it gave the Foresters board confidence that the sales targets in the BCP were achievable and that Woff and Corby knew what they were talking about: see [11] and [19]-[20] above. Also, in that context the Full Court's finding at [69] of continuing use of the information in the BCP, and its use in governance, is contrary to the primary judge's findings: see [29]-[31] above.

35. The Full Court's finding at [41] of Foresters' "active participation in a dishonest breach of fiduciary duty" in relation to the BCP goes well beyond the primary judge's finding at [379] that Foresters' knowing assistance arose from its inaction in failing to require the removal the confidential information from the BCP. Foresters did not specify or request the information to be provided in the BCP: see [20]-[21] above.

36. The Full Court erred at [88] in using the five-year plan to set the period by which the account of profits was determined or to treat it as relevant to governance: see [34] above. The five-year plan was not found or pleaded to involve a misuse of confidential information and, in any event, even the variation to the five-year plan in the FPA agreement ceased to be relevant after that agreement was terminated on 8 March 2013: see [29]-[31] above.

37. The Full Court erred in awarding an account of profits calculated by reference to a 1 January 2011 until 30 June 2015 when the primary judge considered at [446] that disgorgement of only one year was appropriate for the extensive and "blatant and deliberate", breaches of Woff and Corby.

38. It follows from the foregoing that the outcome of this appeal in relation to causation turns on whether the primary judge was in error in finding, on the facts found by him, that the but-for test did not establish the requisite causation for the account of profits ordered by the Full Court.

[11] The review of Foresters' Rules, which resulted in the commission charge described in footnote 6, does not naturally fall within the phrase "preparation of other documents" referred to by the Full Court.

## PART VI: ARGUMENT

*Causation*

39. The errant fiduciary's liability to account for the profit or benefit obtained by reason of a breach of fiduciary duty is imposed to vindicate the high duty owed to avoid actual or possible conflict between interest and duty and not to take advantage of opportunity or knowledge derived by the fiduciary's position.[12] Thus, the fiduciary is brought to account even though no loss may have been occasioned to the principal, the principal may have been unable or unwilling to obtain the benefit or gain for itself, and on the part of the fiduciary there may have been no lack of bona fides and no dishonesty.[13] The stringency imposed by the remedy encourages fiduciaries to conduct themselves as Cardozo CJ put it in *Meinhard v Salmon*[14] "at a level higher than that trodden by the crowd".[15] Also as McLachlin J observed in *Canson Enterprises Ltd. v Boughton & Co*[16], "the fiduciary relationship at its core has trust, not self-interest".[17]

40. In *Maguire* the plurality observed in respect of the remedy of an account of profits against a fiduciary acting in breach of duty that:[18]

> *"...there directly arises a need to specify criteria for a sufficient connection (or 'causation') between breach of duty and the profit derived, the loss sustained, or the asset held.*
>
> *Where the plaintiff seeks recovery of a profit, the necessary connection has been identified in this Court by asking whether the profit was obtained 'by reason of [the defendant's] fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position'."*

41. The policy considerations described in the FC's reasons at [67] (fidelity, conscience and trust), are reasons for imposing the remedy of an account of profits against an errant fiduciary. As such they may inform the circumstances to be considered in determining the order that is appropriate in all the circumstances of a particular case[19] but those considerations are not to be treated as criteria for determining whether the profit or benefit sought to be the subject of an account was obtained "by reason of" the breach of duty. As was made clear in *Warman*, an account of profits is to be granted or withheld according to "settled principles"[20]

---

[12] *Warman* at 557.6; *Maguire v Makaronis* (1997) 188 CLR 449 ***(Maguire)*** at 465.2.

[13] *Warman* at 558.2; and The Hon William Gummow, 'Dishonest Assistance and Account of Profits', (2015) 74(3) *The Cambridge Law Journal*, 405, at 406.9 to 407.1

[14] (1928) 164 NE 545.

[15] Ibid 564; see also *Warman* at 557.9.

[16] [1991] 3 SCR 534.

[17] Ibid at 543.

[18] *Maguire* at 468.

[19] See, for example, *Warman* 558.5-559, 568.5 and also 560.4 and *Victoria University of Technology v Wilson* 60 IPR 392 at 454 (***VUT***), [201] per Nettle J.

[20] *Warman* at 559.2.

42. The High Court observed in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[21] the phrase "by reason of":

> *"... serves to remind, as Mummery LJ recently put it, that '[t]here is no equitable by-pass of the need to establish causation' and that '[i]n questions of causation it is important to focus on the relevant equitable duty'."*

43. The High Court in *Warman* also observed that the outcome in cases of the kind it was considering (ie acquiring or operating a business)[22] will depend on a number of factors including the relevant powers and obligations of the fiduciary and the relationship between the profit made and those powers and obligations.[23] Writing extra-judicially The Hon. William Gummow, in the context of causation, observed that a profit that was not "within the scope and ambit", or that was "wholly separate" from, the fiduciary duty owed would not be the subject of the account in that the profit or benefit would not have been obtained by the fiduciary *in* breach of duty.[24]

44. In *Michael Wilson & Partners v Nicholls*[25] the plurality observed:[26]

> *"The reference to the liability of knowing assistance as an 'accessorial liability' does no more than recognise that the assistant's liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows ... that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum."*

In contrast to the fiduciary, the knowing assistant does not owe and has not breached any duty to the principal. Nonetheless, the accessorial liability of the knowing assistant to an account for profits will, as is the case with the fiduciary, be limited to the profit obtained "by reason of" the knowing assistance to the fiduciary's breach of duty. It follows that the sufficient connection or causation requirement in relation to the fiduciary will also apply to the knowing assistant but only in respect of the breach of duty it has knowingly assisted.

45. As stated at [38] above the central issue in the present appeal is whether the application of the "but for" test provided a sufficient connection between the knowing assistance and the profits the subject of the account ordered.

46. As was observed in a common law context in *Amaca Pty Ltd v Booth*:[27]

---

[21] (2003) 212 CLR 484 (***Youyang***) at 502 [44].

[22] The High Court observed (at 560.8-561) that the principles that might be applied where a specific asset is acquired and where a business is acquired and operated are quite different.

[23] *Warman* at 560.5.

[24] Gummow, above n 13, 407.5. Cf. the High Court's statement in *Warman* at 182 CLR at 558.5 "*What is necessary however is to determine as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.*"

[25] (2011) 244 CLR 427.

[26] Ibid at 457, [106] per Gummow CJ, Hayne, Crennan and Bell JJ.

[27] (2011) 246 CLR 36 (***Amaca***), 62 [70] per Gummow, Hayne and Crennan JJ.

*"The 'but for' criterion of causation proved to be troublesome in various situations in which multiple acts or events led to the plaintiff's injury, for example, where the development of a particular medical condition was the result of multiple conjunctive causal factors. In such cases what may be unclear is the extent to which one of these conjunctive causal factors contributed to that state of affairs. These situations have been addressed by the proposition stated by Lord Watson in* Wakelin v London & South Western Railway Co *that it is sufficient that the plaintiff prove that the negligence of the defendant 'caused or materially contributed to the injury'."*

47. In his discussion of *March v E & MH Stramare Pty Ltd*[28] in *Gunnersen v Henwood,*[29] Dixon J made a similar observation:[30]

*"Where concurrent and successive causes are in issue, such causes can be proved by establishing the material contribution of the relevant wrongful conduct. The 'but for' test plays an important role in causation issues, although its inadequacy is evident when the issue concerns concurrent and successive causes."*

48. Recognising that inadequacy Dixon J suggested recourse to the question:[31]

*"... [H]aving regard to the scope of the relevant rule of responsibility, did the impugned act or omission materially contribute to the risk of injury?"*

That approach was similar to that suggested by The Hon. William Gummow[32] in relation to a breach of fiduciary duty; he suggested the causation criterion may be satisfied if the knowing assistance "at least materially contributed to, even if not immediately causing, the derivation of the profit".

49. Dixon J's analysis of causation at the "practical level" (cited by Edelman J)[33] was:

*"[375] At the level of practical application of the principles derived from the cases, commonsense defines the approach to evaluating the evidence, not a test to be applied to it. Starting with the negative proposition, the court postulates that a factor is not sufficiently causal if the Court cannot conclude that the harm would not have occurred. Recognising the qualifications and limitations of this approach across all circumstances, recourse is had to the question: having regard to the scope of the relevant rule of responsibility, did the impugned act or omission materially contribute to the risk of injury? Material contribution refers to increased risk a contribution that is not de minimis. Does the factor add to the outcome? When the risk eventuates, causation follows from the inference of a link between conduct and loss from that contribution."*

50. The present case involves multiple acts or events that led to Foresters' contracts and "profit", or as put in *Amaca*, "multiple conjunctive causal factors", which commenced

---

[28] (1991) 171 CLR 506.

[29] [2011] VSC 440.

[30] Ibid at [375].

[31] Ibid [379].

[32] Gummow, above in 13, 409.

[33] Justice James Edelman, *Unnecessary Causation* (2015) 89 *Australian Law Journal* 20 at 24.

with the employment. of Woff and Corby. The "but for" test applied by the Full Court therefore provided *a* connection between the knowing assistance and the "profit" that later came about as one consequences of that employment, but whether that was a sufficient connection required consideration at least of whether the connection was material. Logic, principle and equity dictate that the common law approach to causation (including the role of scope of liability, remoteness and *novus actus interveniens*) can assist, by analogy, in answering that question.

51. Professor Mitchell observed[34] that, although the Courts do not always explain very carefully how they have distinguished between the gain for which a fiduciary must account and the gains which the fiduciary can keep, the decisions are shaped by principles "...which can meaningfully and usefully be expressed in the language of causation and remoteness."[35] In that context the Professor suggested that there would be "...no causative effect whatsoever, by showing that the gain came into [the fiduciary's] hands exclusively as a result of activities legitimately undertaken in her own interest".[36]

52. Associate Professor Barnett,[37] in a causation discussion which included an account of profits for breach of fiduciary duty, suggested it was appropriate to apply a remoteness test that asks, inter alia, whether it would be *fair* to hold the defendant responsible for gain which has arisen as a result of the defendant's wrongful act, but which was a distant consequence of that act, or which was more immediately caused by the defendant's non-wrongful acts.

53. Professor DeMott,[38] in the United States context, stated:

> *"A basic limit to a fiduciary's liability to disgorge ill-gotten gain is causal; the liability does not extend to assets acquired in a manner unrelated to the breach of duty."*

54. McLachlin J in *Canson* appeared to apply these principles:[39]

> *"There is no link between the breach of duty and this loss. The solicitor's duty had come to an end and the plaintiffs had assumed control of the property. The loss was the result, not of the solicitors' breach of duty, but of the decisions made by the plaintiff and those they chose to hire."*

---

[34] Charles Mitchell, 'Causation, Remoteness, and Fiduciary Gains' (2006) 17(2) *King's Law Journal*, 325.

[35] Ibid at 332.

[36] Ibid at 333.

[37] Katy Barnett, *Accounting for Profit for Breach of Contract* (Hart Publishing, 1st ed, 2012), Chapter 7 - Allowances and Bars to Relief, 186-211 at 190.

[38] Deborah DeMott, 'Causation in the Fiduciary Realm', (2011) 91 *Boston University Law Review* 851 at 857.

[39] McLachlin J's reasons in *Canson* has been cited with approval in *Youyang* at 499-501; *Pilmer v Duke Group Ltd* (in liq) 2001 207 CLR 165 at 196, footnote 157 (per McHugh, Gummow, Hayne and Callinan JJ) and 225 (per Kirby J); *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] AC 1503 at 1521 [36], 1528 [66] and 1530-1533 [79]-[89]; and *Target Holdings Ltd v Redferns* [1996] 1 AC 421, 438-39.

55. Another example is the decision of, Ma J in *Kao Lee & Yip v Koo Hoi Yan & Ors*[40] at [157]-[158] referring to a diversion of a business opportunity:[41]

> *"... in some cases there comes a point when the profits of the relevant business are so remote from the breach of the fiduciary duty that it would simply be unfair to force the fiduciary to continue to account."*

56. A further example may be that the unexpected profit derived as a consequence of the third party's knowing assistance in *Novoship v Mikhaylick*[42] may be seen as the *novus actus* that breaks the chain of causation.

57. The decision in *Warman*, properly analysed, is based on causation and can be seen as an application of the principles outlined above concerning scope of duty, remoteness and *novus actus* being employed by the High Court in rejecting the claim for profit after the two year period. Thus, *Warman* can be explained on the basis that the breach did not materially contribute to the profits earned after that period. *Warman* provides no support for the Full Court's application of the "but-for" test. That approach may have distracted the Full Court from identifying at the outset not only what was acquired by Foresters in consequence of its knowing assistance (relevantly, greater confidence to move forward with Woff and Corby's proposal and a possible head start concerning its documents and future customers), but also from asking whether the income streams from the contracts written up to 30 June 2015 were either too remote, involved a *novus actus*, or related to income earned exclusively from activities that were not in breach of any fiduciary duty.

58. The significance of causation to the decision in *Warman* is highlighted by the fact that it is not a case where profits were apportioned at the outset between those referable to the breach and those which reflected the skill, labour, resources and risk of the defendants so as to avoid an inequitable result. The High Court did not accept the trial judge's approach of giving an 'allowance' of 50% of the profits (over four years). Rather, as a first step the Court used causation analysis to limit the profits for which the defendants were required to account to two years'.[43] But, the second step involved the Court remitting the matter to the trial judge to determine an appropriate allowance to be made out of those profits for expenses, skill, expertise, effort and resources employed. For this reason, the High Court's approach in *Warman* 'must be understood in terms of causation, not equitable discretion.'[44] In contrast, the Full Court's approach at [66]-[68] and [87] is best understood as involving the application of discretion.

59. It follows from the foregoing and, in particular from *Maguire* and *Warman* that a decision to order an account of profits in a business operation case in respect of a breach of fiduciary duty involves a two-step process:

    (a) the first is to determine if there is a sufficient connection between the breach of duty or knowing assistance and the profits to be made the subject of an order for an account, applying, by analogy, the causation principles described above; and

---

[40] [2003] 3 HKLRD 296.

[41] Ibid 343 at [157]-[158].

[42] *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 WLR 526, [114].

[43] Warman at 567.8-568.2

[44] Devonshire, Peter, *Account of Profits* (Thomson Reuters, 1st ed, 2013), 70.

(b) if the answer is in the affirmative, the second step is to determine the appropriate allowance, if any, (eg. for expenses, skill, expertise, effort and resources contributed) to be made in respect of those profits.

60. However, in Warman the Court accepted that there may be a more, or less, favourable approach taken by the Court in the allowances to be made in the second step depending on the level of culpability or dishonesty.[45]

*Causation Errors of the Full Court*

61. At the outset the Court failed to recognise that the scope and ambit of the duties breached by Woff and Corby concerned:

(a) the disclosure of confidential information the subject of the BCP breaches to obtain employment with Foresters, but not to provide Foresters with confidential information which could be employed by it in its business to its advantage; and

(b) the breaches of duty involved in the approach to funeral directors and in respect of the disclosure documents were likewise limited to the pre-contract preparatory period and a possible headstart.

62. If the Court had given proper recognition to those factors it would have appreciated the profits claimed were not profits made *in* breach of duty but, rather, were profits arising from lawful competition that were unrelated to the scope and ambit of the duties found to have been breached with Foresters' knowing assistance. In that context scope of duty, remoteness or *novus actus* considerations would recognise that the "profits" were earned entirely from the legitimate competitive activities, capital invested and risks taken by Foresters and were not materially contributed to by Woff and Corby's breaches that Foresters knowingly assisted.

63. The Court must have recognised the causation problem of an account for profits in respect of the first five years after Woff and Corby's employment commenced (2011 to 2015) when losses were suffered. It sought to overcome that problem, as well as the remoteness issue because of the period between the breaches and the period the profits were to cover, potentially from 2011 to about 2024) by using the policy considerations (infidelity etc) to fill the causation gap between breach and profit: see [63] to [68] and [87] of the FC's reasons. Put another way, those policy considerations were impermissibly employed as causation criteria.

64. The Full Court's reliance on those policy considerations led it to fail to consider the issues of scope of duty, remoteness and *novus actus* in respect of the relief it was granting. The primary judge's considered finding, which included not making any allowances or assumptions in favour of Woff or Corby, of a one year disgorgement of profits (ie. 2011) by Woff and Corby, which is an orthodox application of *Warman*, is difficult to reconcile with the Full Court's order of profits against Foresters for the disgorgement of profits from the funeral contracts entered into until 30 June 2015, which in the result led to profits derived, potentially until about 2024, being treated as an existing capital profit.

[45] *Warman* at 558, 568. See also *VUT* at [201] per Nettle J.

65. The Full Court's frank recognition at [87] that the "end point against which to make the valuation is not driven by any logical analysis beyond the recognition that it should support and fortify the underlying principles being vindicated: fidelity, trust and honesty" stands in stark contrast to the logical analysis in *Warman* of that end point based on "settled principles". While each case must be decided on its own facts the one year period for Woff and Corby, the two year period in *Warman* and the facts of this case strongly suggest the Full Court has strayed into penal and unjust enrichment territory.

66. A common sense approach to evaluating the evidence leads to the same conclusion. However, the question is framed - was the profit *materially contributed* to by the breach of duty? or; was the profit made *in* or *through* breach of duty?[46] – a common sense evaluation of the evidence leads inexorably to a negative answer to both questions.

*Actual or Anticipated profits*

67. The Full Court ordered that Foresters account for profits, in equity and pursuant to section 1317H of the Corporations Act, in the sum of $6,558,495.

68. The $6,558,495 was taken from the experts revised calculation for the "run off model" in respect of policies written in the Foresters funeral fund from February 2010 up to 30 June 2015.[47] The calculation used a discount rate of 8.5% and a valuation date of 30 April 2015. The experts had revised their calculations from the trial in accordance with the findings of the primary judge at [449] – [481].

69. The primary judge described the "run off model" at [457] as the run off for infringing policies assuming no new policies after a particular date. The calculation assumes that new policies are written up until that date but not thereafter, and the existing policies run down to their maturity.

70. As the primary judge explains at [457], the calculation of the present value of policies written to 30 June 2015 of $6,558,495 is comprised of two components. First, the figure in the left-hand column, being an accumulated loss of ($1,098,031), is the value (as at 30 April 2015) of the actual financial result to 30 June 2014, which was the last date in respect of which the experts had actual financial date, Secondly, the projected figure of $7,656,526 in the right-hand column represents the projected cash flows associated with the policies written to 30 June 2015 over a 10 year run off period from 30 June 2014 plus a terminal value to take into account those policies. The total figure of $6,558,495 is the total of $7,656,526 less $1,098,031.

71. The instructions and assumptions on which experts' calculations were based included:

    (a) capital expenditure, depreciation and allocation of overheads should only be taken into account if the relevant item was solely referable to the Foresters' funeral products business and should not be taken into account if, in whole or part, they related to other aspects of the Foresters business;

    (b) the annual rates of new policies written by Lifeplan from 1990 to 2009 are applicable to the rate of new policies written by the Foresters' funeral products business beginning in 2011;

---

[46] See *Warman* at 558, 568.

[47] Joint Expert Report dated 11 August 2016 at Table 1 and Section D

(c) new policies will have the same attributes as to age and gender of members as policies written in 2011, 2012 and 2013;

(d) monthly maturity rates, that is the rate of death of members, would be as predicted in the KPMG actuarial report (the duration of the contracts on this calculation was between 6 and 9 years);

(e) assumptions with respect to the nature of expenses and whether they are recurring or incremental;

(f) the accuracy of financial and other data provided;

(g) that the regulatory environment will remain constant; and

(h) there will be no change to the existing taxation regime within the funeral planning industry.

72. The relevant annual accounts of Foresters were in evidence at trial.[48] The accounts did not disclose as an asset in the management fund (or elsewhere) the funeral contracts or the right to receive the management fee payable on funds under management in the Foresters funeral fund (or in other approved benefit funds) in respect of the funds paid pursuant to those contracts. Rather, the management fee (the income stream from the contracts) was recorded as revenue received year-to-year by the Foresters' management fund from its statutory funds.[49]

73. In *Dart Industries v Decor Corp Pty Ltd,*[50] the plurality said:

> *"As Windeyer J. pointed out in Colbeam Palmer Ltd. v. Stock Affiliates Pty. Ltd., even now an account of profits retains its equitable characteristics in that a defendant is made to account for, and is then stripped of, profits which it has dishonestly made by the infringement and which it would be unconscionable for it to retain. An account of profits is confined to profits actually made, its purpose being not to punish the defendant but to prevent unjust enrichment."*

74. While an account may be ordered of trading or capital profits, the profits must be actual or realised, not anticipated. The Full Court's order required Foresters to account for the present value of anticipated cash flows (ie. the net present value of the income earned or to be earned on each contract entered into up to 30 June 2015 and terminating on the member's death) is in respect of 'profits' that may or may not be derived.

75. The Full Court erred at [116] in holding that the present value of Foresters's funeral fund business was an existing capital profit of which an account could be required. The Full Court's statement that the present value of the business was "*conceptually, and in*

---

[48] CB-425 – Foresters' 2011 Annual Report; CB-426 – Foresters' 2013 Annual Report; Exhibit MPW-3 to the affidavit of Matthew Peter Walsh sworn on 18 September 2014 included an electronic folder containing copies of Foresters' annual reports for the financial years ending 30 June 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013.

[49] See, for example, note 2A to Foresters 2013 financial statements which shows the management fund receiving management fees of $4,230,602 and note 3A which shows the statutory benefit funds paying management fees in the same amount.

[50] (1993) 179 CLR 101 at 111.

*accounting terms, a valuable profit, and one presently existing*" was not supported by evidence and is wrong as a matter of law.

76. In a taxation context in *Federal Commissioner of Taxation v The Myer Emporium Ltd,*[51] the right to future income (interest in that case) was stated not to be a capital asset which is progressively transformed into income as and when the income is received. As the making of a loan in that case was found not to immediately produce a capital gain equal to the present value of the interest to be paid (see at 217.9), so Foresters' funeral contracts do not produce a capital gain equal to the present value of the interest to be paid. This principle applies *a fortiori* to anticipated cash flows expected to be received from the funeral contracts the subject of the Full Court's order, save that the net cash flow in this case is significantly less certain than a right to interest on a debt.

77. The plurality in *Dart Industries* observed that, in determining an account of profits, some assistance may be derived from the principles and practices of commercial accounting.[52]

78. Neither party's accounting experts gave evidence that "in accounting terms" that the present value of anticipated cash flows or of Foresters' funeral fund business was an existing capital profit.

## SECTION 1317H

79. Section 1317H(1) provides that a person may recover compensation for damage suffered resulting from contraventions of the civil penalty provisions (relevantly for present purposes ss 181, 182, 183). Section 1317H(2) provides that damage includes "profits made by any person "resulting from" the contravention. As stated by the Full Federal Court in *Grimaldi Chameleon Mining NL and Another*:[53]

> *"the 'include profits formula' is simply definitional in the sense that it brings within the compensatory scheme of the section a type of claim (ie for profits made) which would not otherwise necessarily fall within the formula "damage suffered by the corporation' as, for example, where the contravenor or a third person made profits as a result of the contravention, but without loss to the corporation. Put shortly, it empowers the Court to compensate for profits made from a contravention without proof of a corresponding loss."*

80. The question arises as to what is the proper causal connection required to satisfy the statutory requirement that those profits "resulted from" the contravention. On a proper construction of s 1317H, the terms of the section make clear that a causal connection is required. As Giles JA observed in *Adler v Australian Securities and Investments Commission (ASIC); Williams v Australian Securities and Investments Commission (ASIC)*:[54]

> *"In my opinion, the words "resulted from" in s 1317H are words by which, in their natural meaning, only the damage which as a matter of fact was caused by the contravention can be the subject of an order for compensation. Like the word*

[51] (1987) 163 CLR 199 at 217.

[52] See also McHugh J at 126.

[53] 2012 200 FCR 296 (***Grimaldi***), 433 at [630], cited with approval in *Agricultural Land Management Ltd v Jackson (No. 2)* (2014) 48 WAR 1, 82-83 at [434].

[54] (2003) 179 FLR 1, 156 at [709].

*"by" in s 82 of the Trade Practices Act 1974 (C'th) (see Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494 at [38]-[42]), they should be given their ordinary meaning of requiring a causal connection between the damage and the contravening conduct, free from the strictures of analogy with equitable claims against fiduciaries."*

81. Furthermore, as a statutory provision, while its application may involve some normative considerations similar to its equitable counterparts, its foundation is distinct. A key difference is the fact no election is required, with both compensation and profits being available as set out above. Therefore the causal connection should not be made by analogy in accordance with equitable principles but, rather, the section should be treated as akin to a breach of a statutory duty, which necessarily makes reference to common law tests of causation, remoteness and *novus actus interveniens*. Indeed, Giles JA held:[55]

> *"[707] I am respectfully unable to agree that analogy with equitable claims against fiduciaries influences the meaning and application of "resulted from" in s 1317H. As Spigelman CJ observed in O'Halloran v RT Thomas & Family Pty Ltd at 272 –*
>
> > '... the remedy of equitable compensation differs from damages at common law. It also differs from damages under a statutory regime where the Court is concerned with, and confined by, the construction of the statute. Causation for purposes of s 212 of the Corporations Law will not involve the same analysis of causation as is required for breach of a fiduciary obligation.'
>
> *[708] For s 1317H, the analogy with equitable claims against fiduciaries is all the more difficult because some civil penalty provisions in the Act do not involve contravention by a person standing in a fiduciary capacity."*

82. It is contended that the approach of Giles JA is correct. While the provision allows for profits to be disgorged, it is expressed as part of a compensation scheme. Damages would clearly be calculated by reference to common law concepts of causation, remoteness and *novus actus interveniens*. In those circumstances, it would lack coherence for remedies calculated under the one statutory provision to be calculated by reference to different causation tests.

## PART VII APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

83. Sections 79, 181, 182, 183 and 1317DA, 1317E, 1317H and 1317HA of the *Corporations Act 2001* (Cth).

[55] Ibid at [707] and [708].

## PART VIII ORDERS SOUGHT

84. The Appellant seeks the following orders:

(a) The appeal be allowed.

(b) The Orders of the Full Federal Court of Australia made in proceeding No: SAD 118/2016 on 16 June 2017 be set aside.

(c) In lieu thereof:

(i) the appeal to the Full Federal Court of Australia be dismissed;

(ii) the First and Second Respondents to pay the costs of the Appellant of the appeal to the Full Federal Court of Australia.

10 (d) The First and Second Respondents pay the Appellant's costs of this appeal.

## PART IX TIME FOR ORAL ARGUMENT

85. It is estimate that 2.5 hours will be required for the presentation of the oral argument of the Appellant.

Dated: 24 November 2017


**RON MERKEL QC**
T: 9225 6394
E: ronmerkel@vicbar.com.au

**DOUGLAS GRATION**
T: 03 9225 7304
F: 03 9225 8668
E: douglas.gration@vicbar.com.au

**PREMALA THIAGARAJAN**
T: 03 8660 1778
F: 03 9225 8395
E: premala@chancery.com.au


20

## ANNEXURE

Sections 79, 181, 182, 183, 1317DA, 1317E, 1317H and 1317HA of the *Corporations Act 2001* (Cth)

(a) a body corporate or other person whose name is included in that official list; or

(b) a body corporate or other person whose name has been changed but whose previous name was included in that official list immediately before the change and is still so included.

### 79 Involvement in contraventions

A person is involved in a contravention if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

### 80 Jervis Bay Territory taken to be part of the Australian Capital Territory

The Jervis Bay Territory is taken to be part of the Australian Capital Territory.

### 82 Offers and invitations to the public

A reference in this Act to, or to the making of, an offer to the public or to, or to the issuing of, an invitation to the public is, unless the contrary intention appears, to be construed as including a reference to, or to the making of, an offer to any section of the public or to, or to the issuing of, an invitation to any section of the public, as the case may be, whether selected as clients of the person making the offer or issuing the invitation or in any other manner and notwithstanding that the offer is capable of acceptance only by each person to whom it is made or that an offer or application may be made pursuant to the invitation only by a person to whom the

(3) In this section:

***business judgment*** means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

## 181 Good faith—civil obligations

*Good faith—directors and other officers*

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

## 182 Use of position—civil obligations

*Use of position—directors, other officers and employees*

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

## 183 Use of information—civil obligations

*Use of information—directors, other officers and employees*

(1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

Note 1: This duty continues after the person stops being an officer or employee of the corporation.

Note 2: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

## 184 Good faith, use of position and use of information—criminal offences

*Good faith—directors and other officers*

(1) A director or other officer of a corporation commits an offence if they:

(a) are reckless; or

(b) are intentionally dishonest;

and fail to exercise their powers and discharge their duties:

(c) in good faith in the best interests of the corporation; or

(d) for a proper purpose.

Note: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

*Use of position—directors, other officers and employees*

(2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:

# Part 9.4B—Civil consequences of contravening civil penalty provisions

## 1317DA Definitions

In this Act:

***corporation/scheme civil penalty provision*** means a provision specified in column 1 of any of the following items of the table in subsection 1317E(1):

(a) items 1 to 13;

(b) item 46.

***financial services civil penalty provision*** means a provision specified in column 1 of any of the following items of the table in subsection 1317E(1):

(a) item 14;

(b) items 23 to 45.

## 1317E Declarations of contravention

(1) If a Court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention. The provisions specified in column 1 of the following table are ***civil penalty provisions***.

**Civil penalty provisions**

| Item | Column 1<br>provisions that are civil penalty provisions | Column 2<br>brief description of what the provisions are about |
|---|---|---|
| 1 | subsections 180(1), 181(1) and (2), 182(1) and (2) and 183(1) and (2) | officers' duties |
| 2 | subsections 188(1) and (2) | responsibilities of secretaries etc. for |

| Civil penalty provisions | | |
|---|---|---|
| **Item** | **Column 1**<br>**provisions that are civil penalty provisions** | **Column 2**<br>**brief description of what the provisions are about** |
| | | corporate contraventions |
| 3 | subsection 209(2) | related parties rules |
| 4 | subsections 254L(2), 256D(3), 259F(2) and 260D(2) | share capital transactions |
| 5 | subsection 344(1) | requirements for financial reports |
| 6 | subsection 588G(2) | insolvent trading |
| 7 | subsection 601FC(5) | duties of responsible entity |
| 8 | subsection 601FD(3) | duties of officers of responsible entity |
| 9 | subsection 601FE(3) | duties of employees of responsible entity |
| 10 | subsection 601FG(2) | acquisition of interest in scheme by responsible entity |
| 11 | subsection 601JD(3) | duties of members |
| 12 | subsection 601UAA(2) | duties of officers of licensed trustee company |
| 13 | subsection 601UAB(2) | duties of employees of licensed trustee company |
| 14 | subsections 674(2), 674(2A), 675(2) and 675(2A) | continuous disclosure |
| 15 | subsection 798H(1) | complying with market integrity rules |
| 16 | section 901E | complying with derivative transaction rules |
| 17 | section 903D | complying with derivative trade repository rules |
| 18 | subsections 961K(1) and (2) | financial services licensee responsible for breach of certain best interests duties |
| 19 | section 961L | financial services licensee to ensure compliance with certain best interests duties |

Section 1317E

| Civil penalty provisions | | |
|---|---|---|
| **Item** | **Column 1**<br>**provisions that are civil penalty provisions** | **Column 2**<br>**brief description of what the provisions are about** |
| 20 | subsection 961Q(1) | authorised representative responsible for breach of certain best interests duties |
| 21 | section 962P | charging ongoing fee after termination of ongoing fee arrangement |
| 22 | subsection 962S(1) | fee recipient must give fee disclosure statement |
| 23 | subsections 963E(1) and (2) | financial services licensee responsible for breach of ban on conflicted remuneration |
| 24 | section 963F | financial services licensee must ensure representatives do not accept conflicted remuneration |
| 25 | subsection 963G(1) | authorised representative must not accept conflicted remuneration |
| 26 | section 963J | employer must not pay employees conflicted remuneration |
| 27 | section 963K | financial product issuer or seller must not give conflicted remuneration to financial services licensee or representative |
| 28 | subsection 964A(1) | platform operator must not accept volume-based shelf-space fees |
| 29 | subsections 964D(1) and (2) | financial services licensee responsible for breach of asset-based fees on borrowed amounts |
| 30 | subsection 964E(1) | authorised representative must not charge asset-based fees on borrowed amounts |
| 31 | section 965 | anti-avoidance of Part 7.7A provisions |
| 32 | subsection 985E(1) | issuing or increasing limit of margin |

| Civil penalty provisions | | |
|---|---|---|
| **Item** | **Column 1**<br>**provisions that are civil penalty provisions** | **Column 2**<br>**brief description of what the provisions are about** |
| | | lending facility without having made assessment etc. |
| 33 | subsection 985H(1) | failure to assess a margin lending facility as unsuitable |
| 34 | subsection 985J(1) | failure to give assessment to retail client if requested before issue of facility or increase in limit |
| 35 | subsection 985J(2) | failure to give assessment to retail client if requested after issue of facility or increase in limit |
| 36 | subsection 985J(4) | demanding payment to give assessment to retail client |
| 37 | subsection 985K(1) | issuing or increasing limit of margin lending facility if unsuitable |
| 38 | section 985L | making issue of margin lending facility conditional on retail client agreeing to receive communications through agent |
| 39 | subsection 985M(1) | failure to notify of margin call where there is no agent |
| 40 | subsection 985M(2) | failure to notify of margin call where there is an agent |
| 41 | section 1041A | market manipulation |
| 42 | subsection 1041B(1) | false trading and market rigging—creating a false or misleading appearance of active trading etc. |
| 43 | subsection 1041C(1) | false trading and market rigging—artificially maintaining etc. market price |
| 44 | section 1041D | dissemination of information about illegal transactions |
| 45 | subsections 1043A(1) and (2) | insider trading |

| Civil penalty provisions | | |
|---|---|---|
| **Item** | **Column 1**<br>**provisions that are civil penalty provisions** | **Column 2**<br>**brief description of what the provisions are about** |
| 46 | subclause 29(6) of Schedule 4 | disclosure for proposed demutualisation |

Note 1: Once a declaration has been made ASIC can then seek a pecuniary penalty order (section 1317G) or (in the case of a corporation/scheme civil penalty provision) a disqualification order (section 206C).

Note 2: The descriptions of matters in column 2 are indicative only.

(2) A declaration of contravention must specify the following:
- (a) the Court that made the declaration;
- (b) the civil penalty provision that was contravened;
- (c) the person who contravened the provision;
- (d) the conduct that constituted the contravention;
- (e) if the contravention is of a corporation/scheme civil penalty provision—the corporation or registered scheme to which the conduct related.

### 1317F Declaration of contravention is conclusive evidence

A declaration of contravention is conclusive evidence of the matters referred to in subsection 1317E(2).

### 1317G Pecuniary penalty orders

*Corporation/scheme civil penalty provisions*

(1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to $200,000 if:
- (a) a declaration of contravention by the person has been made under section 1317E; and
- (aa) the contravention is of a corporation/scheme civil penalty provision; and
- (b) the contravention:

*Recovery of amount as a debt*

(4) If the Court makes an order that the fee recipient refund an amount specified in the order to the client, the client may recover the amount as a debt due to the client.

### 1317H Compensation orders—corporation/scheme civil penalty provisions

*Compensation for damage suffered*

(1) A Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if:

(a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme; and

(b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

*Damage includes profits*

(2) In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.

*Damage includes diminution of value of scheme property*

(3) In determining the damage suffered by the scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.

(4) If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to scheme property. If anyone else is

ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.

*Recovery of damage*

(5) A compensation order may be enforced as if it were a judgment of the Court.

### 1317HA Compensation orders—financial services civil penalty provisions

*Compensation for damage suffered*

(1) A Court may order a person (the ***liable person***) to compensate another person (including a corporation), or a registered scheme, for damage suffered by the person or scheme if:

(a) the liable person has contravened a financial services civil penalty provision; and

(b) the damage resulted from the contravention.

The order must specify the amount of compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

*Damage includes profits*

(2) In determining the damage suffered by a person or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention.

*Damage to scheme includes diminution of value of scheme property*

(3) In determining the damage suffered by a registered scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.

(4) If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to the scheme property. If anyone else

is ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.

*Recovery of damage*

(5) A compensation order may be enforced as if it were a judgment of the Court.

### 1317HB Compensation orders—market integrity rules

*Compensation for damage suffered*

(1) A Court may order a person (the ***liable person***) to compensate another person (including a corporation), or a registered scheme, for damage suffered by the person or scheme if:

(a) the liable person has contravened subsection 798H(1) (complying with market integrity rules); and

(b) the damage resulted from the contravention.

The order must specify the amount of compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

(2) Subsection (1) does not apply in relation to a contravention by the operator of a licensed market acting in that capacity.

*Damage includes profits*

(3) In determining the damage suffered by a person or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention.

*Damage to scheme includes diminution of value of scheme property*

(4) In determining the damage suffered by a registered scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.